Expert insight on consumer law and regulatory compliance

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Contents


CTOR RUSSELL KILTMAKER
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HECTOR RUSSELL
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Introduction

Consumers are the lifeblood of businesses across the media, technology and brands sectors.

It's critical that businesses are able to successfully navigate the complex (and ever-changing) consumer protection framework. Consumers are increasingly savvy and litigious, and regulators ever more empowered.

Falling foul of the consumer protection framework can and does have real and lasting consequences for businesses, whether in the form of regulatory undertakings and other enforcement actions, potentially substantial fines, civil and/or criminal liability, and the reputational damage that so often follows – particularly in the age of social media.

This trend is only set to continue. Whether the UK exits Europe with a deal or without one, the UK Government has made clear its firm commitment to strong, enforced consumer rights from which UK consumers can benefit. Indeed, the Government recently publicised its intention to introduce legislation enabling courts to impose fines for breaches of consumer law up to a total of **10% of a company's worldwide turnover.**

We advise clients on all aspects of consumer law compliance, with a particular emphasis on contracting with consumers in the online environment and with respect to digital and online goods and services.

We are committed to sharing our expertise and experience and we hope you find the insights in this publication interesting and thought-provoking. Please do get in touch if you'd like to discuss any of the issues in more detail with our team.

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Building consumer law compliance into your start-up/new offering

Consumer law compliance requires ongoing work and attention to ensure that evolving business practices remain on the right side of (equally rapidly) evolving law and regulation. That said, there is no better time for businesses to think about consumer law compliance than when in their infancy and/or when preparing to launch a new product or service to market.

Building compliance in at ground level ensures true 'compliance integration' and minimises headaches further down the line. Your early-stage considerations should include:

Consumer contracts

Think about your website terms and conditions and other standard terms, end user licence agreements, and any 'wet ink' contracts you plan to use. Are these fair and transparent? Do they comply with applicable industry regulations and/or codes?

Pre-and post-contractual information requirements

How, when, and with what prominence will you supply consumers with the legally mandated pre- and post-contractual information?

Consumer cancellation rights

Does the statutory consumer cancellation right apply to the product you sell or the service you offer? Make sure you understand this right in your specific business context (be careful – cancellation rights vary depending on the product/service in question and how you engage with consumers).

Commercial practices

Every 'commercial practice'[1] during the whole lifetime of a B-C transaction must be compliant – i.e. must not be unfair, misleading (whether by action or omission) or aggressive.

Advertising and promotion

Advertising and marketing activities are vital to new business ventures, but are also heavily regulated (particularly so in certain sectors and when targeted at young or vulnerable markets).

Complaints handling

Think about this as early as possible. If ever a business is vulnerable to complaints, it's in the early days while kinks are being worked out. If complaints are handled effectively, most (if not all) consumer disputes can be resolved. But if handled poorly, the disgruntled consumer may resort to legal action, publicise their grievance, and/or report the issue to a regulator – at which point the risks to the business increase exponentially.

Knowhow

When it comes to engaging successfully and lawfully with consumers, knowledge is everything. Make sure you understand your rights and responsibilities, and – crucially – the rights and responsibilities of your consumers. Do you know who your industry regulators are and understand their practices and requirements?

Consumer law compliance is complex and can seem daunting, but giving it proper – and *early* – consideration will undoubtedly pay dividends in the future. This not only avoids potential conflict and the expense of 'reverse engineering' compliance into an already established business offering, but it just makes good, sound commercial sense. After all, a happy consumer is likely to be a much more profitable consumer.

[1] Basically, anything a business does (or indeed omits to do) which is directly connected with the promotion, sale or supply of a product to a consumer.

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Brexit: an uncertain future for consumer rights protection & enforcement in the UK

UK consumer rights and remedies are derived in part from EU law, which provides for a minimum harmonised standard of consumer rights and safety standards throughout the EU. The EU cross-border consumer protection framework enables UK consumers to buy goods or services from any EU Member State (and vice versa) and to enforce their rights in the EU.

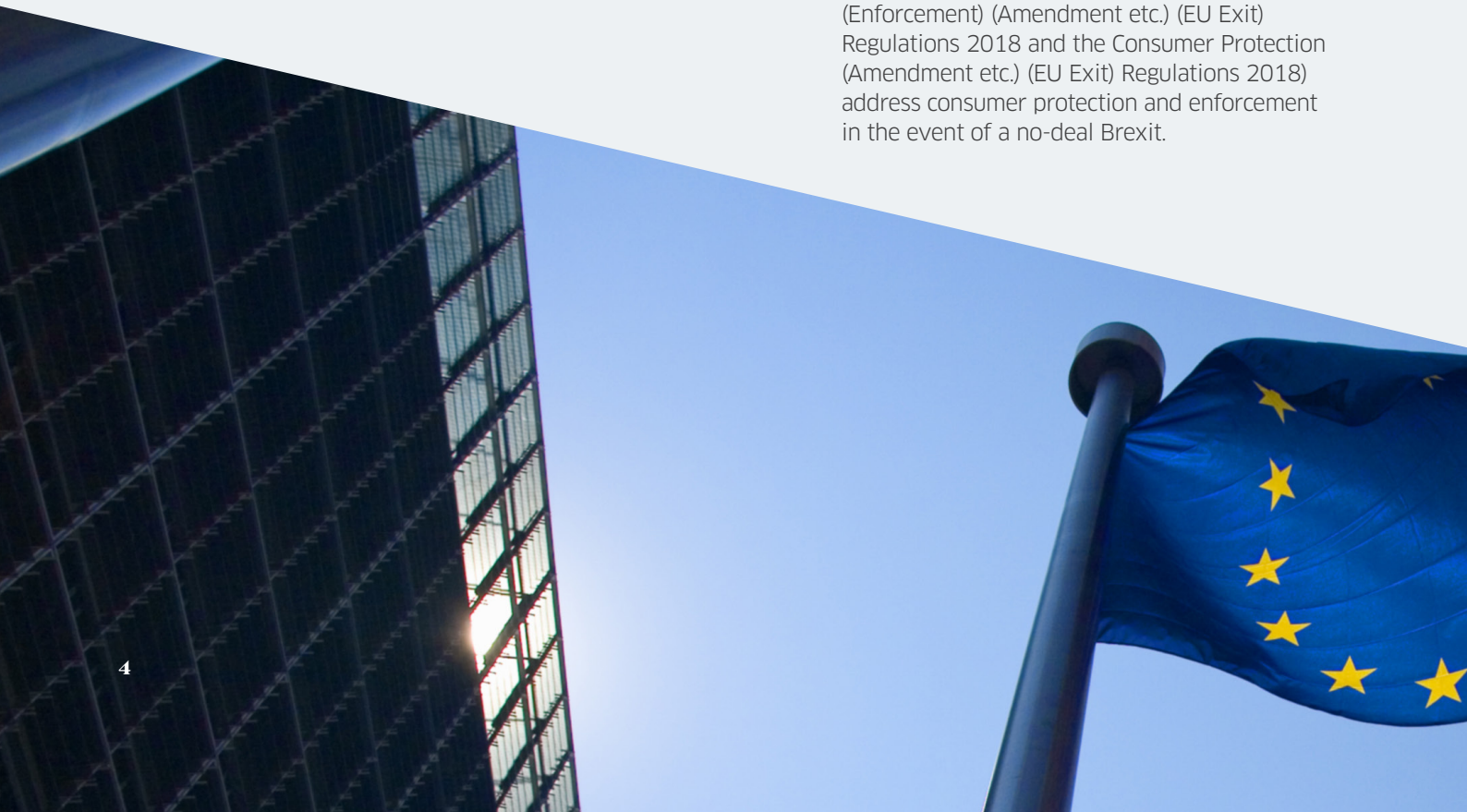
Importantly, the reciprocal cross-border consumer enforcement framework enables co-operation between consumer enforcement agencies in different Member States, and the civil judicial cooperation framework gives consumers access to redress when their rights have been breached. In practice, UK consumers can rely on UK law and the UK courts to seek redress in respect of goods or services brought from traders elsewhere in the EU, and court judgments will be recognised in the EU Member State concerned.

Implications of Brexit

The UK Government has recognised that maintaining a comprehensive framework of consumer rights and an effective enforcement regime is crucial for the UK's prosperity. Yet, while the intention is to cooperate closely with the EU on consumer protection and enforcement matters after the UK leaves the EU, the precise implications of Brexit remain unclear. It is difficult to predict the impact on consumers without knowing what form the UK's future relationship with the EU may take. There remains a real possibility that the UK could leave the EU without a deal in place.

What does the UK Government anticipate in the event of a no-deal Brexit?

The Technical Notice on Consumer rights if there's no Brexit deal and two statutory instruments (the Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2018 and the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018) address consumer protection and enforcement in the event of a no-deal Brexit.



Although UK consumers would continue to enjoy similar consumer rights within the UK, they would have reduced rights in relation to goods and services purchased from the remaining 27 EU Member States.

Specifically, if the UK leaves the EU without a deal, there will no longer be reciprocal obligations to investigate breaches of consumer law or pursue enforcement action. Also, UK consumers will no longer be able to use the UK courts effectively to seek redress from EU traders. Even if a UK court were to give judgment in favour of a UK consumer, the enforcement of that judgment would be more difficult. Likewise, EU consumers would no longer be able to enforce their consumer rights against UK traders via their domestic courts.

In a no-deal scenario, UK consumers and traders would also have less access to Alternative Dispute Resolution to settle disputes as the EU Online Dispute Resolution platform run by the European Commission is exclusively for EU Member States.

There may also be knock-on economic effects for UK and EU businesses as consumers are less likely to purchase goods and services where they cannot be confident of their rights and their ability to enforce those rights.

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Blockchain payments from consumers – what you need to 'crypto'

The past decade has seen the financial industry shaken by challenges concerning trust and reliability. Pain points in the payments industry regarding high transaction fees and cross-border payments continue. Blockchain has the potential to resolve these issues, and in doing so, has begun to disrupt the financial industry almost entirely.

Big banks on board

A consensus appears to be growing that blockchain-based payment networks and digital currencies can bring a sea change within the financial services industry. Although banks were initially sceptical, JPMorgan has now created its own stable coin token for use on blockchain distributed ledgers, and IBM has launched its Blockchain World Wire which will enable banks to transfer tokens and cryptocurrency in near-real time.

In addition, many of the major credit card companies are developing blockchain solutions in the payments sphere. For example, Mastercard recently filed a patent for a blockchain system with a focus on securing customer information and Visa is partnering with the Chain platform to simplify cross-border payments.

What's the downside?

Industry commentary suggests that the ubiquity of payment options such as cash and credit/debit cards makes the argument for blockchain being used for consumer payments rather weak. Furthermore, questions around the stability of cryptocurrencies such as Bitcoin and Ether has resulted in a lack of individuals seeking to invest in and engage with cryptocurrency. And then you have the issues regarding speed. For instance, it can take minutes for the network to confirm a single Bitcoin transaction – VISA processes 24,000 transactions per second.

What are the benefits?

Well, it really comes down to transaction transparency – this technology allows everyone to keep an eye on what is going on within a system without giving any individual control over it. It means that each transaction takes place between the consumer and merchant with little or no need for intermediaries, and there is an indisputable transaction history and complete visibility on both sides.

Newer blockchain platforms such as Ripple and Stellar are seeking to match (or exceed) the scale of payment networks such a VISA and SWIFT making speed concerns seem ill founded. It is clear that blockchain technology is developing at a pace, and looks set to overcome all barriers put in place.

What next?

Crypto could go mainstream - Facebook is finalising its own coin for launch next year that aims to provide affordable and secure ways of making payments, regardless of whether users have a bank account. In addition, some retailers are already accepting cryptocurrency as a form of payment. US startup Flexa has enabled Starbucks, Whole Foods and other major retailers to accept Bitcoin with a process similar to existing digital payment methods like Apple Pay. Once the app is downloaded, payments are made by simply scanning a QR code at the till.

The changes that blockchain could make within the consumer and retail industries has shown itself to be transformational but it will take time to see whether we move to a point of widespread consumer adoption.

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Computer games and cancellation rights

From 13 June 2014, consumers in the UK have had a right to cancel most contracts entered into with traders online, during the period of 14 days commencing on the day that the contract is concluded. Although now part of UK law for over five years, this right still presents problems.

The right to cancel is contained in the Consumer Contracts Regulations 2013 (**CCRs**) which implemented most of the Consumer Rights Directive (**CRD**) into UK law. In the discussions that led to the CRD, it was recognised that it would not generally be appropriate for this right to apply to the purchase of digital content, such as films, music and games, once the consumer had downloaded that digital content. If it did, then a trader would either have to wait until after the 14 day cancellation period had expired before enabling a consumer to download the digital content, or would face the possibility that a consumer would download the digital content, and then cancel the contract and obtain a full refund.

The CRD therefore included an exception to the right to cancel for what it describes as, "the supply of digital content not on a tangible medium". Under this exception, a trader can ask a consumer to waive the right to cancel, before the trader downloads the digital content to the consumer.

However, this exception is not without difficulties. For a waiver to be effective a number of requirements need to be met, and it is quite common to see online sales procedures that do not meet these requirements. One common defect is that the waiver requires the express consent of a consumer, and so a pre-ticked box or a statement of consent in terms and conditions will not be sufficient. This is important, since if all of the requirements are not met, then the right to cancel will not be waived and the cancellation period is extended by 12 months.

In addition, the exception presents some particular challenges for publishers and platforms that supply computer games.

Balancing the right to cancel with in-game activity

In the context of some games, particularly mobile games, it can be very difficult for a publisher (or the platform owner) to comply with the requirements of the exception, without creating a significant degree of friction to the purchase process. Publishers and platform owners are therefore forced to make a choice between either meeting these requirements and risk losing sales, or not obtaining a waiver and risk the possibility of cancelled sales.

Application to virtual currency

Even more challenging is the fact that the CRD does not anticipate the way in which digital content is purchased and used in online games.

Many online games have a form of in-game virtual currency that consumers purchase with real money, which they then use to acquire in-game items. The virtual currency will constitute digital content within the meaning of the CRD, and so a game publisher will want consumers to waive their right to cancel when purchasing the virtual currency.

However, the issue that then arises is whether the right to cancel also applies when a consumer uses the virtual currency to 'purchase' a digital item. There are good arguments to suggest that it does not, but the point remains untested.

One might have thought that the processes around an apparently simple mechanism would now be settled. However, it would seem that the right to cancel will present challenges for some time yet.

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Data protection – opportunity or obstacle?

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

Direct marketing

GDPR introduced significant changes to the rules on consent and its arrival brought a great deal of rhetoric on the subject of 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 new 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 is also important to note that it is much more difficult to sign-up existing customers to marketing databases than new customers.

Data mapping

Mapping out your data flows, both current and anticipated, is another important step. Not only does it help ensure compliance today, 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 barriers down the road. A consumer-facing business may simply want to sell goods at the outset, but as the business grows it may decide that there are opportunities to collect and leverage data, either internally or externally. For example, a car rental company that asks customers why they are renting certain vehicles at certain times may be able to use the data to help its marketing gain greater traction (sorry) with potential new customers.

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 is an obvious basis on which trust can be built (and also lost).

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

[1] Okay, maybe not if you are running a car boot sale.

[2] Rather confusingly this is called the 'soft opt-in'.

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Advertising: don't mislead me this way…

In 2018 the ASA resolved 33,727 complaints relating to 25,259 ads, 72% of which were concerned with whether the ads in question were potentially misleading. Misleading advertising remains a key issue for consumers and a problem for marketers - whether in the form of ads that risk misleading consumers by their omission, ambiguous pricing or comparative claims about competing products that don't quite follow the rules.

It's not just the ASA that is concerned with misleading advertising. The CMA - the UK's primary competition and consumer authority - has recently led several investigations involving sectors and other groups of advertisers (including influencers) involved in misleading online advertising practices which breach the Consumer Protection from Unfair Trading Regulations (2008).

Don't omit key information

The omission of key information from ads has been a key focus of the CMA's most recent enforcement action against gambling companies. The absence of relevant information, in particular from promotional offers, was revealed as a particular industry flaw. A reminder that all pertinent information, including all the significant conditions of a promotional offer, should be made clear within the ad itself – this might mean that not all media is suitable for all ads and this should be considered carefully when promotional campaigns are at the planning stage.

Ensure pricing is clear

Lack of clarity around pricing, leading to complaints about misleading ads being upheld by the ASA, is no better highlighted than by the CMA's investigation into the secondary ticket market and the travel sector, where the failure to include compulsory charges (e.g. VAT, delivery and/or booking fees) when showing the prices for products, has been found to be in breach of the misleading advertising rules.

Don’t exaggerate or contradict

Pulling ads which ‘over-claim’ or ‘over-qualify’ has also been a way in which the ASA has sought to keep misleading advertising in check. Advertisers are reminded that qualifying text (small print or footnotes) can be used to clarify a claim but all too frequently, marketers use this as a way to hide important information or in a way that misleadingly contradicts the headline claim.

Comparisons must be fair and verifiable

It can be difficult to make comparative claims against competitors without misleading consumers. Remember, as a marketer your goal is to ‘objectively compare one or more material, verifiable and representative feature of a product or service meeting the same need or intended for the same purpose’. This will likely require some supporting evidence or need to be capable of objective substantiation to ensure that it doesn’t mislead.

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Online gambling: CMA successfully acts to end unfair terms and practices

In a joint letter published in May 2019, the Competition and Markets Authority **(CMA)** and the Gambling Commission **(Commission)** announced that they had concluded their investigation into unfair terms and practices in the online gambling industry. The letter marked the end of a long, and sometimes painful, investigation into certain practices that were widespread in the industry which were considered contrary to UK consumer law.

The investigation

Among other things, the investigation focused on:

- The practice of restricting withdrawals of deposited funds whilst participating in a promotion;
- A lack of transparency regarding key restrictions which apply to free bet and bonus offers (e.g. requirements to wager bonus funds a number of times before becoming eligible for withdrawal);
- The fairness and transparency of bonus restrictions (e.g. restricted play strategies) and disproportionate sanctions for breach of them;
- The imposition of trading restrictions (against successful gamblers) which limit the ability for a customer to realise any value out of a free bet offer;
- The imposition of maximum withdrawal limits; and
- The imposition of dormant account fees for inactive accounts.

The outcome

The CMA secured undertakings from six operators to implement changes to their terms and practices in order to comply with consumer law; however, the Commission made it clear that it expects all gambling operators to comply with the terms of the undertakings. To reinforce this view, the Commission amended its licence conditions and codes of practice[1] to enable it to use the full extent of its enforcement powers against operators who breach consumer protection law.

This effectively amounts to 'double' regulation. Gambling operators now face sanctions available to the CMA and the Commission - which has shown itself prepared to impose severe sanctions on operators in recent years - as part of a publicly stated effort to drive up compliance standards in an industry with a poor reputation for placing consumers at the heart of their business.

The Commission didn't miss the opportunity to remind operators of this enforcement risk, stating in its joint letter that it will take "*swift and firm action*" against operators who fail to comply. Gambling operators can expect compliance with consumer protection standards to be made the subject of acute regulatory scrutiny by the Commission following the investigation.

[1] The regulatory conditions which attach to the licences granted by the Commission.

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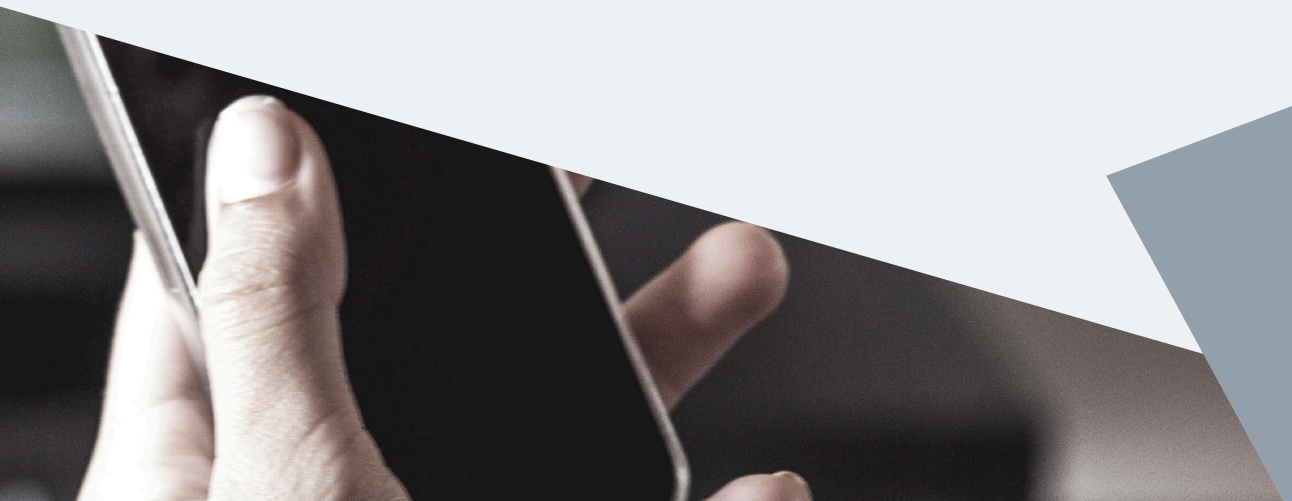

Contracting with consumers – a quick guide to unfair contract terms

Business to consumer contracts are highly regulated. Contracts must be presented in the correct way, at the correct time, and must not contain any blacklisted, grey-listed, or otherwise unfair terms. Unfair contract terms are not legally binding on consumers and businesses that use them are vulnerable to regulatory investigation and enforcement action, potentially substantial fines, civil and/or criminal liability, and the reputational damage that so often follows.

Key tests and considerations for B-C contract terms

Is the term "blacklisted" by law?

Blacklisted terms include those that exclude or restrict liability for death or personal injury resulting from negligence, and terms seeking to exclude or restrict statutory rights and any associated remedies. Blacklisted terms are never enforceable against a consumer.

Is the term included in the "grey list"?

Terms included in Schedule 2 of the Consumer Rights Act 2015 are unlikely to be fair (and therefore probably unenforceable).

Does it pass the "fairness test?"

If the term creates a "*significant imbalance, contrary to the requirements of good faith, to the detriment of consumers*", it fails the "fairness test" and will be unenforceable.

Is the term transparent?

I.e. is it in plain and intelligible language? Failing the transparency test alone, independently of the fairness test, does not make a term unenforceable against a consumer. But if a term is unclear or ambiguous, it will always be given the meaning that is most favourable to the consumer.

Common pit-falls

Excluding/limiting liability

Businesses must not prevent or restrict consumers from seeking any form of redress that would otherwise be available to them by law. Contract terms that purport to do this are specifically blacklisted by law and the much-used "*to the fullest extent permitted by law*, we exclude all liability for..." caveat is largely ineffective (contrary to popular belief). Businesses must also avoid terms which exclude or limit their own liability to consumers when the business itself is at fault, and must be very clear about the circumstances in which they *will* be liable to consumers.

Variation clauses

Terms that entitle businesses to make unilateral contractual changes without a valid, stated reason are specifically grey-listed. This does not mean that so-called variation clauses are completely off the table, provided that businesses:

a) are very clear about how, when and why the contract may change and the given reasons for variation represent a legitimate, good faith business interest;

b) give the consumer reasonable notice of anymaterial changes (particularly when to the consumer's detriment); and

c) offer consumers the opportunity – without penalty – to exit the contract if they're not happy with the amended terms.

Subscriptions and automatic roll-overs

Businesses should make clear to consumers at the outset how their subscription or contract will be renewed and should send a reminder to the consumer a reasonable time before the contract is due to be renewed. The reminder should include clear information about the terms of the proposed contract renewal and the steps (which should not be prohibitive) that customers need to take to exit the contract – without penalty or cancellation fee – if they want to.

Using unfair contract terms to make a point

Many businesses deliberately use contractual terms which they know or suspect are unfair because they feel that these terms 'send a message' to the consumer, and/or they're relying on the consumer not knowing their rights. This practice is to be strenuously avoided. Not only do unfair contract terms risk attracting the unwanted attention of the regulators, but the practice is likely to fall foul of the law prohibiting misleading commercial practices, breach of which carries criminal sanctions.

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Better regu-late than ever

Online shopping has created a revolution for consumers. National borders have been eliminated, there is an endless choice of products and consumers can now access a truly global (and continually expanding) digital marketplace. In 2018, almost 1.8 billion people purchased items or services via an online provider[1]. Whilst the rise of counterfeiting activity has been the most direct result of online shopping's growing popularity, there are more and more cases of products entering national markets without the proper regulatory authorisation. This can have direct implications on the health and safety of consumers and brand protection.

What is the problem?

Regulatory violation concerns products that are not, in fact, counterfeit. They are genuine products that are either:

1. sold without the relevant authorisation from national or international regulatory bodies; or
2. sold in a way that compromises their condition/state/status.

The latter refers to legal frameworks explicitly regulating how products should be offered for sale.

The difference between the two scenarios of regulatory violation lies within the point in time when the act of non-compliance occurs. In the first case, the products have not obtained the approval required to enter a specific market, whereas in the second case, the products are approved for sale, and the regulation provides an extra layer of legal protection.

Why does it matter?

The growing importance of regulatory violation has not escaped the attention of online shopping moguls. Mega-platforms Amazon and eBay are among the first to act on the intensifying issue. These marketplace giants have already included specific articles in their policies, promising to remove any listings that might be infringing relevant national and international regulations.

Consumer protection is not, however, the only variable in this equation. Brands are invested in seeing their products sold online in an orderly way which is compliant with both the relevant regulation and marketplace policies. For them, it is a matter of upkeeping brand integrity by maintaining clear distribution channels for their products, and making sure the end product that reaches consumers adheres to the essential standards and regulations of each national market. As a brand protection provider, Incopro has a wealth of experience in dealing with complex cases of online regulatory violation and can confidently identify and expertly handle the delicate nature of these cases.

What's next?

While intellectual property related infringement will continue to be the epicentre of discussions around the perils of online shopping, we are entering a new age where regulatory violation will become all the more relevant. This is partly attributable to the fact that the harm can be more challenging to discover - it involves genuine products and online sellers whose knowledge on how and where some products need to be sold is limited. Consumers and brands alike need to be aware of the issue at hand.

Incopro's experience in regulatory enforcement sets the company out as the top provider for tailored analytical services to manage this latest trend in online infringement.

[1] https://www.statista.com/statistics/251666/number-of-digital-buyers-worldwide/

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Consumer disputes: setting the rules of the game

When a consumer claim arises the issue in dispute is usually clear - perhaps late delivery, a defective product, negligent provision of services, or a failure of after-care. Sitting alongside this will be a host of more nebulous questions though: who should resolve the dispute, under what process, in what jurisdiction, and pursuant to which law?

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, heavy regulation underpins the terms on which businesses trade with consumers (including how they agree to regulate disputes), and e-commerce means that such contracts are often concluded cross-border.

Consumer facing businesses need to proactively consider these issues from the outset. Properly and pre-emptively defining the rules of the game can prevent a dispute on a specific issue from spiralling into satellite litigation over the fairness and validity of terms and conditions more broadly.

Location matters

For instance, whilst in principle it is open to a consumer and trader to choose any law to govern their contract, if the trader pursues 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 of contracting to ensure the enforceability of the term.

There is even less scope to narrow the forum within which the consumer can sue. Assuming the business directs its activities to the part of the UK where the consumer is domiciled, the consumer will generally be able to sue the business in that part of the UK, irrespective of where the business is based and what any jurisdiction clause may say to the contrary.

A complex landscape

In addition to these rules which trump the usual 'freedom to contract' principles, there are specific regulations requiring traders to provide consumers with information about Alternative Dispute Resolution **(ADR)** entities and, for online traders (at least for as long as the UK remains in the EU), about the Online Dispute Resolution (ODR) platform established by the European Commission to better facilitate the bringing of cross-border complaints.

This complex landscape presents a two-fold challenge for consumer facing businesses: first, to ensure that carefully crafted dispute resolution regimes are compliant with the numerous regulations in play and, second, to explain the nuances of such processes in clear and intelligible language.

It's a readily achievable challenge but one which requires careful and considered forethought, particularly for those more familiar with the wider contractual freedoms afforded in the B2B sphere.

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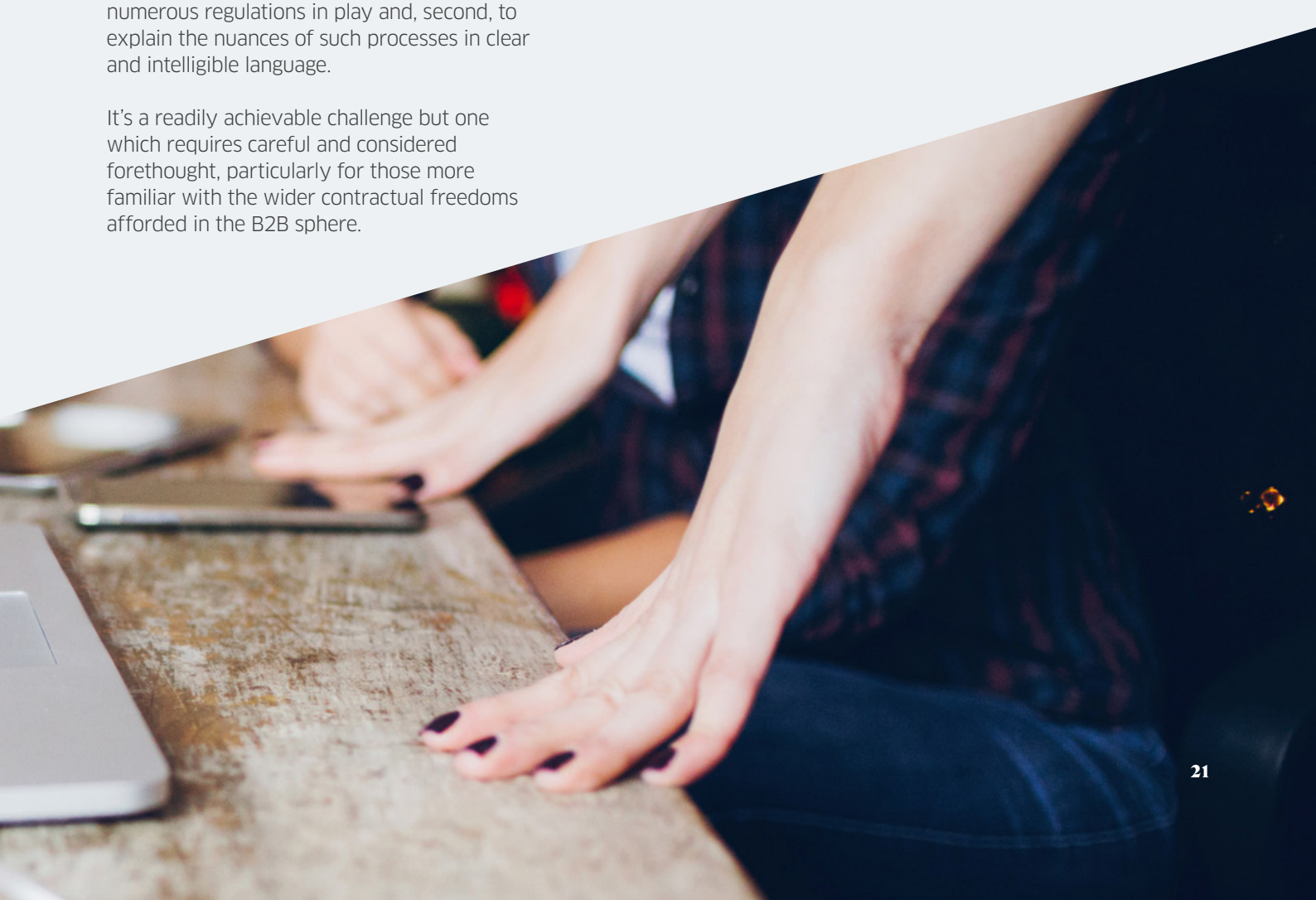

Is there a role for competition law in protecting consumers and their data?

Consumer welfare and fairness underpin both competition law and data protection rules. Yet, historically, these areas were addressed separately. Any possible issues relating to the sensitivity of personal data were not considered to be a matter for competition law and could be resolved on the basis of the relevant data protection provisions.

This line of reasoning was followed by the European Commission in its review of the *Google/DoubleClick* merger, which assessed the deal purely from the perspective of competition law, whilst noting that its clearance decision was without prejudice to the obligations imposed onto the parties by EU privacy and data protection rules. Likewise, while the *Facebook/WhatsApp* merger raised concerns about combining the datasets of the companies, the Commission's analysis focused solely on the extent that the data concentration was likely to strengthen Facebook's position in the online advertising market. Any potential privacy-related concerns arising from the increased concentration of data under Facebook's control was considered to be the preserve of EU data protection rules. The same approach was adopted in *Google/Sanofi/DMI JV*, where the Commission rejected claims that the joint venture would have the ability to lock-in customers by restricting portability of their data to other platforms, noting that under the General Data Protection Regulation users would have the right to ask for data portability of their personal data.

A change of approach

More recently, however, the Commission's *Microsoft/LinkedIn* and *Verizon/Yahoo* merger decisions considered that privacy concerns can be taken into account in a competition assessment to the extent that consumers see privacy as a significant factor of quality and that this is a parameter for competition between the merging parties.

Today, the rise of multi-sided online platforms, which collect, process, and monetise user-data on a large-scale, raises a number of concerns for competition and data protection enforcers across Europe. Notably, there are questions about the imbalance of power between platforms and consumers (including the potential misuse of personal data) and whether control over significant volumes of data means that there is no real competition for the market.

These issues were at the heart of the German Federal Cartel Office's *Facebook* decision in February 2019. This was the first time that an infringement of data protection rules was considered as an abuse of dominance. This novel decision, which has resulted in Facebook being ordered to make changes to its terms and conditions to give German users the choice of whether to consent to the collection and use of their personal data from websites and applications other than Facebook, emphasises the increased interaction between the fields of data protection and competition law.

What's next?

The *Facebook* decision suggests that competition authorities should monitor the data collection and processing activities of dominant firms, but that they should have regard for data protection laws when assessing whether such firms' data collection and processing policies are unfair and work closely with data protection authorities.

There are still a number of important questions that remain, particularly whether competition law could or should be used to impose controls and obligations on entities that collect and process consumer data, such as data sharing or access obligations. Undoubtedly, the debate on the extent of the inter-relationship between data protection law and competition law will continue.

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