Auto-Renewal Terms in your Consumer Contracts

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Auto-renewal or subscription-based contracts can certainly provide benefits to both businesses and consumers. For consumers, they can enable them to pay a smaller regular payment rather than one large sum, and for businesses they can provide a predictable, recurring income.

However, concerns have been raised as to whether such contracts are fair under consumer law, as consumers may find themselves locked into paying a subscription for a service they are not actually using, being subject to unexpected price increases, and being not able to get out of the subscription easily. In addition, there may be renewal fees, cancellation fees, and other costs which were not anticipated at the outset.

The Competition and Markets Authority (CMA) aims to ensure that consumers get a good deal when buying goods and services and that businesses operate within the law. The CMA aims to protect consumers from unfair trading practices and it has therefore investigated auto-renewal subscriptions in the online gaming and anti-virus software industries. It is therefore important for businesses to be aware of this investigation and to adapt their own practices so as to comply with CMA Guidance otherwise there may be detrimental consequences.

CMA Investigations

In April 2019, the CMA launched an investigation into the online gaming industry. An online gaming company provided memberships to its consumer customers which usually operated on an auto-renewal basis. The member was required to actively stop the subscription, otherwise, it would just continue to apply at the end of each contractual period.

The CMA investigated the company's auto-renewal procedure and as a consequence, it identified several areas of concern. It was questioned whether it was clear to consumers at the point they entered into the contract that their contract would automatically renew, whether it was possible to opt out of the auto-renewal and whether customers realised they were still being charged for a subscription they may not be using.

Following the CMA's investigations, the company agreed to the following steps to address the CMA's findings:

- to provide more transparent information at the point consumers enter into the contract to ensure customers understand what they are signing up to;

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- to contact consumers to give them the option to end their contract and claim a pro-rata refund before the contract auto-renews;
- to monitor customers' use of the subscription and to remind consumers who have not been using their membership for a period of time how to stop their payments;
- to not continue taking payments from customers who are no longer using their membership;
- to give clear notification of any future price increases;
- to make it clear to customers how to turn off auto-renewal if they do not want to pay much higher prices.

The CMA also investigated anti-virus software businesses using automatically renewing contracts with consumers in the UK. In July 2021, the Department for Business, Energy & Industrial Strategy consulted on competition and consumer policy reforms including new powers to address subscription traps by requiring businesses to be clearer on pre-contract information and to take greater steps actively to remind consumers of auto-renewals and long-term inactive subscriptions, and to make it as easy for consumers to cancel subscription contracts as it is to enter into them (the consultation).

In October 2021, the CMA issued a response to the consultation, approving the proposals for new rules around subscription contracts that auto-renew. The CMA produced guidance setting out nine 'Compliance Principles' also providing examples of terms that are 'more likely to comply' and those that are 'unlikely to comply' with consumer law.

CMA Compliance Principles

Principles 1 – 3 concern information to be provided to consumers *before* the contract is made.

Principle 1 states that customers should be able to make a fully informed choice about auto-renewal. Terms likely to be fair include:

- giving customers a clear, genuine, and free-standing choice between 'opting-in' to auto-renewal, or instead of taking the contract for a fixed period.
- setting out how auto-renewal will work, including the amount of any renewal fee, the length of the renewed contract period, how the customer can 'turn off' auto-renewal after entering the contract, and their refund rights after the renewal.

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The Guidance suggests setting this information out clearly and prominently next to the offer details on a business website's home page and product pages. The Guidance suggests it is not sufficient to have this information where a consumer may need to go looking for it. It is therefore unlikely to be sufficient if it is hidden away within a set of terms and conditions or other documentation such as a hyperlink that must be clicked.

Principle 2 states that any price advantage or saving claimed must be genuine. Businesses should not give the impression that the price they ordinarily charge for the initial period is a discount or a saving, merely because it is cheaper than the price charged on auto-renewal. This is because, in these circumstances, the price being charged for the initial period is the normal price paid by a consumer when they first buy the product. Offering a temporary discount for new customers against the price that new customers would normally pay for that product is likely to comply with consumer law.

Principle 3 states that businesses should confirm to the customer the key points of the auto-renewing contract giving clear and prominent information about what they are agreeing to, immediately before they conclude the purchase. As above, this should include information on the length of the contractual period following auto-renewal, any charges applicable, when payment will be taken, how auto-renewal can be turned off, and how they can terminate the contract after auto-renewal, and information on the business' refund policy. An electronic copy of the key information should be provided after the purchase has been completed.

Principles 4 – 9 apply during the contract.

Principle 4 states that customers should be able to easily turn off auto-renewal. It should be at least as easy for a customer to exit the auto-renewing contract as it was to sign up, i.e. by the same methodology such as the click of a button online. Customers should not have to phone up a call centre to turn off auto-renewal, and businesses should not use practices that give the impression that if customers turn off auto-renewal their product (which they have already paid for) will be adversely affected. Businesses should not use techniques to dissuade customers from turning off auto-renewal, and should not mislead or pressurise customers not to exercise their rights.

Principle 5 states that businesses should remind customers about the auto-renewal before it happens, including the renewal fee amount, the date payment will be taken, when auto-renewal should be turned off so as to avoid it occurring, the length of the renewal period and how the customer can end the contract after renewal and get a refund. The reminder should be sent in good time to enable customers to act before the money is taken for renewal. The method of communication should be one that the customer is likely to read and a different method should be used if it becomes clear the customer is not receiving the message (i.e. if there is an email bounce back). The reminder should be clearly labelled as such and clear instructions should be given on what to do to prevent the renewal from taking place. The reminders should not be hidden amongst other types of sales and marketing correspondence.

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Principle 6 states that once a customer has turned off auto-renewal, it should not be turned back on without the customer's express consent. If, for example, a customer buys an additional package or bolt-on to the product, auto-renewal should not be turned back on again unless the customer expressly agrees.

Principle 7 states that businesses should inform customers of an auto-renewal and give them the chance to change their minds and provide the opportunity for an appropriate refund. The Guidance suggests it is advisable to give a cooling-off period of at least 2 weeks after they have received their renewal confirmation in which to end the contract and get a full refund and there should be an ongoing right to a pro-rata refund throughout the whole period of the renewed contract, especially where auto-renewal was on by default when entering the initial contract.

Principle 8 states that it should be easy for customers to obtain a refund so that where customers exercise their right to a refund (either full or pro-rata), it should be simple and straightforward to request this and receive their money back as quickly as possible. It is suggested that there is an online process to request the appropriate refund without needing to leave the business website and only essential information should be required to process the refund.

Principle 9 states that appropriate safeguards should be provided for customers who are no longer using the product following auto-renewal. Businesses should therefore have procedures in place to check whether customers are using the product or service and where it becomes clear that a customer is not using an automatically renewed product or service, steps are taken to engage with them. A business should not just continue to take payments if they do not respond.

Conclusion

Whilst investigations to date have taken place in industries such as the gaming industry and anti-virus software, the concerns highlighted by the CMA are certainly not specific to such industries and therefore any companies offering memberships and subscriptions that auto-renew should take note of the above and if necessary seek legal advice.

CMA guidance is not legally binding, however, the CMA does have powers to take enforcement action if it considers that there has been a breach of the law. The government has recognised the problems surrounding the auto-renewal of subscription contracts as highlighted by the CMA and is looking at the CMA's recommendations in order to update the law. Businesses should therefore note the steps required to be taken to address the CMA's concerns and reflect these in their own practices, in order to ensure that their auto-renewal processes are likely to comply with consumer protection law.

If you think it might be time for a review of your terms and conditions, please do not hesitate to contact our Corporate & Commercial team by emailing online.enquiries@la-law.com or calling 01202 786188.

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