

## Consumer Protection in the time of Covid-19

By Jonathan Lewis and Hazel Jackson

The Competition and Market Authority (“CMA”) has set up a task force to take action against companies which it considers are breaching consumer laws in the way in which they are dealing with the consequences of the Covid-19 pandemic (for example, companies refusing to provide cash refunds for goods and services which have been disrupted). The CMA has robust enforcement powers such that businesses would be wise to be careful as to how they balance their commercial interests with consumer rights in these difficult times.

### Introduction

1. The Covid-19 pandemic lockdown measures taken to suppress the impact of the virus on public health have resulted in significant financial difficulty for both consumers and businesses. The CMA is concerned that businesses might not be respecting consumer rights in these difficult times. On 20 March 2020, it therefore established a dedicated Covid-19 taskforce (the “**Taskforce**”). This will, *inter alia*, take enforcement action if there is evidence that businesses may have breached consumer protection law and failed to respond to warnings given by the CMA.
2. Four out of five complaints being received by the Taskforce relate to cancellations and refunds. The CMA has identified three sectors of particular concern: (i) weddings and private events; (ii) holiday accommodation; and (iii) nurseries and childcare providers. These three sectors are the CMA’s current priority, but it may well examine other sectors in due course.
3. The CMA has made a public statement about the Taskforce, and has indicated that two key pieces of consumer legislation it considers businesses may be breaching in their response to the pandemic are the Consumer Rights Act 2015 (“**CRA**”) and

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the Consumer Protection from Unfair Trading Regulations (“**CPRs**”).<sup>1</sup> Some other possible contenders are suggested below. The CMA is providing a clear message that the unprecedented circumstances which companies currently face do not override the rights of ordinary consumers.

### Legal background to CMA Enforcement

4. The CMA takes enforcement action under Part 8 of the Enterprise Act 2002 (the “**EA**”). It is empowered to take action in respect of either: (i) a domestic infringement (s.211 EA); or (ii) a community infringement (s.212 EA). Hence, it is necessary to establish an infringement upon which to launch enforcement action.
5. Under ss.211 and 212 EA, an infringement is an act or omission which contravenes “*specified*” provisions. Two orders have been made in respect of domestic and community infringements respectively which specify the consumer legislation upon which enforcement action can be based.<sup>2</sup> A notable example of domestic legislation is the Consumer Rights Act 2015 (“**CRA**”), Part II of which deals with unfair contract terms. The Consumer Protection from Unfair Trading Regulations and the Package Travel and Linked Travel Arrangements Regulations<sup>3</sup> (the “**Travel Regs**”) are examples of potentially relevant specified community legislation.

### Potential infringements in the CMA’s three industry sectors

6. Complaints to the CMA thus far have included that nurseries are asking parents to pay high sums to keep a place open for their child; consumers have been pressured to accept vouchers for holiday accommodation that can only be used during a more

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<sup>1</sup> S.I. 2008 / 1277.

<sup>2</sup> The Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2015 (S.I. 2015/1727); and the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003 (S.I. 2003/1374).

<sup>3</sup> S.I. 2018 / 634.

expensive period; and wedding venues are refusing to refund any money and telling consumers to claim on their insurance.

7. As well as examining the three sectors, the CMA issued a statement on 30 April 2020 outlining its general views on consumer protection law in relation to cancellations and refunds during the pandemic. It stated that, where a contract is not performed as agreed, consumer protection law will generally allow consumers to obtain a refund.<sup>4</sup> In particular, the CMA would expect a consumer to be offered a full refund where:

- a. a business has cancelled a contract without providing any of the promised goods or services;
- b. no service is provided by a business, for example because this is prevented by Government health measures; or
- c. a consumer cancels, or is prevented from receiving any services, because Government public health measures mean they are not allowed to use the services.

8. If businesses do not provide such refunds, the CMA will rely upon one of the various specified consumer legislation to bring enforcement action against the company.

***a. Weddings and private events***

9. On 23 March 2020, all weddings were cancelled in the UK until further government notice. Some wedding venues are currently refusing to provide any refund to consumers. Consumers will be particularly affected in this sector because several of

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<sup>4</sup> <https://www.gov.uk/government/publications/cma-to-investigate-concerns-about-cancellation-policies-during-the-coronavirus-covid-19-pandemic/the-coronavirus-covid-19-pandemic-consumer-contracts-cancellation-and-refunds>.

the UK's largest wedding insurance providers have stopped selling cover to new customers and have excluded cancellation due to coronavirus as part of their terms.<sup>5</sup>

10. It is possible that if the CMA were to take enforcement action in this regard, it might rely upon the provisions in Part II of the CRA (s.62(1) provides that an unfair term of a consumer contract is not binding on the consumer). We say this because in March 2016, in a different context, the CMA wrote an advisory letter to major venue providers reminding them that advance payment and cancellation terms, commonly used in the industry, may not comply with the CRA. Such terms were less likely to be considered fair where, for example: (i) deposits are non-refundable when the amount is more than that required by the business to represent the consumer's payment to reserve the services; (ii) advance payments are more than that required by the business to cover its actual costs; (iii) there are sliding scales of cancellation charges. The CMA warned providers that it will take enforcement action where there is evidence that a business is relying on potentially unfair terms.

**b. *Holiday accommodation***

11. International and domestic travel has been severely affected by the pandemic. In addition to the Foreign and Commonwealth Office advising against all but essential travel to *all* overseas destinations for an "*indefinite period*", many countries have closed their borders and a large number of flights and holidays have been, and will be, cancelled.
12. If a consumer has booked a "*package holiday*", the Travel Regs will apply. To qualify as a "*package holiday*",<sup>6</sup> the consumer must have booked two or more types of travel

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<sup>5</sup> Across many of the largest providers, losses arising from government regulations or government acts are excluded from the terms of the policy.

<sup>6</sup> As defined in Regulations 2 and 3 of the Travel Regs.

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service at the same time for the same holiday from a travel organiser, and the trip must last more than 24 hours or include an overnight stay. It also includes a package whereby the consumer booked part of the holiday by clicking on a link from a company they already booked with, the consumer did not give his or her details again because the first company passed them on, and the consumer made the second booking within 24 hours of the first. Package holidays will need to be distinguished from: (i) “*linked travel arrangements*” where a consumer bought one service from a tour operator and was then prompted to buy another – but their information and payment details are not transferred; and (ii) where the consumer organised their trip independently.

13. Regulation 13 of the Travel Regs covers the termination of a package travel contract by a travel organiser and implies a series of contractual terms into the contract. Regulation 13(3) is stated to apply when the organiser “*is prevented from performing the contract because of unavoidable and extraordinary circumstances and notifies the traveller of the termination of the contract without undue delay before the start of the package*”. In those circumstances, the obligation under reg.13(3) is to provide the traveller “*with a full refund of any payments made for the package*” but there is no further liability to pay compensation. Under reg.14(3), the refund paid to the traveller must be made “*without undue delay and in any event not later than 14 days after the package travel contract is terminated*”. The package travel contract can also be terminated by the traveller at any time before the start of the package (under reg.12(2)) and the traveller will be similarly entitled to a “*full refund of any payments made*” but no further compensation (reg.12(8)). If the traveller has terminated the contract, any refund may be subject to a termination fee (reg.12(3)). However, this is not payable in the event of “*unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity*” which affect the performance of the package (reg.12(7)).

14. Five of the UK's largest holiday cottage rental companies are being referred to the CMA for potentially unfair terms in their contracts with consumers. Consumers have been subject to credit notes in lieu of refunds, some of which can only be used during a more expensive period, and extra charges for changing the dates of their stay.

**c. Nurseries and childcare providers**

15. Nurseries are facing particularly acute difficulties as a result of the current pandemic. While some are being asked to stay open for parents of key workers and vulnerable children, half of all nurseries in the UK have been forced to close due to not being able to cover their costs.<sup>7</sup> The CMA is concerned that some nurseries are still charging parents a proportion of childcare fees while closed. Sector organisations have defended this approach by stating that nurseries are being put between a rock and a hard place: they are being asked to remain open and run at a loss to provide emergency childcare, whilst those that are open face staffing and other costs which the government support (such as the furlough scheme) does not fully cover.
16. This is exacerbated by previous inadequate government funding to the childcare sector, upon which the sector is heavily reliant. In addition, the NDNA argue that: (i) most nurseries are allegedly waiving parents' fees regardless of the terms of their parental contracts; and (ii) nurseries cannot claim on their insurance for losses suffered. As a result, the contributions asked for from parents may be an attempt to merely keep the businesses afloat to avoid permanent closures.
17. Unlike the holiday and wedding industries, the CMA will have to be alive to these issues when undertaking its investigation, and the fact the childcare sector was already in a difficult financial state prior to Covid-19.

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<sup>7</sup> A survey undertaken by the National Day Nurseries Association ("NDNA").

## Conclusion

18. The CMA has robust enforcement powers. In the first instance, after consulting with a business (s.214 EA), it might seek undertakings from that business to change practices which are considered to breach consumer law (s.219 EA). If that fails, it could issue a claim against a business seeking an “*enforcement order*” (s.215 EA), the purpose of which is largely to stop the offending conduct. The CMA’s armoury has recently been bolstered by the introduction of “*enhanced consumer measures*” (s.219EA) which allows it, amongst other things, to seek redress for consumers.
19. Given the CMA’s publication of its concerns in the way businesses are responding to the Covid-19 pandemic, businesses would be well advised to be acutely aware of their obligations under consumer legislation. Given the current unprecedented circumstances, this will be no easy task.

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