



June 2023

Motion Picture Association comments on the Digital Markets, Competition and Consumers Bill

1. The Motion Picture Association (MPA) welcomes this opportunity to provide comments on the Digital Markets, Competition and Consumers Bill. In our comments below we focus on the proposed changes to rules on subscription contracts, commenting also on the scope of enforcement powers.

About the MPA

2. The MPA is the international trade association for the major companies that invest-in, produce, distribute, and market film and television content in the UK: Walt Disney Studios Motion Pictures, Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, and Warner Bros. Discovery.
3. MPA member companies represent a key part of the UK film and television industry, both as significant inward investors and with a strong permanent presence in this country, including owning major production companies and facilities such as Working Title Films and Leavesden Studios.
4. Our members produce and distribute a rich and diverse selection of content, ranging from entertainment and children’s programming to news and sports coverage. Their wide range of services encompasses both traditional linear channels and on-demand direct-to-consumer services and are enjoyed daily by millions of UK consumers.
5. For several MPA members, subscription contracts are a principal source of revenue. This revenue allows them to invest in UK production, where the total UK spend on film and high-end television (HETV) productions for the 2022 was a record-breaking £6.27 billion¹.

Comments on Part 4 – Chapter 2 (Subscription contracts)

General comments

6. MPA members believe that providing a high-level of consumer protection is vital for maintaining a positive brand reputation and being able to grow their services in a highly competitive marketplace. For this reason, they are keenly aware of the need to design services which are both easy to use and deliver important information in a transparent and upfront way, avoiding any misleading or other unfair commercial practices which could lead customers to take transactional decisions they would not have taken otherwise.

¹ <https://www.bfi.org.uk/news/official-2022-statistics>

7. Given the steps already taken, we do not see sufficient evidence of consumer detriment in the case of our members' customers to warrant the introduction of additional obligations in the area of subscription contracts. Furthermore, we believe that the proposed measures do not provide the necessary clarity or flexibility to deal with the broad range of subscription contracts available to consumers and the different subscription journeys they can take (e.g. where both an app store and the trader are part of the same journey).
8. Without additional clarity and assurances, some of the measures in the Bill could have a negative impact on the market and consumer choice by disrupting popular business models and discouraging the availability of certain commercial offers, such as free trials, introductory offers and discounted rates for longer subscriptions. Collectively, as well as reducing the availability of these types of offers, they would increase uncertainty for companies in respect of revenue streams, with potential negative consequences for future investment in production and other content, such as sports, and, ultimately, the quality of the subscription services that may be offered.

Supply of digital content in cancellation period

9. The Consumer Contracts Regulations 2013 contain an important provision whereby consumers can request that the supply of digital content begins before the end of the cancellation period, acknowledging that they will then cease to have the right to cancel from that point of supply². This provision aims to take into account the immediate nature by which digital content can be supplied while also avoiding the potential for abuse that would clearly arise if consumers were to continue to have a right to cancel and obtain a refund after having downloaded or viewed the content.
10. Introducing a non-waivable right to cancel for digital content subscriptions would be highly disruptive for many of the business models on which these subscription contracts are offered. Allowing consumers to cancel a subscription contract after having viewed their chosen film, series, or sports event would lend itself to abuse, even if only a partial refund were offered. It would effectively enable bad actors to repeatedly use a subscription service as a pay-per-view service, albeit at a fraction of the price of pay-per-view offers. This would be to the detriment of the great majority of consumers who would use subscription services as intended. It would likely impact prices, would limit the different types of contracts and offers that our members would be able to make available to UK consumers and, ultimately, would impact the ability to invest in new content.
11. The Bill does not expressly retain this provision from the Consumer Contract Regulations 2013 and it is not clear whether the delegated powers for the Secretary of State (under Clause 259) will be used to implement a similar exception. To avoid creating uncertainty for digital content subscription providers, we recommend that the Bill makes clear that the current exemptions for digital content will continue to apply to subscription contracts.

² Regulation 37 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, <https://www.legislation.gov.uk/uksi/2013/3134/regulation/37>

We recommend that this provision be set out in primary legislation, rather than left to regulations, given its central importance to the creative economy.

Pre-contract information (Clause 248 & Schedule 20)

12. We welcome the recognition in Clause 248 that consumers will typically find certain pre-contract information more important than others when deciding to enter into a subscription contract. However, we believe that there could be some improvement to the Bill's approach of requiring traders to provide two different sets of pre-contract information to consumers ("key pre-contract information" and "full pre-contract information") and to present each set of information separately to one another.
13. We do not believe that a one-size-fits-all approach is appropriate given the many different types of subscription contract the Bill is intended to cover. For example, consumers entering into subscription contracts for the supply of digital content will do so when using screens of very different sizes, and we would therefore recommend greater flexibility as to how pre-contract information is to be provided. In this context, the requirement that key information "be given together" and separately from "any other information" may not be practicable nor consumer friendly when implemented for smallest screens.
14. It would be more effective to allow traders to retain flexibility in the design of their customer journey, while ensuring that each item of key pre-contract information has been delivered and given appropriate prominence, taking into account the nature of the device and size of screen. Providing simple and concise information at relevant stages of the journey will mean consumers are more likely to read and understand that information, as compared to standalone paragraphs of legal copy. Further flexibility could also be offered by allowing traders to provide a single summary of key pre-contract information only where that information has not already been delivered during the customer journey, or by allowing them to display pre-contract information on the on the same page as the payment information.
15. Consideration should also be given to further focussing the scope of what information is considered "key". This includes avoiding repetition in Part 1 of Schedule 20 (e.g. regarding frequency and amount of payments) and removing unnecessary items (e.g. the requirement to provide a pro-rated monthly figure for an annual subscription, which can have the unintended consequence of leading consumers to believe they can pay in instalments).

Reminder notices (Clauses 250-251)

16. For subscriptions paid on an annual basis, we believe it is reasonable to notify the subscriber before they are charged. For shorter contracts (e.g. of one month), MPA considers that there are already strong commercial incentives for video-on-demand (VOD) providers to keep their customers engaged with their service. Many providers, for example, regularly refresh their catalogues and will send updates to their consumers. Members also need to ensure that they can effectively communicate important service and contract announcements to their customers. Such updates effectively provide a reminder to consumers that the subscription or free trial is active, and we recommend that this is taken into account. Providers may also need to change the terms or price for

their subscriptions. It is important that these important messages are not lost or ignored, which is a risk if providers are required to increase the email traffic to subscribers.

Renewal cooling-off periods (Clauses 256-263)

17. Clause 257 introduces the concept of a “renewal cooling-off period” which will start to apply at the point that a consumer transitions from a free trial or discounted promotional offer period to a contract charged at full standard price, and, in the case of annual subscriptions, each time a contract renews for a 12-month period. MPA questions the need for an additional “renewal” cooling-off period and considers that its introduction will likely disincentivize companies from offering free trials and/or promotional offers and create an additional layer of uncertainty for business. Given that free trials are very often offered for periods of under 14 days, they could also create confusion for consumers who will be faced with two overlapping cooling-off periods for the same contract.
18. The 14-day cooling off period for consumer contracts follows from the UK’s transposition of the EU’s Consumer Rights Directive of 2011³. Recital 37 of that Directive sets out the rationale of providing a cooling-off period, explaining that, for distance contracts “the consumer should be allowed to test and inspect the goods he has bought to the extent necessary to establish the nature, characteristics and the functioning of the goods”. It adds, albeit not in respect of online trading, that consumers should also benefit from a cooling-off period for off-premises contracts because of the “potential surprise element and/or psychological pressure”.
19. Neither of these considerations is relevant in the case of a renewal cooling-off period. Consumers transitioning from a free trial or discount period to a full priced paid contract, or renewing a long-term subscription, will already have had substantial opportunity to establish the nature, characteristics and functioning of the product. Indeed, this is the function served by a free trial and therefore the significant consumer benefit that such initial offers provide. Furthermore, there is no potential surprise element or psychological pressure, especially in view of the pre-contract information provided to consumers (including for free-trials) and the expectation that traders send reminders ahead of long-term renewals.

Cancellation by any method (Clauses 252-253 and 264)

20. The Bill provides the right for subscribers to bring a contract to an end in a "single communication" and to do so (or to cancel) by providing notice "by any means". If cancelling or bringing a contract to an end via notice, that notice will be treated as effective on the date it is *sent*, rather than the date received.
21. These provisions are ambiguous and impracticable. For example, they could be interpreted as meaning that consumers could cancel by sending or posting a message on social media. This requirement would present a significant logistical challenge, particularly when put together with the corresponding requirement for the trader to send a confirmation notice to a customer within strict timeframes. The Bill separately requires

³ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0083>

our members to provide a simple, online means of cancellation. This aligns with current good practice and consumer behaviour in the context of an online subscription contract. We see no rationale for mandating acceptance of an open-ended list of cancellation methods when the trader already provides consumers with a clear online mechanism.

22. There is also a lack of clarity as to whether the phrase "bringing a contract to an end" entails an immediate cancellation right or refers to switching off auto-renew (to take effect at the end of the current billing period). We recommend providing greater clarity as to the distinction between these concepts to avoid introducing a requirement on traders to allow for immediate cancellation at any time, which would destabilise and effectively undermine the commercial basis for the auto-renewing subscription model.

Comments on Part 3 (Enforcement of Consumer Protection Law)

Scope

23. We understand that the "UK connection condition" in Clause 141 of the Bill is drafted to make enforcement measures available no matter where the trader is based. However, we believe that this clause, in combination with Clause 140, could potentially bring into scope commercial practices which involve no UK consumers at all. We do not believe that this can be the intention of the Bill, especially given the burdensome international enforcement obligations it would imply for the CMA.
24. MPA would therefore recommend greater clarity on the scope of Part 3 of the Bill (Enforcement of Consumer Protection Law), and in particular on whether the condition in the first part of Clause 140 (relevant infringements) requires that the commercial practice harms the collective interests of *UK* consumers to qualify as a relevant infringement.
25. More broadly, the scale of the proposed maximum monetary penalties are likely to be disproportionate to infringements of the subscription contract rules. Unlike competition law, which is concerned with interactions with other providers and the wider market, consumer compliance is often concerned with the detail of product design and phrasing of terms. Setting monetary penalties at the proposed level may paralyse traders and stifle innovative product design, unless clear guidance is published which makes clear that the CMA is obliged to conduct a sensible assessment (taking into account whether any enforcement would be proportionate). We also recommend that the Bill specify that significant monetary penalties can only be imposed as a final sanction (after all other routes have been exhausted, unless the circumstances are exceptional) and there must be an easily accessible out-of-court route of appeal against a decision to impose a monetary penalty.

Summary

26. In summary, our main comments and recommendations on the Bill are:

- **Enabling the supply of digital content during cancellation period:** We recommend seeking confirmation that consumers will continue to be able to curtail the cancellation period for subscription contracts in order to begin the supply of digital content earlier.

- **More flexibility on precontract information:** We advise granting more flexibility to traders as to how they provide pre-contract information in order to take into account wide variety of subscription contracts on offer and the different interfaces via which a consumer might enter into a subscription contract.
- **Reminder notices:** We recommend that the Bill take into account the updates that traders already send to their customers and the strong commercial incentives to keep their customers engaged with their services.
- **Renewal cooling-off periods:** These additional cooling-off periods lack a clear rationale, will likely disincentivize companies from providing certain offers, and will create more business uncertainty.
- **Cancellation by any method:** We recommend removing the requirement to allow cancellation by any means, provided that a clear online means of cancelling has been provided. We also recommend providing greater clarity as to the distinction between "bringing a contract to an end" and cancellation.
- **Scope of consumer enforcement powers:** We recommend more clarity on the scope of the powers for enforcing consumer protection law.

**For further information regarding this consultation response, please contact
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