

CMA cracking down on unfair cancellation policies

On 30th March 2020, the Competition and Markets Authority (CMA) launched its investigation into unfair cancellation and refund policies, following an increasing number of consumer complaints during the COVID-19 pandemic.

The CMA initially identified three sectors of particular concern to tackle as a priority, before moving on to examine other sectors:

- weddings and private events;
- holiday accommodation; and
- nurseries and childcare providers.

On 21 May, the CMA added package holidays to this priority list, after receiving almost 27,000 complaints regarding holidays and airlines (around three-quarters of total complaints received relating to COVID-19).

As well as examining specific sectors, the CMA has published a [statement](#) on its views regarding consumer cancellation policies and refunds. This aims to clarify how the law in this area should be applied during these unprecedented times, where Government public health measures are preventing businesses from providing, and/or consumers from receiving, a huge number of services.

Refunds

Generally, the CMA expects businesses to offer full refunds (including any so-called non-refundable deposits or pre-payments) to consumers where:

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

There are two scenarios where the CMA considers businesses may lawfully issue partial refunds:

- Where a consumer has received some of the services they have paid for, then they should generally be expected to pay for these (but should be refunded for the services that are not provided).
- In some cases, where Government public health measures prevent a business from providing a service or the consumer from receiving it, the business may be able to deduct a contribution to the costs it has already incurred in relation to the specific contract in question (where it cannot recover them elsewhere). In the CMA's view, these cases are likely to be relatively rare, however, and the costs that may be deducted from refunds will usually be limited.

The CMA is clear that no administration fees (or equivalent) should be charged for processing refunds.

The CMA acknowledges that, in the circumstances, it may take businesses longer than normal to process refunds. The timeframes for providing refunds should be made clear to consumers, and refunds should still be given within a reasonable time. Where there are statutory deadlines for payment – like the 14 day rule for package holidays – businesses should take those into account (although, at the time of writing, the Association of British Travel Agents (ABTA) is [advising customers](#) that this 14 day rule is impossible for many companies to adhere to and to be patient. See this previous [article](#) for further analysis on refunds under the Package Travel Regulations).

Credits and re-booking

In its statement, the CMA is clear that customers may be offered credits, vouchers, re-booking or rescheduling as an alternative to a refund. However, the right to a full refund should always be an option that is just as clearly and easily available. Any restrictions that apply to these alternatives, such as the period in which credits must be used or services re-booked, must also be fair and made clear to consumers.

Travel companies should note ABTA's guidance on issuing Refund Credit Notes (RCNs), which entitle customers to rebook a holiday at a future date or

receive a cash refund at the expiry date of the note. See this previous [article](#) for further analysis on RCNs.

Ongoing contracts

Where a consumer receives regular services in exchange for a regular payment as part of an ongoing contract (e.g. gym subscriptions), the CMA considers businesses will generally be required to:

- Offer customers a refund for any services they have already paid for but that are not provided by the business, or which they are not allowed to use because of Government public health measures.
- Allow customers to withhold future payments for services that are not provided by the business, or which they are not allowed to use because of Government public health measures.

A business may be permitted to require payment of a small contribution to its costs until the provision of the service is resumed, but only where the contract terms set this out clearly and fairly.

Future contracts

Where a contract requires a consumer to pay in advance for services it will receive later in the year (when the lockdown measures may have been relaxed) the CMA's view is businesses can generally require consumers to make these payments.

Consumers' rights to refunds will depend on whether the services can be provided when the time comes. That said, the CMA is very clear that a business should not seek payments for a service it knows it will be unable to provide.

Cancellation by consumers for other reasons

If a consumer cancels a contract because they no longer want the service, even though the service can still be provided as agreed, they will be entitled to a refund under the applicable terms and conditions (on the assumption those terms are fair).

The CMA's investigation into unfair cancellation terms is the latest action by its COVID-19 Taskforce, which was launched on 20 March to monitor the activities of businesses during the crisis and ultimately take enforcement action against those breaching consumer protection law. It is unlikely to be welcomed by businesses, especially those in the travel, leisure, entertainment and hospitality sectors for whom large scale refunds could mean the end. However, the report does not preclude offering alternatives, and businesses should think about how they can work with their customers to offer a solution which works for both parties. After all, many customers will have booked for a reason, and will in most cases want the business to survive this crisis.

Authors



Alexandra Cooke
Associate

T: +44 (0)20 3036 7320
M: +44 (0)7980 903019
E: acooke@fladgate.com

Alexandra Cooke is an Associate in the Commercial team at Fladgate LLP. She advises on a range of commercial contract, intellectual property, and data protection issues and has a particular interest in the travel and leisure industries.