

The Brexit Papers



Consumer Law

Paper 12



Bar Council Brexit
Working Group
June 2017

**THIRD
EDITION**



Brexit Paper 12: Consumer Law

Summary

The laws governing relations between consumers and businesses are of vital importance to the future success of the UK. Consumers will be much more likely to purchase goods and services, whether domestically or across borders, if they can be confident that their rights and ability to enforce those rights remain the same. Likewise, businesses are likely to benefit from the continuation of a legal and regulatory regime with which they have become familiar; if they are to be expected to come to terms with a new legal order they will require legal certainty.

The influence of EU law and CJEU jurisprudence on UK consumer law is so all-pervading that even maintaining the status quo will require considerable work. There will be difficulty in achieving the Government's twin aims set out in the White Paper of preserving EU law, and of bringing an end to the jurisdiction of the CJEU in the UK; at least if the latter is intended to truly separate the development of UK consumer law from the jurisprudence of that Court. EU law is a moving target, both because legislative changes to consumer law are still work in progress in some areas and because of developing CJEU jurisprudence. Divergence between EU and national law is likely to occur unless some mechanism is devised to prevent this.

- We therefore urge the Government to clarify its intentions as to the route to be followed in relation to EU consumer law, both as to issues of interpretation of existing law and as to intentions for the future, by reference to developments of the existing law within the EU and in relation to EU laws which are currently in the process of negotiation or which await implementation.
- We urge the Government to give detailed consideration to the manner in which EU consumer law is to be adopted under the Great Repeal Bill. Some of the measures likely to be necessary will in addition have to be agreed at the level of future (including transitional) UK/EU arrangements – particularly where reciprocity is required.

The Impact of Brexit on Consumer Law

Consumer Contracts

1. Contracts for the sale or supply of goods, services and digital content are governed by the Consumer Rights Act 2015. This implements some EU provisions, such as Council Directive 93/13/EEC on unfair terms in consumer contracts, and also contains some purely domestic provisions. The interrelationship of domestic remedies for breach of sale of goods contracts with European remedies has been the subject of a number of legislative changes, with further EU legislation proposed.

2. The key test of unfairness in relation to terms in consumer contracts has recently been interpreted by the Supreme Court following a decision of the CJEU.¹ The CJEU has had a crucial role in the development of the law in this area, and is likely to continue to do so. The Government will therefore need to decide whether and to what extent past and/or future CJEU decisions are to have effect in relation to this area.

Unfair commercial practices

3. The Consumer Protection from Unfair Trading Regulations 2008 implement the Unfair Commercial Practices Directive (Directive 2005/29/EC). The Regulations are the key enforcement mechanism relating to the manner in which goods and services are sold to consumers. They prevent consumers from falling prey to misleading and/or aggressive practices by providing for criminal offences relating to misleading actions, misleading omissions, aggressive commercial practices and actions which are contrary to the standards of professional diligence. In each case offending behaviour attracts criminal liability and/or civil liability under the enforcement provisions of the Enterprise Act 2002.²

4. Again, the decisions of the CJEU have been fundamental in developing understanding of the key concepts underlying the Directive and therefore also the Regulations. For example, the concept of a “transactional decision” is central: if a trader’s actions would not have influenced a consumer’s transactional decision there is no liability. However, the interpretation given to that phrase by the High Court was markedly different to the approach taken subsequently by the CJEU.³ These cases show that there is clear potential for significant divergence in the future.

¹ *Beavis v Parkingeye Ltd* [2015] UKSC 67; Case C-415/11 *Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa*.

² Which implements Directive 2009/22/EC on injunctions for the protection of consumers' interests (Injunctions Directive).

³ *Office of Fair Trading v Purely Creative* [2011] EWHC 106 (Ch); and Case C-281/12 *Trento Sviluppo*.

Consumer finance

5. The UK has a complex and sophisticated system of regulation of consumer lending, much of which pre-dates European legislation. The provisions of the Consumer Credit Act 1974 have been affected by the Consumer Credit Directive (Directive 2008/48/EC) in a number of ways, and in some ways the Directive has provided for a system which is simpler than its UK predecessor – for example the requirements of the Consumer Credit (Agreements) Regulations 2010 (which reflect the requirements of the Directive) are much less prescriptive than the 1983 Regulations which they have (partially) replaced. A European standard method for calculation of the APR is likely to continue to be considered a good idea.

6. The biggest single issue for businesses in this area is likely, however, to be the authorisation regime. Consumer lenders are currently able to take advantage of the ‘passporting’ system where they wish to trade in another Member State, thus avoiding the need to satisfy many different regulatory requirements. The continued operation of a system of this nature will be very important.

Cross-border enforcement

7. The Consumer Protection Cooperation Regulation (Regulation 2006/2004) currently provides a mechanism whereby enforcement bodies in each Member State can take action against breaches of consumer law by a trader in another Member State. Although this rarely takes the form of court proceedings, there are numerous instances where UK regulatory bodies take action on behalf of regulatory bodies in other Member States and vice versa. There are plans for reform of this mechanism within the EU. The Government should in our view give serious consideration to retaining this important form of protection, or to negotiating a similar scheme of cooperation post-Brexit.

Holidays and Travel

8. The peculiarities of the relationship between UK and EU law, and the difficulties of providing for an orderly maintenance of the status quo, are well demonstrated in the context of compensation for delays and cancellation to flights. Regulation 261/2004 gives passengers certain rights in the context of denied boarding and of cancellation or long delay of flights. On its face, the Regulation only provides for monetary compensation in the event of denied boarding or cancellation. However, the CJEU has ruled that this right to monetary compensation also extends to cases of delay.⁴ The UK Courts have followed the CJEU’s approach and these decisions are also followed routinely by UK ADR bodies which decide cases in this area.

9. If it is intended that the Regulation, as interpreted by the CJEU, is to continue to have effect for UK airlines, thought will need to be given, among other matters, to:

9.1. Whether UK airlines are to be ‘EU carriers’ within the Regulation and, if not, how that is to be avoided, given that they will presumably still fly to EU destinations.

⁴ Cases C-402 and 432/07 *Sturgeon v Condor Flugdienst*; Cases C-581 and 629/10 *Nelson v Deutsche Lufthansa*.

9.2. How the UK is to be designated within that Regulation, i.e. whether UK airports are to be treated as an equivalent to “an airport located in the territory of a Member State” for the purposes of take-off and landing.

9.3. The EU will need by some mechanism to agree with this designation. Failure to engage with the Regulation might well encourage passengers to choose other European airlines.

10. Another relevant Directive is the Package Travel Directive, which with effect from 1 July 2018 will be repealed and replaced by Directive 2015/2302 on package travel and linked travel arrangements, which extends passenger rights to arrangements where the traveller selects travel service components and purchases them from a single business, and to linked travel arrangements where a traveller who has booked one travel service online (e.g. a flight) is invited to book another travel service (car, hotel etc.) through a targeted link, and the second booking is made within 24 hours. Travel agencies and tour operators already have to have an eye to holidays which may be offered to customers in 2018 and their liabilities need to be understood.

11. It may be sensible for the Government to consider the future of these regimes, so far as they concern air passengers, in tandem with other issues of interest to the aviation community such as airspace access and the European aviation safety regime.

Other pending reforms

12. European consumer law is subject to frequent change. At present the Commission is engaged in a number of major projects, concerning the digital single market, online sale of goods and a review of consumer law as part of the Commission’s Regulatory Fitness and Performance Programme (REFIT). It is likely that at least some of these projects will produce new Directives which alter the current law. We consider it almost inevitable that the digital single market proposals⁵ will also create new European provisions which are likely to diverge from the position adopted by the UK in relation to digital content.

13. The extent to which the Government proposes to follow and implement any such proposals in the short to medium term is a matter which will be of considerable interest to businesses which trade across borders.

Recommendations

- We urge the Government to clarify its intentions as to the route to be followed in relation to EU consumer law. The examples in this paper raise questions of interpretation of existing law and development of the existing law within the EU and new EU laws that are currently in the process of negotiation or which have been adopted but await implementation.
- We urge the Government to give detailed consideration to the manner in which EU consumer law is to be adopted under the Great Repeal Bill. Some of the measures likely to be necessary will in addition have to be agreed at the level of future

⁵ <https://ec.europa.eu/digital-single-market/en/digital-single-market>.

(including transitional) UK/EU arrangements – particularly where reciprocity is required.

Brexit Working Group⁶

February 2017

For further information please contact:

*Philip Robertson, Director of Policy or
Luke Robins-Grace, Senior Public Affairs and Communications Adviser
The General Council of the Bar of England and Wales
289-293 High Holborn
London WC1V 7HZ
Direct line: 020 7242 0082
Email: PRobertson@BarCouncil.org.uk
LRobins-Grace@BarCouncil.org.uk*

⁶ This paper is an edited version of a document prepared for the Working Group by the Law Reform Committee. The full document can be made available on request.