



UK CONSUMER LAW AFTER WITHDRAWAL FROM THE EUROPEAN UNION (“BREXIT”)

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Abstract: This paper explains the state of UK Consumer Law immediately before Brexit. It then explains how the withdrawal from the EU was effected through a statutory scheme which transferred EU legislation and case-law into the domestic law of the UK, and the immediate changes made to UK Consumer Law as a result. It then turns to the implications of the Trade and Cooperation Agreement, before commenting on the first set of reform proposals made after the UK's departure from the EU.

Title: UK Consumer Law after withdrawal from the European Union ("Brexit")

Keywords: Consumer Law; Brexit; law reform; Trade and Co-operation Agreement; Retained EU Law

Resumen: En este trabajo se explica el Derecho de consumo en el Reino Unido inmediatamente antes del Brexit. Luego se explica cómo la retirada de la UE se llevó a cabo a través de un régimen legal que transfirió la legislación y la jurisprudencia de la UE al Derecho interno del Reino Unido, así como los cambios inmediatos que, como resultado, se produjeron en el Derecho de consumo del Reino Unido. A continuación, se abordan las implicaciones del Acuerdo de Comercio y Cooperación, antes de comentar el primer conjunto de propuestas de reforma realizadas tras la salida del Reino Unido de la UE.

Título: Derecho de consumo en el Reino Unido tras la retirada de la Unión Europea ("Brexit")

Palabras clave: Derecho de consumo; Brexit; reforma legal; Acuerdo de Comercio y Cooperación; Derecho de la UE que se ha mantenido en vigor

Resum: En aquest treball s'explica el dret de consum al Regne Unit immediatament abans del Brexit. Després s'explica com la retirada de la UE es va dur a terme a través d'un règim legal que va transferir la legislació i la jurisprudència de la UE a el Dret intern del Regne Unit, així com els canvis immediats que, com a resultat, es van produir en el dret de consum del Regne Unit. A continuació, s'aborden les implicacions de l'Acord de Comerç i Cooperació, abans de comentar el primer conjunt de propostes de reforma realitzades després de la sortida del Regne Unit de la UE.

Títol: Dret de consum en el Regne Unit després de la retirada de la Unió Europea ("Brexit")

Paraules clau: Dret de consum, Brexit, reforma legal, Acord de Comerç i Cooperació, Dret de la UE que s'ha mantingut en vigor

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1. INTRODUCTION

This contribution focuses on both the immediate and potential future impact of the United Kingdom's (UK) withdrawal from the European Union (EU), commonly known as "Brexit". It will first summarise the state of UK Consumer Law before Brexit, before explaining the way in which UK law provided for continuity after Brexit as well as the immediate changes that were made to UK Consumer Law. It then turns to explore the implications of the Trade and Cooperation Agreement for the future trajectory of UK Consumer Law, before examining a first government Consultation Paper on Consumer Law reform.

2. UK CONSUMER LAW AT THE TIME OF WITHDRAWAL FROM THE EU

In the same way as all the other EU Member States, Consumer Law in the UK has been a mixture of EU-derived legislation,¹ legislation of a domestic origin, as well as the general law of contract and tort.

Leaving aside the case-based common law rules, which are of general application and not limited to consumer situations specifically, UK legislation dealing with consumer issues has taken one of two forms: (i) *Acts of Parliament*, enacted by Parliament using its legislative processes; and (ii) Secondary legislation (statutory instruments), adopted under an enabling power granted in an Act of Parliament. Typical examples of Acts of Parliament include the Consumer Protection Act 1987,² or the Consumer Rights Act 2015,³ both concerned exclusively with aspects of consumer law. Prior to the enactment of the Consumer Rights Act 2015, there were consumer-specific provisions in Acts of Parliament with a general scope, such as the Sale of Goods Act 1979 or the Supply of Goods and Services Act 1982. An Act of Parliament is a form of domestic legislation, enacted by both Houses of Parliament, and therefore has the status of domestic law.

In contrast, secondary legislation can only be adopted by the government where Parliament has created an enabling provision through primary legislation (i.e., an Act) which authorises the government (usually through the relevant Secretary of State) to lay legislation before Parliament. Such secondary legislation takes the form of *statutory instruments*, and these are widely used, whether for legislation applicable throughout the UK/Great Britain or applicable in one or more of the constituent jurisdictions. Such statutory instruments can be adopted through one of two procedures: (i) the *negative resolution procedure*: a statutory instrument takes legal

¹ See e.g., Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (Abingdon: Routledge, 2017).

² Part I transposes the Product Liability Directive (85/374/EEC).

³ Part I contains provisions transposing the "old" Consumer Sales Directive (99/44/EC), as well as the Unfair Contract Terms Directive (93/13/EEC).

effect once it has been signed by the relevant Secretary of State, but it can be annulled if a motion to that effect is moved and passed in either House of Parliament; or (ii) the *affirmative resolution procedure*, which requires a vote by both Houses of Parliament before it can take effect. The negative resolution procedure is used more widely than the affirmative resolution procedure. The latter does require a debate and a vote in Parliament, but it is not as complex (and slow) a process as the adoption of an Act of Parliament.

Statutory instruments were widely used to implement EU Directives, including most of the directives on consumer law.⁴ The enabling power for such statutory instrument was the broad power contained in the *European Communities Act 1972*. In brief, section 2(1) of the 1972 Act provided that

“All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly.”

This provision was essential to ensure that all directly applicable provisions of EU Law, such as the Treaties themselves, Regulations, and rulings by the CJEU, would have legal effect in the UK. This provision therefore was the key to unlocking the application of EU law in the domestic legal systems of the UK.

All EU regulations relevant to consumer law took effect on the basis of Art.2(1), at least to the extent that no further domestic implementing measures were required. This included e.g., the denied boarding regulation (261/2004/EC).

As directives are not directly applicable, they require transposition into national law. Section 2(2) of the 1972 Act conferred powers on the relevant government member to enact secondary legislation in order to implement a directive (and other not directly-applicable provisions of EU Law) into domestic law. This power allowed a government minister to

*“make provision—
(a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised”*

⁴ As was the case with the Product Liability Directive’s transposition in Part 1 of the Consumer Protection Act 1987.

Statutory instruments adopted on the basis of s.2(2) of the 1972 Act could follow either the negative or the affirmative resolution procedure.⁵ It is important to note that this power only extended to the implementation of “any EU obligation”, so could only be exercised insofar as this was necessary to implement the substance of a relevant directive or other EU obligation.⁶ If the government wanted to go beyond the requirements of an EU directive, e.g., by exercising a provision in a minimum harmonisation directive to introduce more protective rules, it had to rely on a different power or enact primary legislation. This became necessary when the government decided to extend the scope of the old Doorstep Selling rules beyond “unsolicited” visits to cover all contracts between a consumer and a trader concluded in a doorstep selling situation. In order to do so, a special power had to be included in s.59 of the Consumers, Estate Agents and Redress Act 2007, leading to the enactment of the Cancellation of Contracts made in a Consumer’s Home or Place of Work etc. Regulations 2008.⁷ These Regulations were subsequently repealed in order to implement the Consumer Rights Directive (2011/83/EU), and the resulting regulations⁸ were based on s.2(2) of the 1972 Act. Not every directive was transposed on the basis of s.2(2) or through specific powers; the Price Indications Directive (98/6/EU) was implemented via the Price Marking Order 2004,⁹ based on a power then provided in s.2(3) of the Prices Act 1974.

Most of the consumer law directives were implemented through secondary legislation, whether on the basis of s.2(2) of the 1972 Act, or another statutory power. Some consumer directives were implemented, or re-implemented, through primary legislation. Thus, the Product Liability Directive (85/374/EEC) was implemented in Part 1 of the Consumer Protection Act 1987, and the Unfair Contract Terms Directive (93/13/EEC) and the first Consumer Sales Directive (1999/44/EC) were ultimately implemented in the Consumer Rights Act 2015.¹⁰

⁵ See Schedule 2, paragraph 2 (2).

⁶ The Legislative and Regulatory Reform Act 2006 provided a procedure to combine secondary legislation with additional changes to remove or reduce burdens, but it is not necessary to go into the detail in this paper.

⁷ S.I. 2008/1816.

⁸ The Consumer Contracts (Information, Cancellation and Additional Charges Regulations) 2013, S.I. 2013/3134.

⁹ S.I. 2004/102, repealing the earlier implementation through the Price Marking Order 1999 (S.I. 1999/3042).

¹⁰ The Unfair Contract Terms Directive was initially implemented through the Unfair Terms in Consumer Contracts Regulations 1994, which were replaced by the Unfair Terms in Consumer Contracts Regulations 1999. Following a comprehensive review and proposals made by the Law Commission, the Directive was re-implemented in Part 2 of the Consumer Rights Act 2015. Similarly, the Consumer Sales Directive was initially implemented through regulations (which amended the relevant primary legislation), before being re-implemented in Part 1 of the Consumer Right Act 2015. Importantly, the

This overview of the legal basis for the implementation of the various EU consumer law directives is important for the discussion of the impact of the UK's withdrawal. The process of withdrawing would involve the repeal of the European Communities Act 1972, because this was the route for EU Law into the domestic legal systems of the UK. As will be explained in the next section, the process of dealing with the implications of withdrawal for domestic law is very complex and has inevitably gone far beyond simply repealing the 1972 Act. The simple repeal of this Act, without any other provision, would have immediately resulted in the repeal of every statutory instrument adopted on the basis of s.2(2) of the 1972 Act. This would have affected a number of measures implementing consumer law directives, although, as seen above, not every measure would have been affected immediately. Any transposition through an Act of Parliament would not have been affected, for example; neither would the Price Marking Order 2004 as it was not enacted on the basis of the 1972 Act.

3. DEALING WITH WITHDRAWAL: THE 2018 ACT

The legislation giving effect to the UK's withdrawal from the EU is the European Union (Withdrawal) Act 2018 ("EUWA"), as amended by the European Union (Withdrawal Agreement) Act 2020. This is a complex piece of legislation, but for present purposes, a selective overview suffices.¹¹ First, EUWA repeals the European Communities Act 1972.¹² However, for the duration of the so-called "implementation period", which lasted until the end of 2020, the 1972 Act continued to have effect,¹³ and EU Law remained applicable as before. This included the operation of s.2(2) of the 1972 Act, which was the legal basis for much of the secondary legislation relevant to consumer law, and s.2(1), which provided for the legal effect of directly applicable EU Law in domestic law. Both provisions ceased to have effect on the expiry of the implementation period.¹⁴

A key purpose of the EUWA is to ensure that from 1 January 2021, so-called "retained EU Law" continues to have effect in domestic law to provide continuity in the law unless and until provisions of "retained EU Law" are amended or repealed. The term "retained EU Law" covers a wide range of legal provisions which are based in EU Law. First, there is "EU-derived domestic law",¹⁵ which covers both the secondary

provisions of the 2015 Act exceed the minimum requirements provided for in the corresponding directives.

¹¹ See also Christopher Bisping and Christian Twigg-Flesner, "Preparing for withdrawal from the European Union in the United Kingdom" in Malte Kramme, Christian Baldus and Martin Schmidt-Kessel (eds.), *Brexit: Privat- und wirtschaftsrechtliche Folgen* (Nomos, 2020).

¹² Section 1. The repeal took effect on "Exit Day", which was 31 January 2020 at 11pm (s.20(1) EUWA).

¹³ S.1A EUWA.

¹⁴ S.1A(5) EUWA.

legislation previously enacted on the basis of s.2(2) of the 1972 Act¹⁶ as well as any other domestic provision which has its origins in EU Law.¹⁷ Secondly, there is “direct EU legislation”, which includes regulations and decisions, in particular.¹⁸ Third, there is “retained case-law”, which includes both decisions by the European Court and domestic cases dealing with the application of EU-law or relevant directly applicable or implemented EU Law.¹⁹ Such provisions are retained EU Law insofar as they were binding immediately before the end of the implementation period (i.e., 11pm on 31 December 2020). The EUWA also contains provisions for the amendment of retained EU Law to correct “deficiencies”.²⁰ This could entail relatively minor matters such as replacing references to the “EU” with the “UK”, or more significant, e.g., the repeal of retained EU Law which no longer works because it requires interaction with the EU and/or its Member States.²¹

The EUWA provisions on retained EU Law are somewhat more complex than set out here,²² but the overall objective can be stated quite simply: their effect is that much of EU Law which was effective before the end of the implementation period continues to apply beyond this end-date, unless and until amended by domestic legislation.

The same applies in respect of the case-law from the EU courts, which could eventually be “overruled” by the Supreme Court²³ or other “relevant courts”²⁴ (such as the Court of Appeal). In deciding whether to depart from retained EU case law, the Supreme Court and other designated relevant courts should follow the test which the Supreme Court would apply in deciding whether to depart from any of its previous decisions (or previous decisions by the Judicial Committee of the House of Lords, its

¹⁵ See s.2 EUWA.

¹⁶ S.1B(7)(a) EUWA.

¹⁷ To a degree, this seems to be “overkill”, because any domestic law contained in an Act of Parliament or in secondary legislation not based on the 1972 Act would have remained in effect in any case.

¹⁸ S.3(2) EUWA.

¹⁹ S.6(7) EUWA.

²⁰ The term used in s.8 EUWA.

²¹ See s.8(2) EUWA for the kinds of “deficiencies” covered by this provision.

²² For a more detailed analysis, see Simon Whittaker, “Retaining European Union Law in the United Kingdom” (2021) 137 *Law Quarterly Review* 477, pp. 478-488.

²³ S.6(4)(a) EUWA.

²⁴ As defined in Regulation 3 of the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (S.I. 2020/1525).

predecessor).²⁵ Whittaker has noted that the temporal effect of a decision to depart from EU case-law, particularly on the interpretation of EU legislation which has been retained, is a difficult one: when the Supreme Court departs from an one of its earlier decision (or of the House of Lords), the effect will usually be retroactive. Whittaker has argued that any retroactive effect should only go back to the point when the Implementation Period ended, because it was only at that point that “retained EU legislation” was created.²⁶ It will remain to be seen how the Supreme Court (or, indeed, the Court of Appeal) will utilise its power to depart from European case-law.

The upshot of all this is that the EUWA froze EU Law (other than the treaties) as it was at the point when the Implementation Period ended and incorporated it into UK Law. At this point, retained EU Law assumed a special status within UK law, although the government has since announced its intention to change this status and to review the substance of many aspects of retained EU Law.²⁷

The immediate benefit of this is obvious: it ensures that there is continuity in the substantive legal rights and obligations conferred by legislation implementing EU Law and directly applicable EU Law, as well as CJEU case-law. It has created the somewhat strange situation where an EU Regulation now exists both in its original EU form, and as a UK version frozen in time as at 31 December 2020, but any legislation implementing EU legislation has continued in effect without interruption, despite the repeal of the enabling provisions in the European Communities Act 1972.

As a result, the UK’s withdrawal from the EU at the end of January 2020 and the end of the Implementation Period at the end of December 2020 did not have an immediate effect on consumer rights originating in EU legislation and case-law, although some changes were made to the overall Consumer Law landscape.

4. IMMEDIATE CHANGES MADE TO UK CONSUMER LAW

Whilst the bulk of consumer law originating from the EU continues to apply, there are some important exceptions to this. In particular, EU legislation regarding the enforcement of consumer law has either been repealed altogether or limited in scope to the UK. For example, the Consumer Protection Enforcement Cooperation Regulation (2017/2394),²⁸ which deals with the co-operation between national enforcement

²⁵ Set out in the *Practice Statement (Judicial Precent) 1966* [1966] 1 W.L.R. 1234. Its continued application was confirmed by the Supreme Court in *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28 (para [25]).

²⁶ Whittaker, “Retaining European Union Law in the United Kingdom”, p. 486.

²⁷ A review of ‘retained EU legislation’ was announced on 16 September 2021, with particular measures identified in a list published as *Brexit Opportunities: Regulatory Reform* (available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018386/Brexit_opportunities-_regulatory_reforms.pdf [last accessed 28 September 2021]).

authorities, was repealed²⁹ and the necessary amendments to the enforcement regime in the Enterprise Act 2002 were made by the Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019.³⁰ More generally, the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018,³¹ which came into effect at the end of the Implementation Period, amended a number of domestic laws, primarily in order to replace references to the EU or the EEA with references to the United Kingdom, and to make other corresponding amendments. For instance, Regulation 3 of the 2018 Regulations amends references in the Consumer Rights Act 2015 to the “EU” and to a “non-EEA State”. Regulation 8 replaces references in Regulation 6 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013³² to the EU Directives on Package Travel (2015/2302/EU) and Timeshare (2008/122/EU) with their UK implementing legislation equivalents. The 2018 Regulations also repealed the retained EU Law version of the Online Dispute Resolution (ODR) Regulation (524/2013).³³ Furthermore, the Consumer Credit (Amendment) (EU Exit) Regulations 2018³⁴ amended references to the EU in the Consumer Credit Act 1974 and related secondary legislation. A further measure making wide-ranging changes to legislation relevant to Consumer Law are the Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019.³⁵ For example, Schedule 3 to these Regulations amend the Consumer Protection Act 1987 which, *int. al.*, gave effect to the Product Liability Directive (85/374/EEC). Again, these amendments concern mostly geographical references, but also included the repeal of a power to amend the Act (and subsequent Acts) where necessary to give effect to changes to the Product Liability Directive provided in s.8 of the Consumer Protection Act 1987. Similar technical changes are made to the General Product Safety Regulations 2005 by Schedule 9.

All of these amendments are of the kind permitted by s.8 EUWA to remedy deficiencies in retained EU Law. As noted, many concerned references to the EU, EEA and similar, which no longer made sense after the UK had completed its withdrawal from the EU. The full repeals of the retained Consumer Protection Enforcement

²⁸ Somewhat ironically, the UK had to *implement* relevant provisions by making changes to the legislation dealing with enforcement issues during the Implementation Period: see The Consumer Protection (Enforcement) (Amendment etc.) Regulations 2020 (S.I. 2020/484).

²⁹ Regulation 8, The Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/203).

³⁰ S.I. 2019/203.

³¹ S.I. 2018/1326.

³² S.I.2013/3134; these Regulations implemented the Consumer Rights Directive (2011/83/EU).

³³ Regulation 10.

³⁴ S.I. 2018/1038.

³⁵ S.I. 2019/696.

Cooperation Regulation and the ODR Regulation was necessary because these apply to cross-border situations within the EU, so had no purpose to fulfil as a part of UK Law. Furthermore, provisions in the Enterprise Act 2002 giving effect to the Injunctions Directive (2009/22/EU) were removed or amended for the same reason.

The immediate effect of the UK's completion of withdrawing from the EU has therefore been limited to technical adjustments of retained EU Law, particularly in respect of the geographical scope or extent of particular provision, and the repeal of retained EU law which only applied to cross-border issues. Although these changes covered a large number of domestic laws from the pool of retained EU Law, they have not had significant implications for the level of consumer protection in the UK. However, this does not mean that there will not be any changes to aspects of UK consumer law which have their origins in EU Law. Indeed, in July 2021, the Department for Business, Energy and Industrial Strategy (BEIS) published a Consultation Paper on reforming competition and consumer policy, which raises the spectre of substantive reforms in the near future. This will be discussed below. First, however, it is necessary to consider to what extent the agreement between the UK and the EU governing its future relationship – the Trade and Co-operation Agreement - addresses consumer protection aspects.

5. THE TRADE AND CO-OPERATION AGREEMENT AND CONSUMER LAW

The future relationship between the UK and the EU is governed by the Trade and Co-operation Agreement (TCA), which was agreed at the end of 2020 and entered into force provisionally on 1 January 2021, and definitively on 1 May 2021 following ratification by the European Parliament. The TCA was implemented into UK Law by the European Union (Future Relationship) Act 2020 (“EU(FR)A”).

In the entire text of the TCA,³⁶ the word “consumer” appears a total of 57 times in a document comprising 2555 pages. Nevertheless, there are several provisions of relevance to consumer law. Point 7 of the Preamble stresses that the UK and EU have “autonomy and rights to regulate within their territories in order to achieve legitimate public policy objectives such as the protection and promotion of...consumer protection... while striving to improve their respective high levels of protection”. This emphasises that the UK can act freely in deciding issues of consumer protection but should seek to *improve* the already existing levels of consumer protection. “Improve” can mean several things: it could mean making it easier to utilise consumer rights, clarification of the law, removal of gaps and inconsistencies, but also further increases in the level of consumer protection. The exact intention behind this commitment is therefore somewhat vague.

³⁶ Available e.g., at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982648/TS_8.2021_UK_EU_EAEC_Trade_and_Cooperation_Agreement.pdf [accessed 28 September 2021].

This statement in the Preamble therefore encapsulates a commitment to maintain and improve (however understood) existing levels of consumer protection, but does not require that the UK and EU take the same path. It also does not commit either to leave specific rules of existing consumer law untouched; rather, the focus seems to be on the overall level of consumer protection. Furthermore, point 12 of the Preamble expresses the desire that the TCA should “contribute to consumer welfare through policies ensuring a high level of consumer protection and economic well-being”. The commitment to preserving and enhancing a high level of consumer protection has therefore been clearly stated in the TCA.

However, there is not a separate title or chapter in the TCA dealing with consumer protection issues; rather, consumer protection is mentioned at various points throughout the TCA in the context of more specific policy areas. For instance, Art.123 (Title II, chapter 1 on services and investment), para.2, is one of several instances³⁷ where the TCA reaffirms the regulatory freedom of the EU and UK with regard to, int.al., consumer protection., but there is nothing more substantial beyond this.

However, Title III on Digital Trade contains a more detailed provision in Art.208. This provides as follows:

“1. Recognising the importance of enhancing consumer trust in digital trade, each Party shall adopt or maintain measures to ensure the effective protection of consumers engaging in electronic commerce transactions, including but not limited to measures that:

- (a) proscribe fraudulent and deceptive commercial practices;*
- (b) require suppliers of goods and services to act in good faith and abide by fair commercial practices, including through the prohibition of charging consumers for unsolicited goods and services;*
- (c) require suppliers of goods or services to provide consumers with clear and thorough information, including when they act through intermediary service suppliers, regarding their identity and contact details, the transaction concerned, including the main characteristics of the goods or services and the full price inclusive of all applicable charges, and the applicable consumer rights (in the case of intermediary service suppliers, this includes enabling the provision of such information by the supplier of goods or services); and*
- (d) grant consumers access to redress for breaches of their rights, including a right to remedies if goods or services are paid for and are not delivered or provided as agreed.*

2. The Parties recognise the importance of entrusting their consumer protection agencies or other relevant bodies with adequate enforcement powers and the

³⁷ See also e.g., Art.198 or Art.302.

importance of cooperation between these agencies in order to protect consumers and enhance online consumer trust.”

Crucially, Art.208 TCA only applies in respect of consumer protection in the context of electronic commerce transactions, and does not extend to all consumer transactions. On a cursory reading, much of this Article seems familiar from the existing consumer law *acquis*, but there are a number of departures from the current *acquis*.³⁸ For example, sub-paragraph (a) broadly reflect aspects of the Unfair Commercial Practices Directive (2005/29/EU) and the Consumer Protection from Unfair Trading Regulations 2008³⁹ – although in both these measures, the concern is with misleading and aggressive commercial practices, rather than “fraudulent and deceptive” practices. Similarly, sub-paragraph (b) appears to reflect the general prohibition on unfair commercial practices, with the reference to “good faith” corresponding to the use of this concept in the definition of “professional diligence” in the UCPD/the 2008 Regulations.⁴⁰ However, it has inverted the familiar prohibition into a positive obligation, and so it will be interesting to see if both the EU and the UK will consider reflecting this shift in a future revision of the legislation. There is also particular mention of a prohibition on charging for unsolicited goods and services, which is one of the commercial practices always regarded as unfair under the UCPD/CPRs,⁴¹ as supplemented by Art.27 of the Consumer Rights Directive.⁴² However, none of the other prohibited practices are expressly mentioned, so the inclusion of this particular one seems odd.

The requirements of sub-paragraph (c) reflect the detailed information duties already in existence in EU and UK Law, particularly under the Consumer Rights Directive (2011/83/EU) and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. Neither measure is specifically limited to electronic commerce transactions, but both apply to such transactions because they would be “distance contracts” within the meaning of the Directive/Regulations.

Finally, sub-paragraph (d) looks innocuous, but could potentially have significant implications. It contains a general commitment to ensure that consumers can access redress for breaches of their rights, but only in the context of electronic commerce transactions. Presumably, this means rights in the context of electronic commerce transaction generally, but these will include the rights listed in Art.208(1)(a)-(c). This means that there should be redress for consumers for instances when the information

³⁸ S Whittaker, “Retaining European Union Law in the United Kingdom (2021) 137 *Law Quarterly Review* 477, esp. pp. 498-501.

³⁹ [S.I. 2008/1277](#).

⁴⁰ Cf. Art.2(h) UCPD and Reg.2(1) CPUTR.

⁴¹ Cf. Annex I, para.29 UCPD and Schedule 1, para.29 CPUTR respectively.

⁴² The UK has given effect to Art.27 by inserting Regulation 27A into the CPUTR.

required by sub-paragraph (c) has not been given. The Consumer Rights Directive simply requires that any information provided becomes an integral part of the contract,⁴³ allowing for the application of contract law remedies.⁴⁴ A similar approach is taken under the Consumer Contract Regulations 2013 in the UK,⁴⁵ with the Consumer Rights Act 2015 doing the same⁴⁶ this and making available specific remedies for a breach of the terms containing the information. In the case of contracts for the supply of goods, for instance, s.19(5) CRA provides that a consumer can recover from the trader any costs incurred as a result of the failure to provide information up to the value of the price paid.⁴⁷ If the information about the main characteristics of the goods has not been provided, however, then this is treated as an instance of a non-conformity and the full range of remedies under the Act becomes available.⁴⁸ The onus might therefore be on the EU to improve its provisions on redress in respect of non-compliance with information duties.

With regard to the rights in sub-paragraph (a) and (b), the situation is less clear-cut. As noted, both sub-paragraphs relate to the UCPD. As originally enacted, the UCPD did not provide for any kind of private redress for individual consumers, but this was changed by the Better Enforcement and Modernisation Directive (2019/2161/EU, “BEMD”). Article 3 BEMD inserted a new Art.11a into the UCPD which requires that Member States provide for “proportionate and effective remedies, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract” for consumers harmed by unfair commercial practices. This would seem to meet the requirements of Art.208 TCA as far as sub-paragraphs (a) and (b) are concerned. The UK had already introduced a private right of redress by amending the CPUTR 2008 in 2014,⁴⁹ but this does not extend to all the provisions of the Regulations but only to misleading actions and aggressive practices,⁵⁰ provided a number of other conditions are met.⁵¹ There is no go into the

⁴³ Art.6(5) CRD.

⁴⁴ In most cases, a claim for damages if loss can be proved.

⁴⁵ Regulation 18 CCR.

⁴⁶ See ss.11(4) and 12 for goods, ss.36(3) and 37 for digital content, and s.50(3) for services contracts.

⁴⁷ See also s.42(4) in respect of digital content

⁴⁸ For a discussion, see C Twigg-Flesner and R Canavan, *Aityah and Adams’ Sale of Goods*, 14th ed. (Pearson, 2020), ch.19, pp.482-490.

⁴⁹ See Part 4A of the CPUTR, inserted by the Consumer Protection (Amendment) Regulations 2014 (S.I. 2014/870).

⁵⁰ Reg.27B CPUTR.

⁵¹ See Reg.27A CPUTR.

detail of these provisions here;⁵² rather, the point is that UK law currently is more limited in the way it approaches the private right of redress. In order to fulfil its obligations under the TCA, the UK might have to modify its provisions on the private right of redress in the CPUTR, at least with regard to electronic commerce transactions.

In contrast, the general reference to “services” in Art.208(1)(d) might suggest that provisions should be in place in respect of the non-performance or non-conformity of services (at least where these result from an electronic commerce transaction). In the UK, ss.48-57 of the Consumer Rights Act 2015 would seem to fulfil this requirement. However, EU law has, thus far, not addressed the conformity of services other than in respect of digital services,⁵³ and so might now be obliged to act.

A further important provision is Art.438 TCA in the chapter on aviation. In particular, Art.438(2) provides that

“The Parties shall ensure that effective and non-discriminatory measures are taken to protect the interests of consumers in air transport. Such measures shall include the appropriate access to information, assistance including for persons with disabilities and reduced mobility, reimbursement and, if applicable, compensation in case of denied boarding, cancellation or delays, and efficient complaint handling procedures.”

The final part of this sub-paragraph is worth noting. It refers to “compensation in case of denied boarding, cancellation or delays”. In EU Law, this matter is addressed in Regulation 261/2004,⁵⁴ which remains in force with some amendments to geographical references in the UK as retained direct EU legislation. This provision resulted in an early judicial consideration of the impact of the TCA by the Court of Appeal in a case involving a claim under Regulation 261/2004 - *Lipton v BA City Flyer Ltd*, decided in March 2021.⁵⁵ The case concerned a claim arising from the cancellation of a flight after the captain became ill, which resulted in the claimant consumer being rebooked on a flight which arrived just under 3 hours later than the original flight. Coulson LJ addressed the substantive aspect of the claim by reviewing the Regulation and relevant CJEU and domestic case-law. Although the facts giving rise to the case arose in 2018 at a time when the UK was still a member of the EU, the Court of Appeal did consider the effect of the UK’s withdrawal. Green LJ undertook a

⁵² See G Woodroffe, C Twigg-Flesner and C Willett, *Woodroffe and Lowe on Consumer Law*, 10th ed. (Sweet & Maxwell, 2016), pp. 130-132.

⁵³ See the Digital Content and Digital Services Directive (2019/770/EU).

⁵⁴ Regulation (EC) No 261/2004 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights (2004) O.J. L 46/1.

⁵⁵ [2021] EWCA Civ 454, 30 March 2021.

detailed examination of the UK's legislative framework (summarised above) for withdrawal and the retention of EU Law, as well as the effect of the TCA.

First, Green LJ determined the status of the Regulation as retained direct EU legislation under s.3 of the European Union (Withdrawal) Act 2018. The retained EU Law version of the Regulation was amended by the Air Passenger Rights and Air Travel Organisers' Licencing (Amendment) (EU Exit) Regulations 2019 to amend geographical designations as well as references to EU legislation to reflect the reduced scope of the Regulation in UK Law. Green LJ then considered whether Art.438 (then labelled Art. AIRTRN.22) affected the application of Reg.261/2004. This required consideration of s.29 EU(FR)A 2020, which provides a "sweeping up mechanism"⁵⁶ for the implementation of the TCA. As Art.438 TCA had not been specifically implemented, s.29 came into relevance. In essence, this provides that existing domestic law has effect "*with such modifications as are required for the purposes of implementing*"⁵⁷ the TCA, unless implemented elsewhere, if this is required to ensure that the UK complies with its international obligations under the TCA. In consequence, any provision of existing domestic law which could be deemed as implementing a corresponding provision of the TCA is effectively modified so as to reflect the TCA. This means that the effect of s.29 EU(FR)A is that provisions of domestic law have to be treated as having been modified by the TCA and be read as meaning "what the TCA says it means, regardless of the language used."⁵⁸ Any modifications to domestic law under s.29 EU(FR)A only arise if domestic law is not already consistent with the relevant provisions of the TCA and where these are necessary for compliance with the UK's international law obligations. Green LJ explained that the application of s.29 EU(FR)A requires three steps. First, relevant domestic law has to be identified. For Art.438 TCA, this would be the UK's version of Regulation 261/2004. Secondly, the domestic law has to be compared with the relevant provision(s) of the TCA in order to determine whether domestic law is already the same as the TCA provisions. If so, nothing further needs to be done. But if there is "inconsistency, daylight or a lacuna",⁵⁹ then domestic law is amended by virtue of s.29 to bring it into line with the TCA. Thus, the effect of s.29 EU(FR)A is not simply to require the interpretation of domestic law in accordance with the provisions of the TCA, but it operates so as to change domestic law to bring it in line with the TCA.⁶⁰ In this particular case, the purposive reading of Regulation 261/2004 by Coulson LJ in light of the relevant CJEU case law already complied with Art.438 TCA, and so recourse to s.29 EU(FR)A was not necessary.

⁵⁶ Green LJ at para [77].

⁵⁷ Section 29(1) EU(FR)A 2020, my emphasis.

⁵⁸ Green LJ at para [78].

⁵⁹ Green LJ at para [82].

⁶⁰ Cf. Green LJ at para [78].

At this point, it is necessary to return briefly to Art.208 TCA. Above, it was noted that UK law might fall short in respect of the right of redress for unfair commercial practices when compared to Art.208(a), (b) and (d) TCA. Article 208(1) TCA requires that the EU and UK “shall adopt” measures which comply with sub-paragraphs (a)-(d), and so are part of the UK’s international obligations under the TCA. The effect of s.29 EU(FR)A, as analysed by Green LJ in *Lipton v BA City Flyer*, could well be that the CPUTR are already modified through the operation of s.29 to provide for an extended right of redress in respect of unfair commercial practices in the context of electronic commerce transaction (the scope of Art.208 TCA).⁶¹ The CPUTR are the domestic legislation dealing with commercial practices (including, although not limited to, electronic commerce transactions). The redress for breaches of their right in respect of unfair commercial practices in the CPUTR is limited, so there is a “gap” in the CPUTR when compared to the TCA. This is the kind of situation when s.29 EU(FR)A will operate to effect a modification of domestic law so as to reflect TCA.

In summary, whilst there are some interesting features of the TCA with regard to Consumer Law, its main significance is that it requires both the UK and the EU to maintain a high level of consumer protection, whilst recognising their respective autonomy to act in this area. Neither is obliged to follow what the other decides to do; however, if and when divergence between the UK and EU’s respective approaches to Consumer Law happen, a close eye will have to be kept on whether this has the effect of reducing the overall level of consumer protection.

6. FUTURE DEVELOPMENT OF UK CONSUMER LAW

Thus far, this contribution has discussed the current situation regarding Consumer Law after the UK’s withdrawal from the EU. In the immediate aftermath, very little has changed, although some EU measures no longer apply in the UK at all, whereas others have been modified to reflect the fact that the UK is no longer an EU Member State and that the body of “retained EU Law” only applies within the UK. These developments aside, Consumer Law in the UK has not been significantly affected by Brexit at this point.

However, the Department for Business, Energy and Industrial Strategy (BEIS) has consulted on possible changes to consumer and competition law.⁶² Chapter 2 of the Consultation Paper focuses on consumer rights. It contains a number of specific proposals, but also invites comments on wider reforms to UK consumer law. One set of proposals focuses on subscription contracts, auto-renewals and introductory offers; a second deals with the problem of fake reviews. With regard to fake reviews, it makes

⁶¹ See also S Whittaker, “Retaining European Union Law in the United Kingdom” at p. 501, reaching the same conclusion.

⁶² BEIS, *Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers*, CP 488, July 2021.

two proposals which, in substance, resemble the changes made to the Annex of the UCPD by the Better Enforcement and Modernisation Directive (2019/2161/EU). Article 3 BEMD added points 23b and 23c to Annex I (prohibiting the publication of reviews without checking that consumer reviews are by consumers who have bought or used the product, and prohibiting the submission of, or the commissioning of someone to submit, false consumer reviews). Somewhat disingenuously, no mention is made in the Consultation Paper that these proposals correspond with the changes made to the UCPD and are instead presented as reform proposals arising from work undertaken by the Competition and Markets Authority (CMA).⁶³ A further proposal which corresponds with changes made deals with not identifying paid-for search results as such – also now a listed practice in point 11a of Annex I. Other proposals relate to refund practices in light of difficulties encountered by many consumers in the early phase of the Covid-19 pandemic in spring 2020, as well as the implementation of a Law Commission draft bill on prepayment protection.⁶⁴

But then there is also a wildcard question inviting those responding to the consultation to identify aspects which could be simplified, clarified, or which are “redundant or unnecessarily burdensome requirements to provide information or other reporting requirements, which burden businesses disproportionately compared to the benefits they bring to consumers”.⁶⁵ This could be an opportunity for some to argue for significant adjustments to consumer law and bring with it the risk of a lowering of the overall level of consumer protection in the UK. Of course, the question focuses on “information or other reporting requirements”, but with most information requirements originating in EU Law, this question is potentially far less innocent than it might seem.

Indeed, it is remarkable that the Consultation Paper does not say much at all about the connection between UK consumer law and EU consumer law, nor is there any mention of the impact of the TCA (both in the specific areas discussed above and the general commitment towards consumer protection).⁶⁶ For instance, several of the proposals mirror reforms made in EU Law already. The Consultation Paper does not mention this, instead providing some basic reasons for the proposals. It passes on the opportunity to consult on the way the UK might wish to take account of consumer law developments at the European level. There are significant chunks of UK Consumer Law which have their origins in EU Law, often actively encouraged by the UK government to promote the reform of domestic consumer law on the back of implementing relevant directives. Reforms to these measures, as has recently happened, should be noted, and it should be asked whether the UK should make corresponding changes or not, or

⁶³ Cf. paras. 2.32 and 2.43 of the Consultation Paper.

⁶⁴ Law Commission, *Consumer sales contracts: transfer of ownership*, Report No. 398 (HC 1365).

⁶⁵ Q.50 on p.96 of the Consultation Paper.

⁶⁶ It is mentioned *once* in a reference to Competition Law enforcement (p.79, para. 1.239).

consider different changes instead. The UK now has regulatory freedom in the field of consumer law, but this does not mean that it is forced to ignore EU developments altogether. When the UK was still a member of the EU, it was obliged to implement EU legislation – now it has the freedom to choose whether or not to do so. One topic which is missing from this Consultation Paper is whether the UK should have a process for considering changes to EU consumer law and whether to make corresponding changes to domestic law or to do something else. The government is perhaps being a little sly in proposing changes reflecting EU reforms but not acknowledging this anywhere.

If this Consultation Paper is a guide to the short-to-medium term attitudes of the UK government to Consumer Law after Brexit, then the likelihood of drastic change seems low. Indeed, the specific proposals presented here (both corresponding to EU reforms and arising from separate work by the English Law Commission) would improve consumer protection. However, there is also the possibility that some changes will be made to existing legislation, although these are unlikely to be significant.

Yet, there are unanswered questions. First, nothing is said about how the UK will implement the consumer protection obligations under the TCA, particularly with regard to electronic commerce transactions and air passenger rights. The latter already seem covered by the UK version of Regulation 261/2004, but as the UK government plans to change the status of retained EU law, this seems far from assured beyond the short term. Secondly, the UK government should clarify whether it intends to ignore EU developments, even where these might be relevant to reforming UK law, or create some form of tracking process. Whatever it intends to do would be preferable to the way in which reform proposals with an obvious EU parallel were presented, with no mention of the EU, in the 2021 Consultation Paper.

7. CONCLUSIONS

The immediate impact of Brexit on Consumer Law has been relatively light, although some important measures for co-ordinated enforcement have been lost. The real difference is the greater regulatory freedom the UK now has in the field of consumer protection – something which has repeatedly been acknowledged in the TCA. The TCA itself contains some consumer protection obligations, but there are many aspects which are not touched by the TCA. However, as yet, there is no clarity as to how the TCA provisions on consumer protection will contribute to shaping future consumer law development, nor has the UK government managed to grapple with the legacy connection of domestic consumer law with EU consumer law. For the time being, a reduction of consumer rights or significant legislative overhauls seem unlikely.



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