



BRIEFING PAPER

Number 9126, 21 May 2021

Brexit: UK consumer protection law

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Summary

Consumer protection law is a distinct body of law that regulates the contractual relationships formed between businesses and consumers. It aims to ensure fairness and transparency. In the UK, the development of consumer law has been largely driven by the EU through a series of directives and regulations.

Most EU law applicable in the UK as at **31 December 2020** remains in effect within the UK indefinitely as “retained EU law”¹ (unless or until the Government decides to repeal or amend it). This new body of retained EU law includes a raft of consumer protection measures. In effect, consumer protection law is largely unchanged because of Brexit, at least for UK consumers buying from UK businesses.

Since 1 January 2021, UK consumers have continued to enjoy similar consumer rights as they did before Brexit. However, it may be more challenging to enforce redress rights when buying goods, services, or digital content online from an EU-based trader. With respect to cross-border disputes, the following points should be noted:

- UK consumers may need to seek redress through the courts of the state in which the trader resides rather than the UK courts,
- the enforcement of a UK court judgement against an EU based trader may be difficult and costly,
- UK consumers have lost their rights to use EU-based ADR mechanisms and the EU’s [Online Dispute Resolution \(ODR\) Platform](#), which links consumers with ADR providers in the EU.

UK traders should also be aware of the consumer protection laws in force in the EU countries they are selling goods or services to. As was the case before Brexit, UK traders that operate in EU member states may be subject to consumer claims and to regulatory action. However, any judgment given by a court of an EU member state will not be recognised and enforced automatically in the UK. This might change if reciprocal arrangements are agreed in the future.

An obvious consequence of Brexit is that the UK no longer has any significant influence over the future direction of consumer protection law in the EU and vice versa. In the short term, it is thought unlikely that the Government will make material changes to UK consumer protection law. The [Consumer Rights Act 2015](#) (CRA 2015) only came into force comparatively recently, alongside key changes to the UK’s regime of consumer bodies, making further wholesale reform improbable.

In terms of current policy, it appears that both the UK Government’s [Consumer Green Paper](#) and the EU’s [New Deal for Consumers](#) share similar aims in seeking to implement new rules to modernise consumer protection law, in particular, to address online commercial practices and

¹ Retained EU law is a new category of UK law created under sections 2 to 4 of the [EUWA 2018](#) at the end of the UK-EU transition period, following the repeal of the savings to the [European Communities Act 1972](#).

online markets. Both the UK and the EU also intend to impose stronger penalties for breaches of consumer protection rules.

In the longer-term, however, it is thought likely that UK and EU consumer protection law will diverge. This may be problematic for those UK businesses which sell to consumers in both the UK and the EU. To deal with differences between the two consumer regimes, it may be necessary to draw up separate contractual terms and conditions and engage in different trading practices.

This Commons briefing paper considers some of the implications of the UK's withdrawal from the EU for selected areas of consumer protection law.

1. Background

1.1 Origin of UK consumer law

The development of the UK's consumer protection regime has been largely driven by the EU through a series of directives and regulations. Many consumer rights and remedies derive from EU law and are relatively long standing. For example, the [Consumer Rights Act 2015](#) (CRA 2015), the cornerstone of the UK consumer protection regime, is a mix of EU and domestic derived law.² The [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#), implements in the UK many of the provisions of the Consumer Rights Directive (2011/83/EU).

Similarly, the following key characteristics of the UK's consumer protection regime are derived from EU legislation:

- **fairness test** – consumer contractual terms, conditions and notices must not create an unfair imbalance in favour of a business,
- **transparency test** – consumer contractual terms, conditions and notices must be in written in plain and intelligible language to be enforceable,
- **right of withdrawal** – a consumer's legal right to cancel a contract formed at a distance (e.g. online, over the phone or off-business premises) within 14 days,³
- and **implied standards and remedies** - a requirement that consumer goods, services and digital content be of satisfactory quality, fit for purpose, and as described.

1.2 Retained EU consumer law & Brexit SIs

Most EU law applicable in the UK as at **31 December 2020** remains in effect within the UK indefinitely as "retained EU law"⁴ (unless or until the Government decides to repeal or amend it). This new body of retained EU law includes a raft of consumer protection measures.

So-called "Brexit statutory instruments" (SIs) have either amended or repealed "retained EU law", to reflect the fact that the UK is no longer

² For example, the [Sales and Guarantees Directive](#) (1999/44/EC) introduced tiered remedies for defective goods, so that a consumer must first seek a repair or replacement, before being entitled to either receive a price reduction or reject the goods. However, the [Consumer Rights Act 2015](#) adds a short-term right to reject within 30 days and by limiting the trader to a single attempt at repair/replacement - these additional rights derive from the UK.

³ The [Consumer contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#) require traders to give consumers certain information, such as the total price of the goods, services or the digital content (or the manner in which the price will be calculated if this cannot be determined; how payment should be made and when the ordered goods or services will be provided; all additional delivery charges and other costs; and who will pay the cost of returning items if the consumer cancels the order.

⁴ Retained EU law is a new category of UK law created under sections 2 to 4 of the [EUWA 2018](#) at the end of the UK-EU transition period, following the repeal of the savings to the [European Communities Act 1972](#).

part of the EU. Two Brexit SIs specifically deal with retained EU consumer law, they are:

- [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018/1326](#) (known as the “Protection Regulations”); and
- [Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2019/203](#) (known as the “Enforcement Regulations”).

The primary focus of both SIs is on the enforcement of consumer rights both in the UK and in the EU post-Brexit. Both SIs have applied since **1 January 2021**.

Specifically, the purpose of the “**Protection Regulations**” is to:

- remove or amend references to EU law from consumer legislation, to ensure that it continues to operate effectively now the UK has left the EU,⁵ and
- make further amendments to clarify that, from the end of the transition period, consumer contracts concerned with imports from EEA countries will be treated in the same way as contracts dealing with imports from non-EEA countries.

Affected consumer legislation includes:

- [Consumer Rights Act 2015](#)
- [Consumer Protection from Unfair Trading Regulations 2008](#) (SI 2008/1277)
- [Consumer Rights \(Payment Surcharges\) Regulations 2012](#) (SI 2012/3110)
- [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#) (SI 2013/3134)
- [Alternative Dispute Resolution for Consumer Disputes \(Competent Authorities and Information\) Regulations 2015](#) (SI 2015/542).

The purpose of the “**Enforcement Regulations**” is to either remove or amend references to EU legislation in relation to the enforcement of various consumer protection laws. The Regulations also revoke certain related reciprocal enforcement and investigatory powers across EU member states.

Detailed information about these legislative changes is provided in **Section 2** of this paper (below).

⁵ For example, EU-derived regulations dealing with EU-based online dispute resolution and cooperation in enforcement have been repealed because they relied wholly on reciprocity between EU member states

2. Legislative changes to UK consumer law

2.1 What stays the same

Although many of the rights enjoyed by UK consumers are based on EU-derived regulations and directives, most are now enshrined in UK law. As a result, the essentials of UK consumer protection law have not significantly changed because of Brexit.

Since 1 January 2021, UK consumers buying from UK businesses have the same rights and remedies as they did previously. In addition, the [Competition and Markets Authority](#) (CMA) continues to have the same enforcement powers regarding domestic breaches of consumer protection law.

2.2 What has changed?

Even though a trade deal has been agreed, the UK leaving the EU has impacted on some pieces of consumer protection legislation, resulting in technical changes. A summary of the main changes, which came into effect on 1 January 2021, is provided below.

Consumer Rights Act

The following technical changes have been made to the [CRA 2015](#):⁶

- [Scope of the Act](#) – certain provisions of the CRA 2015 will apply to all contracts with a “close connection” to the UK.
- [Satisfactory quality requirement](#) – only statements made by importers into the UK will have a bearing on this standard (rather than importers into the EEA).
- [Exemption from fairness test](#) (Part 2 of the Act) – the exemption no longer applies to contract terms which reflect mandatory provisions of international conventions to which the EU is a party.

Unfair trading Regulations

The main change to the [Consumer Protection from Unfair Trading Regulations 2008](#)⁷ (SI 2008 No. 1277), is that trader liability for the misleading or aggressive practices of importers of goods is now restricted to importers into the UK (rather than importers into the EEA).

Payment Surcharges Regulations

Payment surcharges are additional fees added to the price of a product or service when a consumer chooses to pay by a certain means of payment. The [Consumer Right \(Payment Surcharges\) Regulations 2012](#) (SI 2012 No. 3110) prohibit payment surcharges being imposed on consumers where the surcharge exceeds the cost to the trader of using that means of payment.

⁶ [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018](#)

⁷ Ibid

With effect from 1 January 2021,⁸ a key change to the Regulations is that surcharge restrictions only apply if at least one of the “payment service providers” used is UK-based (rather than EEA-based). “Payment service providers” are third parties that help merchants accept payments (e.g. via credit/debit card payments, as well as by direct debit, bank transfer etc).

Provision of Services Regulations

The [Provision of Services Regulations 2009](#) (SI 2009 No.2999) implements in the UK [Directive 2006/123/EC on services in the internal market](#) (commonly known as “the Services Directive”). The main aim of the Directive is to facilitate the provision and supervision of services of a high quality in the EU. As such, it is relevant to both service providers and to competent authorities (i.e. bodies with a supervisory or regulatory role in each member state).

With effect from 1 January 2021, the [Provision of Services \(Amendment etc.\) \(EU Exit\) Regulations 2018](#) (SI 2018 No. 1329) made the following changes to the 2009 Regulations:

- UK competent authorities are now able to regulate EEA businesses operating in the UK in the same way as they regulate third country service providers.
- The ban on discriminating against consumers based on their residence is removed.
- Obligations to provide information to service recipients no longer includes recipients who are EEA nationals.

⁸ [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018](#)

3. Impact of Brexit on consumer contracts & dispute resolution

The UK formally leaving the EU has impacted significantly on aspects of consumer contract law and dispute resolution. With effect from 1 January 2021, key changes include the following:

- Choice of governing law – introduction of [UK Rome I](#).
- No automatic recognition in EU member states of any UK judgment.
- The [EU Online Dispute Resolution \(ODR\) Platform](#) will no longer be available to UK consumers and businesses to use.
- There will no longer be any reciprocal obligations on the EU and the UK to investigate breaches of consumer law or pursue enforcement action under the [Consumer Protection Cooperation Regulation](#).

Each development is considered in detail below.

3.1 Choice of governing law: introduction of UK Rome I

Many consumers purchase goods and services online from traders based outside the UK. In the event of a dispute, it is necessary to ascertain if UK or foreign laws apply to the consumer contract. This was the case before Brexit – there has been no change in practice.

Article 6(1) of Regulation (EC) 593/2008 on the law applicable to contractual obligations (known as [Rome I](#)) contains rules for determining the law governing contracts concluded from 17 December 2009 and applies to all EU member states except Denmark. Businesses are allowed to elect the governing law of their business-to-consumer contracts, but that choice of law is “subject to the application of mandatory local law of the consumer where the business directs activities to the country where the consumer has their habitual residence”. In effect, this means that businesses will specify the governing law of their business-to-consumer contracts but usually seek local law advice when directing their activities to a particular country to ensure the contractual terms are enforceable.

Rome I continued to apply to the UK during the transition period. However, on 1 January 2021, Rome I stopped applying to the UK on a reciprocal basis.⁹ The UK has enacted legislation¹⁰ that incorporates

⁹ Except as provided for in Part 3 of the [UK-EU Withdrawal Agreement](#) in respect of contracts concluded before the end of the transition period

¹⁰ [Law Applicable to Contractual Obligations and Non-Contractual Obligations \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) (SI 2019 No.834) as amended by the [Jurisdiction, Judgments and Applicable Law \(Amendment\) \(EU Exit\) Regulations 2020](#)

(with amendments¹¹) the rules in Rome I into UK law, as part of retained law. In the UK, this means that:

- [Rome I](#) will apply to contracts made on or after 17 December 2009 and before the end of the transition period
- Contracts entered into from 1 January 2021 onwards will be governed by the new rules (i.e. UK courts will apply [UK Rome I](#), which currently includes the same rules and principles as Rome I)

The principle of businesses electing the governing law but being subject to mandatory local law in the countries in which goods and services are directed has continued.

3.2 No automatic recognition in EU of UK judgment

With regard to governing law (and despite any choice of non-UK law), where a trader pursues its activities in (or directs its activities to) the UK, a consumer (or an enforcement authority) will be able to take legal action against the trader in the UK. In addition, the UK courts will give consumers the benefits of any protections that parties cannot contract out of under UK consumer law. This would include, for example, rights and protections provided under the [CRA 2015](#) and under the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#).¹²

However, there will be no automatic recognition in EU member states of any UK judgment. Similarly, if an EU business successfully takes legal action in its home jurisdiction against a UK consumer, the judgment will not be automatically recognised by the UK courts.¹³

3.3 Resolution of consumer disputes

Provision of ADR services

The [Alternative Dispute Resolution for Consumer Disputes \(Competent Authorities and Information\) Regulations 2015](#) ("the 2015 Regulations") implemented in the UK the provisions of [EU Directive 2013/11/EU](#) on alternative dispute resolution (ADR). ADR enables disputes between a consumer and business to be settled more quickly and cheaply than using the courts. The 2015 Regulations designate competent authorities responsible for approving and monitoring certain entities which provide ADR services.

The 2015 Regulations were subsequently amended by the [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018](#),¹⁴ with the effect that as from 1 January 2021, there is no longer a requirement for

¹¹ These amendments only seek to ensure that UK Rome I will operate effectively in domestic law from the end of the transition period. They do not change the substance of the rules.

¹² SI 2013/3134)

¹³ Any contractual terms which prevent a consumer from taking legal action in their home jurisdiction are potentially unfair and unenforceable under UK law

¹⁴ Section 9(16)(h) of the [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018](#) omits Schedule 3, paragraph 18 from the [Alternative Dispute Resolution for Consumer Disputes \(Competent Authorities and Information\) Regulations 2015](#)

UK-based ADR entities to offer cross-border services to consumers residing in EU member states. Traders are no longer able to offer consumers EU alternatives to UK-based ADR entities. In addition, the UK Secretary of State has responsibility for the publication of the list of ADR entities and is no longer required to send this list and report to the European Commission.

As from 1 January 2021, the following continues to apply to UK traders:

- Where a trader is obliged by law, contract, or membership of a trade association to use the services of an ADR entity, the trader must include the name and address of this entity on its website or sales terms.
- If the trader has exhausted its internal complaint handling procedure following the initiation of a dispute, it must inform the consumer of the name and website address of an ADR entity that would be competent to deal with the complaint (albeit the trader does not need to engage with such ADR).

Online dispute resolution

The European Commission set up and maintains a dispute resolution platform (known as the “ODR platform”) to resolve disputes arising from cross-border business-to-consumer transactions with the help of an approved dispute resolution body. This ODR platform was established under the [EU Regulation on online dispute resolution](#) (Regulation (EU) 524/2013).

The [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018](#) have revoked in the UK this EU Regulation. This means that as from 1 January 2021, UK consumers can no longer submit a new complaint on the ODR platform and are also unable to act on any ongoing cases (whether to send it to a dispute resolution body, contact a UK ODR advisor or receive an outcome).¹⁵

The following additional points should be noted:

- UK consumers can still access ADR entities in EU countries, just not through the ODR platform.
- Online traders selling in the UK are no longer obliged to provide consumers with information about the EU’s ODR platform on their websites.
- UK businesses can no longer access the [ODR dashboard](#).

3.4 Cooperation between national enforcement authorities

Prior to Brexit, the UK consumer protection regime was supported by a reciprocal cross-border consumer enforcement framework. This allowed

¹⁵ There is little information on the full extent UK consumers/businesses used the ODR platform. See “[Consumer ADR – Delivering Fairness and Justice for Consumers](#)”, Business and Markets Conference, 18 & 19 March 2019, Wolfson College, Oxford, [online] (accessed 20 May 2021) and see “[The ADR Directive: What impact has it had so far and how would the ADR Market be affected by a Brexit?](#)”, 17 June 2016, Peter Causton, Practical Law Dispute Resolution Blog [online] (accessed 20 May 2021)

cooperation between EU member state consumer enforcement authorities and gave consumers access to redress in their home courts when their rights were breached.

However, the [Consumer Protection Cooperation Regulation](#) (2017/2394)¹⁶ has now been revoked in its entirety in the UK, reflecting the end of the UK's role in the EU consumer enforcement cooperation regime. The Regulation sought to facilitate cooperation between EU enforcement authorities in relation to consumer protection and enable the European Commission to co-ordinate common actions between national enforcement authorities.

For UK enforcement bodies, such as the [CMA](#), this means they are no longer part of the cooperative enforcement network across the EU. The reciprocal obligations to investigate consumer law breaches or to bring about cross-border enforcement has ended.¹⁷ It is important to note, however, that the CMA continues to have the same enforcement powers in respect of domestic breaches of consumer protection.

The CMA has published "[Guidance on the functions of the CMA after the end of the Transition Period](#)". In this note the CMA said it would look at ways to ensure continued cooperation with EU consumer enforcement bodies as far as possible, while developing relationships with equivalent international bodies, including the [International Consumer Protection Enforcement Network](#) (ICPEN).

¹⁶ [The Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) (2019/203)

¹⁷ It should be noted that [Article 9](#) of the EU-UK Trade and Cooperation Agreement provides for continued cooperation on market surveillance and non-food product safety and compliance

4. What does this mean for UK consumers and traders?

4.1 Impact on consumers

Since 1 January 2021, UK consumers have continued to enjoy similar consumer rights as they did before Brexit.

Since the UK is no longer a member of the EU, there is an impact on the extent to which UK consumers are protected when buying goods and services from any of the remaining member states. With respect to redress rights, the following points should be noted:

- When placing an online order to purchase goods, services or digital content from an EU-based trader, UK consumers should carefully check the terms and conditions to see what governing law applies. In the event of a dispute, it is possible that they may need to seek redress through the courts of the state in which the trader resides rather than the UK courts.
- Even if a UK court gives judgement in favour of a UK consumer, the enforcement of that judgement against an EU based trader may be difficult and costly.
- UK consumers have lost their rights to use EU-based ADR mechanisms and the EU's [ODR platform](#), which links consumers with ADR providers in the EU. Of course, UK consumers and businesses can still obtain redress through other ADR forums in the UK, but these would not be suitable to resolve cross-border disputes.
- To return a faulty item bought from an EU seller, the consumer will need to complete a customs declaration form, giving the item's description, weight, and value. The customs charge is paid by the recipient upon delivery (although "returns" may not be subject to customs charges). To claim a refund on any VAT and import charges already paid, the consumer will need to complete yet another form.

However, refund protection provided by section 75 of the [Consumer Credit Act 1974](#) if a trader is in breach of contract or misrepresentation will still apply to goods, services and digital content bought from an EU-based trader with a UK credit card. Since the 1974 Act is UK legislation, it is unaffected by the UK leaving the EU.

4.2 Impact on traders

UK traders wishing to sell goods or services to the EU must comply with the national laws of the relevant member state. This might involve adopting new trading practices and consumer terms and conditions.¹⁸

As was the case before Brexit, UK traders that operate in EU member states may be subject to consumer claims and to regulatory action in

¹⁸ For information about the rules on exporting goods and services see the Library's briefing paper, "[After Brexit: Visiting, working, and living in the EU](#)", (CBP 9157) 5 March 2021, [online] (accessed 20 May 2021)

such countries for any breaches of local laws. However, any judgment given by a court of an EU member state will not be recognised and enforced automatically in the UK. This might change if reciprocal arrangements are agreed in the future.

It follows from this that UK businesses selling to EU countries must keep up to date with the national laws of the member states into which they sell. To ensure compliance, they must also be prepared to amend their contractual terms and conditions and trading practices.

As with consumers, traders should also be aware of changes to redress rights and enforcement. Points to note, include:

- The ODR Platform (that allows consumers to make a complaint against businesses) will no longer be available to UK consumers.
- The UK has enacted legislation that contains rules equivalent to Rome I so that when businesses sell in the EU, the domestic legislation and penalties and enforcement framework established in the individual EU country will apply (see above).
- It may be more difficult to resolve a dispute (e.g. an alleged faulty good). Businesses who supply goods/services to EU consumers may face enforcement locally if they fail to comply with local consumer protection laws.

Two further points should be noted:

- [Geo-blocking Regulation \(EU 2018/302\)](#) (28 February 2018) prohibits discrimination between consumers in different EU countries and aims to give all EU consumers equal rights to access a trader's goods or services, under the same terms, irrespective of their location.

This Regulation continues to apply to UK businesses when supplying goods and services into the EU, meaning that UK businesses are not able to geo-block/discriminate between consumers from different member states.

However, with effect from 1 January 2021, businesses selling goods and services in the UK to UK consumers will no longer need to comply with the [Geo-blocking Regulation](#) (Regulation (EU) 2018/302).¹⁹
- The [Platform to Business Regulation](#) (EU) (2019/1150)²⁰ imposes obligations of fairness and transparency on platform/search engine operators where those platforms or search engines allow businesses to reach consumers in the EU.²¹ The territorial test for the application of the Platform to Business Regulation is that the

¹⁹ [Geo-blocking Regulation \(EU 2018/302\)](#) (28 February 2018) prohibits discrimination between consumers in different EU countries and aims to give all EU consumers equal rights to access a trader's goods or services, under the same terms, irrespective of their location. However, the Regulation still applies to UK businesses when supplying goods and services into the EU, meaning that UK businesses are not able to geo-block/discriminate between consumers from different member states.

²⁰ [The Online Intermediation Services for Business Users \(Amendment\) \(EU Exit\) Regulations 2020](#) (2020/796)

²¹ [Regulation on promoting fairness and transparency for business users of online intermediation services](#) (Regulation (EU) 2019/1150)

platform/search engine is aimed at consumers in the EU and at least some of the businesses using the platform/search engine are based in the EU.

The Platform to Business Regulation will continue to apply to platform/search engine operators based in the UK where that platform/search engine is used by EU-based businesses and reaches EU consumers.

In addition, the UK has implemented additional legislation to create a **dual regime** that reflects the Platform to Business Regulation but is restricted to the UK only (i.e. the scope applies to UK-based businesses selling to UK-based consumers using the platform/search engine).²²

4.3 Published guidance

The UK Government has published [Consumer goods sector and the EU](#).²³ This guidance note is targeted at business, manufacture, and distribution. Various consumer bodies have also published guidance, for example, Which? has published, "[How will Brexit affect my consumer rights?](#)" (5 March 2021) and Citizens Advice has published, "[Shopping online after Brexit](#)".

For its part, the European Commission published on 17 March 2020 a readiness notice, [Withdrawal of the United Kingdom and EU rules on Consumer Protection and Passenger Rights](#). This guidance includes a section specifically on "Purchase by consumers in the EU of products or services from traders established in the UK". In brief, this states that EU consumers will be able to rely on EU consumer protection law to begin a legal action in the consumer's home courts, but that enforcement will be subject to national rules in the UK.

²² [The Online Intermediation Services for Business Users \(Amendment\) \(EU Exit\) Regulations 2020](#)

²³ "[Consumer goods sector and the EU: Working with the EU in the consumer goods sector](#)", Department for Business, Energy & Industrial Strategy, 3 November 2020, [online] (accessed 20 May 2021)

5. Possible future divergence

An obvious consequence of Brexit is that the EU no longer has any influence over the future direction of UK consumer protection law and vice-versa. Over time it is thought likely that the UK will diverge from the EU in respect of its consumer law, legal interpretation, and consumer policy.

5.1 Divergence of consumer law

While Brexit has not resulted in an immediate significant change to UK consumer protection law, consumer protection is not one of the “level playing field” areas set out under the [UK-EU Trade and Cooperation Agreement](#). This means the UK is under no obligation to maintain regulatory alignment with the EU in this area.

In the next two years, significant changes to EU consumer protection law are anticipated (see **Box 1** below). The extent to which the UK decides to enact similar legislation will be a good indication of how aligned UK and EU consumer law is likely to remain. For UK traders wishing to sell goods and services to consumers in both the UK and the EU, any divergence in consumer protection law may mean drawing up separate terms and conditions to deal with differences between UK and EU consumer regimes and/or adopting different business practices.

Box 1: Key developments in EU consumer law

This is an outline of key developments in EU consumer law expected over the next few years. Since the directives come into force after the transition period has ended, the UK is not required to implement any of the directives as law.

- The [Digital Content and Digital Services Directive](#) (2019/770)²⁴ and the [Sale of Goods Directive](#) (2019/771) must be transposed into the national law of EU member states by **1 July 2021**.

The [Digital Content and Digital Services Directive](#) (2019/770) aims to fully harmonise a set of key rules on conformity of digital content, and remedies available to consumers in cases of lack of conformity of digital content with the contract. The Directive also aims to harmonise certain aspects concerning the right to terminate a long-term contract, as well as certain aspects concerning the modification of the digital content.

The [Sale of Goods Directive](#) aims to ensure proper functioning of the internal market, while providing consumers with a high level of protection. It does so by laying down certain common rules on sales contract between sellers and consumers. These cover conformity of goods with the contract; remedies if there is no conformity; ways to exercise these remedies; and commercial guarantees. Importantly, the Directive applies to “sales contracts” between a consumer and a seller for the supply of good. It does not apply to the supply of digital content or digital services (with limited exceptions).

²⁴ The [Digital Content and Digital Services Directive](#) (2019/770) is similar but not identical to the UK’s [Consumer Rights Act 2015](#) with respect to the supply of digital content to consumers. It will apply (with two exceptions) to digital services supplied from **1 January 2022**, regardless of when the supply contract was formed.

- The [Enforcement and Modernisation Directive](#) (2019/2161) (informally referred to as the “Omnibus Directive”) must be implemented in member states by **28 November 2021**. As part of the EU’s “New Deal for Consumers”, the Directive introduces new powers to enforce consumer rights, including GDPR-style fines for breaches of consumer protection law (up to 4% of annual turnover in all EU countries in which the breach had an impact). By introducing new information obligations on online traders and new categories of contract – digital services and goods - the Directive also strengthens consumer rights online and increases transparency. Importantly, the Directive amends existing EU consumer protection directives, namely: the EU Directive on Unfair Commercial Practices ([2005/29/EC](#)), the Consumer Rights Directive ([2011/83/EU](#)), the Unfair Contract Terms Directive ([93/13/EEC](#)).
- The EU’s [Consumer Protection Co-operation Regulation](#) (CPC Regulation) came into force on 17 January 2020. It replaces the 2004 Consumer Cooperation Regulation (EC 2006/2004). It aims to improve EU-wide cooperation on consumer protection by giving enhanced enforcement powers to national authorities and providing for coordination on actions. The Regulation no longer applies to the UK. Under the [UK Revocation Regulations](#), EU member states are no longer able to bring or continue enforcement proceedings in the UK. Similarly, UK enforcers are not able to use their powers for infringements of the laws of other EU member states, although they do have the same investigatory powers relating to infringements in the UK of specified retained law in this area.
- On 4 November 2020, the Council of the EU adopted a [draft Directive on representative actions for the protection of the collective interests of consumers in the EU](#).²⁵ This followed an [agreement](#) reached with the European Parliament in June 2020. As part of the EU’s “[New Deal for Consumers](#)” package, the draft Directive would modernise and replace the Injunctions Directive (2009/22/EC) by providing redress and injunctive measures for groups of consumers that have been affected by specific infringements of EU law. According to the EU, such measures are necessary to counter increasing risks to consumers due to widespread digitalisation and globalisation.

5.2 Divergence in legal interpretation

The interpretation of UK consumer protection law may diverge from the equivalent EU law. There are two reasons for this:

- first, whilst the Court of Justice of the European Union (CJEU) case law must be followed by the lower courts, the UK’s Court of Appeal and Supreme Court have the right to diverge from existing CJEU decisions,
- and second, any future CJEU case law will not set precedents in the English legal system.

5.3 Divergence of future consumer policy

UK position

Retained EU law remains in force in the UK indefinitely, unless or until the Government decides to repeal or amend it. It is generally thought that amending UK consumer law will not be a priority for the Government in the short term. This is because the UK regime has already been overhauled, consolidating consumer rights and remedies in the [CRA 2015](#). In addition, most of the EU-derived provisions of consumer law are long-standing, and generally accepted as establishing

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Paper

²⁵ [OJ L/409/1 4 December 2020](#)

“a fair balance” between the interests of consumers and traders. That said there is some impetus to modernise certain aspects of the UK’s consumer regime, to address the needs of a digital society.

The Government published its [Modernising Consumer Markets – Consumer Green Paper](#)²⁶ on 11 April 2018. In this paper, it set out three principles for responding to the challenges and opportunities of modern consumer markets:

- consumers should benefit from new technology and new business models, with competition and regulation working together in the consumer interest,
- consumers should be able to get redress when things go wrong, and consumer rights should be effectively enforced,
- and competition should be central to the UK’s approach and barriers to competition should be removed where they arise.

The Government outlined its intended approach post-Brexit to ensure that modern consumer markets work for all. The relevant extract from the Green Paper is reproduced below:

As we leave the European Union, we are committed to maintaining and championing an open, liberal, and modern economy, built on the principles of competition, free trade, and high regulatory standards. We remain firmly committed to the strong consumer rights and high standards from which UK consumers have benefited for many years.

Our aim is to build a regulatory and competition framework that meets the challenges of the future – whether those come about from the changing nature of markets, from increasing globalisation and innovation or from a better understanding of how consumers behave when faced with real-world questions. We need to adapt to innovations and business models driven by the data revolution to maximise the opportunities to improve consumers’ lives. We want to see responsible businesses flourish.²⁷

On 11 February 2020, during a [Westminster Hall debate](#) on the CRA 2015 and the Consumer Ombudsman Scheme, Kelly Tolhurst MP, then BEIS Parliamentary Under-Secretary of State, provided an update on plans to revise consumer law. She indicated that a consumer and competition command paper would be published in the spring. She also said that the Government would carry out a five-year post-implementation review of the [CRA 2015](#).²⁸

In September 2020, John Penrose MP was invited by the Government to conduct an independent review of UK competition policy, “to see how it can be reformed as the country begins life as an independent trading nation and builds back better from COVID-19.”²⁹ A final report,

Independent review
of UK competition
policy.

New Digital
Markets Unit

²⁶ Department for Business Energy and Industrial Strategy, [Modernising Consumer Markets – Consumer Green Paper](#), 11 April 2018, [online] (accessed 20 May 2021)

²⁷ Ibid, p. 7-8

²⁸ [HC Deb 11 February 2020 c. 234WH](#)

²⁹ HM Treasury, [“John Penrose MP to lead review exploring how to bolster UK competition policy”](#), 14 September 2020, [Online] (accessed 20 May 2021)

[“Power to the people”](#), was published on 16 February 2021.³⁰ The report contained a number of recommendations, including measures to strengthen and speed up the enforcement of consumer and competition law, measures to protect consumers from online scams, and measures to ensure they are treated fairly in all online transactions.

On 27 November 2020, the Government announced the formation of a new [Digital Markets Unit](#) (DMU) within the CMA.³¹ The remit of the DMU is to oversee a new regulatory regime for digital firms, promoting greater competition and innovation in these markets and protecting consumers and businesses from unfair practices.³²

EU position

The EU has a solid consumer protection framework developed over decades. Recently, there have been two important developments: the “New Deal for Consumers” and the “New Consumer Agenda”.

On 11 April 2018, the European Commission adopted [New Deal for Consumers](#), a legislative package designed to strengthen consumer protection in the EU.³³ The main aim being to make enforcement of consumer protection rules more effective in modern, digital markets.

New Deal for
Consumers

One part of this New Deal package was a [Proposal](#) for a new directive to amend four already existing consumer directives, namely:

- [Directive 93/13/EEC](#) of 5 April 1993 on unfair terms in consumer contracts
- [Directive 98/6/EC](#) of 16 February 1998 on price indications
- [Directive 2005/29/EC](#) of 11 May 2005 on unfair commercial practices
- and [Directive 2011/83/EU](#) of 25 October 2011 on consumer rights.

Subsequently, [Directive \(EU\) 2019/2161](#) on the better enforcement and modernisation of Union consumer protection rules (known as “the Enforcement and Modernisation Directive”) came into force on 7 January 2020. Member states have until 28 November 2021 to implement the Directive into their national laws and must apply these measures from **28 May 2022**.

The new Directive will amend the four EU consumer directives outlined above. Once introduced, the changes will be substantive and cover a broad range of issues including:

- **Stronger sanctions:** national authorities will be required to impose penalties for certain breaches of EU consumer laws (where

³⁰ Department for Business, Energy, & Industrial Strategy and HM Treasury, [“Power to the people: independent report on competition policy – An independent report by John Penrose MP on ways to improve consumer protection and promote competition”](#), 16 February 2021, [online] (accessed 20 May 2021)

³¹ Department for Business, Energy & Industrial Strategy, Department for Digital, Culture, Media & Sport, [“New competition regime for tech giants to give consumers more choice and control over their data, and ensure businesses are fairly treated”](#), press notice, 27 November 2020, [online] (accessed 20 May 2021)

³² Ibid

³³ See [Communication. A New Deal for Consumers](#) (COM/2018/0183 final)

infringements affect several EU countries), imposing fines representing 4% of annual turnover in each country. Member states will be able to levy higher fines if they wish. Where information on turnover is not available, fines of at least EUR 2 million may be levied.

- Consumers harmed by unfair commercial practices will be able to seek remedies in all Member State: the rights of consumers to bring claims for compensation, a price reduction or termination of a contract (refund) where they have been harmed by unfair commercial practices (e.g. misleading practices or aggressive marketing) will be harmonised across the EU.
- Transparency online: consumers buying products or services from online marketplaces will have to be told whether they are buying from a trader or an individual. If buying from an individual, the marketplace will be required to inform consumers that protections under EU consumer law will not apply. Online marketplaces must also let consumers know how the obligations related to the contract are shared between the third party offering the product or service and the online marketplace (e.g. who is responsible for delivery).

When searching online, consumers will have to be informed of the basis on which search results are ranked and when higher rankings have been paid for. A prohibition on submitting fake consumer reviews and endorsements, as well as manipulating reviews will also be introduced. In other words, where businesses state that reviews are from consumers who have purchased or used a product, they will need to take steps to ensure that such reviews are from genuine customers.

Consumers will need to be informed when the price presented to them has been personalised based on automated decision-making (e.g. algorithms based on personal consumer behaviour).

- Free digital services – the new Directive will extend current rights to information and withdrawal for paid digital services to “free” digital services (e.g. cloud storage, social media, and email), where the consumer “pays” by providing their personal data.
- Dual quality products – the *Unfair Commercial Practices Directive* (Directive 2005/29/EC) will be updated to clarify how national authorities should address misleading practices involving the marketing of products as being identical across the EU, when their composition or characteristics are different.
- Price reductions – rules will be introduced on the information that needs to be provided for products marketed with a price reduction.

The sanctions for failing to comply with the new Directive are significant, and will affect a wide range of businesses, in particular online marketplaces, online retailers and providers of digital content and services. Sanctions for failing to comply will be heavy.

A second new Directive on representative actions for the protection of the collective interests of consumers (2020/1828) came into force on 24 December 2020, and also forms part of the EU’s New Deal for Consumers. EU member states have until 25 December 2022 to

transpose the Directive with a further months to apply it, meaning that widespread collective redress procedures should be available after **25 June 2023**.

In a nutshell, this new Directive will introduce representative actions across the EU for breaches of certain EU laws including, amongst others, those dealing with consumer rights, product liability and product safety. It will make it easier for consumers to bring class action-style claims for compensation. This new directive will replace the “Injunctions Directive” [2009/22/EC](#).

The legislative reforms contained in the EU’s New Deal, combined with a new collective action enforcement mechanism, are intended to strengthen the EU’s consumer protection regime. The reforms contained in the New Deal will not form part of UK law, but they will apply to an UK business selling to consumers in the EU.

New Consumer
Agenda

On 13 November 2020, the European Commission launched the [New Consumer Agenda](#) to “empower European consumers to play an active role in the green and digital transitions”.³⁴ The Agenda puts forward priorities for EU consumer policy from 2020 to 2025, building on the 2012 Consumer Agenda (which expired in 2020) and the 2018 New Deal for Consumers. It also addresses “how to increase consumer protection and resilience during and after the COVID-19 pandemic”.³⁵ The Agenda covers five key priority areas:

- the green transition (including a legal proposal to provide better information on sustainability to consumers),
- the digital transformation (e.g. adapting existing legislation to the digital transformation),
- redress and effective enforcement of consumer rights,
- specific needs of certain consumer groups,
- and international cooperation (including an action plan on product safety with China).

The Agenda prioritises the need to prepare consumer policy to deal with new challenges, including those relating to artificial intelligence (AI) and Internet of Things (IoT), mobile e-commerce and sustainable consumption. According to the European Commission, by ensuring that these priorities are appropriately addressed, “the Agenda will act as a guide for the implementation of the Single Market Programme under the new Multi-Annual Financial Framework (MFF)”.³⁶ Further, the Commission policy rationale in promoting measures for a “greener, more digital and fairer single market” is to “boost trust among consumers, whose spending generates 54% of the EU’s GDP, thus stimulating economic recovery from the demand side”.³⁷

³⁴ Communication from the Commission to the European Parliament and the Council, [New Consumer Agenda: Strengthening consumer resilience for sustainable recovery](#), COM/2020/696 final, 13 November 2020, [online] (accessed 20 May 2021)

³⁵ Ibid

³⁶ Ibid

³⁷ Ibid

How do EU and UK consumer policies compare?

At present, it appears that both the UK and the EU share similar aims in wishing to modernise existing consumer protection law, including to:

- introduce tougher penalties for breaches of consumer protection law (including General Data Protection Regulation style fines),
- and address online commercial practices and online markets.

However, their approach is not identical. For example, the EU's [Enforcement and Modernisation Directive](#) (EU 2019/2161) requires member states to introduce powers to fine traders up to 4% of annual turnover for breaches of consumer protection law. The UK government may be willing to go further. In its [Consumer Green Paper](#)³⁸ the Government proposed civil fining powers for breaches of consumer protection with such fines capped at 10% of the firm's worldwide turnover.

Similarly, the new [Enforcement and Modernisation Directive](#) will extend consumer rights and remedies to digital content provided in exchange for personal data, bringing social media (and other "free" digital services) within scope of the directives. In this respect, EU consumer law would be much broader in scope than the protections offered by the UK's [CRA 2015](#). That said, [section 33\(5\)](#) of the CRA 2015 already allows for the digital content protections to be extended to "other contracts" if there is evidence of "significant consumer detriment". It is suggested that to catch social media services, the UK could simply extend the current rules on the supply of digital content to include services for which personal data is provided rather than charges paid.

Looking to the future it is likely that the UK's policy on consumer protection will diverge from the EU's position.

³⁸ Department for Business Energy and Industrial Strategy, [Modernising Consumer Markets – Consumer Green Paper](#), 11 April 2018, [online] (accessed 20 May 2021)

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