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Citation: McConnell, Siobhan (2017) Consumer Law - what happens after Brexit? Company Secretary's Review, 41 (6). pp. 81-83.

Published by: LexisNexis

URL:

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Consumer Law – what happens after Brexit?

Prioritising Consumer Law

Recently, the issue of the impact of Brexit on consumer law has become more of a focus for the government. Initially, consumer rights were given little prominence; in the Brexit White Paper of February 2017 consumer rights were hardly mentioned and were not recognised as one of the 12 negotiating principles. However, since then it appears that the government has started to appreciate the importance of ensuring the legal position for both businesses and consumers is clear come 2019.

The UK's Role in Consumer Law

The UK has had an important role in the development of consumer rights in the European Union ("the EU"). In some areas, for example in introducing rights for consumers acquiring digital content, the UK has led the way. Key EU Directives implemented into UK law include the Consumer Rights Directive and the Unfair Commercial Practices Directive. Such Directives have had a major impact on the ways in which businesses deal with consumers. Many Directives have been minimum harmonisation Directives setting minimum standards of consumer protection. This has allowed the UK, in some situations, to go beyond the minimum required of each Member State. For example, the UK provides consumers with a short-term right to reject faulty or misdescribed goods.

The Brexit Process and Consumer Law

The European Union (Withdrawal) Bill ("the Bill") will repeal the European Communities Act 1972, the Act which gave EU law legal effect in the UK. The Bill will 'lift and shift' certain EU laws (e.g. EU Regulations) into UK domestic law. Directives already adopted by UK legislation continue to apply. In a consumer law context, this approach ensures there are no legal 'gaps' after Brexit so the legal position remains the same. The Bill enables the government to make secondary legislation allowing for any amendments necessary to enable the law to continue to function practically, for example, removing legislative references to EU institutions. As such, in the period directly after Brexit, little will change and it will be 'business as usual' for businesses and consumers. However, there are challenges and opportunities to consider. A House of Lords Select Committee is currently hearing evidence on the impact of Brexit on consumer rights. Although it is hard to make predictions on developments following Brexit it is clear that there will be some practical challenges.

EU Law – Moving On Without the UK?

In 2015 the European Commission published 2 proposed Directives ("the Directives"):

- a Directive on contracts for online and other distance sales of goods ("the Distance Sales Directive"); and
- a Directive on contracts for the supply of digital content ("the Digital Content Directive").

The Directives are part of the Digital Single Market Strategy designed to improve cross-border e-commerce within the EU and to homogenise the rights and responsibilities of EU businesses and consumers.

If implemented prior to Brexit, the Directives would lead to significant changes in consumers' rights when buying digital content and when buying goods online or using other distance sales methods (e.g. catalogue purchases). The Directives would be 'maximum harmonisation' Directives so each Member State must follow the Directives and cannot give consumers more or less protection than that contained in the Directives. Some proposed changes would affect provisions in the Consumer Rights Act 2015 ("the CRA") which was designed to simplify consumer rights and remedies. The Directives' proposals could create more confusion for UK businesses and consumers.

Distance Sales Directive - Key Changes

- UK consumers currently have a short-term 30 day right to reject faulty or misdescribed goods. This key remedy would no longer apply to distance sales contracts – although a 14 day right to cancel distance contracts is retained.
- UK consumers can request a repair or replacement of faulty goods if either is the preferable remedy or if the short-term right to reject period has passed. The trader has 1 attempt to repair/replace and if this fails the consumer can reject the goods. This ensures consumers are not left in an endless cycle of repair/replacement. The Directive would remove this 1 attempt criteria.
- Consumers benefit from a reversed burden of proof so if a fault develops within the first 6 months there is a presumption the fault existed on delivery. The Directive would increase the period to 2 years.

Some of these proposals would dilute consumer rights. There are suggestions within the EU that the Directive should go further and apply to face to face sales as well as distance sales, providing a consistent set of laws for **all** types of consumer sales. The view is that a single regime would enhance consumer awareness and confidence when purchasing goods within a Member State and when purchasing cross-border within the EU. This approach would result in some fundamental changes for UK consumers, in particular, the loss of the 30 day right to reject in any sale of goods contract. It is likely that the UK government would seek to amend this change should this Directive be implemented before Brexit. This would mean a divergence in UK and EU consumer law – however, this would have little real impact given this reflects the current legal position.

Digital Content Directive – Key Changes

- The CRA provides UK consumers with significant rights in relation to 'paid for' digital content. The Directive would provide rights where free digital content is supplied in exchange for consumer data, for example, personal information.
- The reverse burden of proof would increase from 6 months to the period of time digital content is provided.
- There would be termination provisions for contracts for the supply of digital content which exceed 12 months.

Should this Directive be adopted before Brexit, consideration will be needed on whether the provisions and the scope of the law resulting from the Directive require adjustment.

Challenges

Enforcement

The Competition and Markets Authority ("the CMA") has provided evidence to the Select Committee, focusing on the future of cross-border enforcement.

The CMA has a leading role in enforcing consumer law, working with Trading Standards and other regulators, taking action where breaches of consumer law affect the collective interests of consumers. The CMA also coordinates EU enforcement work, representing the UK for the purposes of Regulation (EC) No 2006/2004 on Consumer Protection Cooperation (“the CPC Regulation”), liaising with EU consumer law enforcers. Each representative has investigatory and enforcement powers, coordinating enforcement activities and sharing information and evidence. If cross-border consumer breaches occur, enforcers can be asked to investigate and take action against the business involved even if affected consumers are in other Member States. The CMA notes that the CPC Regulation ensures different countries adopt a similar approach, enabling consumers to be better protected than would be the position if countries acted independently. The CPC Regulation is under review and proposed amendments include powers to impose penalties on traders acting illegally and to immediately remove websites containing illegal content. The CMA is considering how this relationship will function post Brexit

Possible models following Brexit

The CMA is keen to maintain cross border enforcement cooperation. One option is for the UK to remain in the CPC Network, continuing to share information and evidence, working with EU enforcers and taking enforcement action where necessary. Alternatively, there could be looser reciprocal cooperation arrangements.

The CPC membership model appears the preferable, simpler option, building on existing good working practices between EU enforcers. However, as the CMA notes, this may require the UK to keep ‘in step’ with EU consumer law, mirroring and not exceeding EU laws. The second option would allow more flexibility in how UK consumer law develops but, as the CMA recognises, could lead to ‘enforcement gaps’.

Courts

Following Brexit the Court of Justice of the European Union (“the CJEU”) will no longer have jurisdiction in the UK. In the years after Brexit there is the possibility that UK courts and the CJEU will interpret EU-derived consumer law differently. The government is giving further consideration to the ongoing role of the CJEU and it is currently unclear how the relationship will develop after Brexit.

Opportunities

As noted, some UK law goes beyond the level of consumer protection afforded by EU law. The short-term right to reject was created by the UK and is not reflected in EU law. The UK managed to preserve and codify this popular consumer remedy which enhances confidence in businesses despite opposition within the EU. As noted above, there is a clear desire to homogenise consumer law across the EU. Outside of this constraint, the UK could continue to offer a system of redress that instils consumer confidence, and lead the way in promoting innovative and workable consumer laws, as evidenced by the creation of rights in relation to digital content.

Business approach

It appears there will be both challenges and opportunities for businesses dealing with consumers after Brexit. There will be no major changes in consumer law at the point of Brexit

and for the immediate period afterwards. The challenge will be in the years to come should EU and UK consumer law start to diverge considerably. Whilst major differences appear doubtful given the shared interests and experience businesses have in selling across Europe, this is an area that businesses must focus on carefully. In the short term, consideration must be given to the impact of the new Directives as this may well be where the approach to consumer law begins to diverge.