

UK CONSUMER PROTECTION UPDATE

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HOW IS THE EU APPROACHING CONSUMER PROTECTION ISSUES IN 2020?

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HOW IS THE EU APPROACHING CONSUMER PROTECTION ISSUES IN 2020?

Prior to the Coronavirus outbreak, the European Commission was making substantial progress with its Digital Single Market strategy, aimed at ensuring better access to online goods and services by limiting barriers to e-commerce and access to online content. There are key deadlines this year by which EU Member States are to implement aspects of the Commission's consumer protection strategy into national law; so businesses trading in the EU27 and the UK should plan now for any changes that they will need to make in 2021/2022.

UK-based businesses will also need to consider how to manage compliance with both EU legislation and any divergent UK legislation adopted by the UK following the end of the Brexit transition period (currently scheduled for 31 December 2020).

What follows is an overview of: (1) developments in EU consumer protection legislation; (2) the proposed UK reforms; and (3) the practical implications for UK businesses.

1. The position under EU law

(a) The revised Consumer Protection Cooperation Regulation

The updated Consumer Protection Cooperation Regulation¹ (the "CPC Regulation") came into force on 17 January 2020 and aims to improve cross-border regulator co-operation within the EU. Key developments include:

- *An enhanced EU co-operation and enforcement framework:* enabling relevant national authorities from all countries in the EEA to co-ordinate to address breaches of EU consumer law when the trader and consumer are established in different countries. Where there is reasonable suspicion of cross-border infringements, both national authorities and the Commission have an obligation to notify each other without delay and the Commission will co-ordinate the regulatory response.
- *Stronger enforcement powers for national authorities:* including the right to:
 - (i) order websites or social media accounts hosting scams to modify their content (otherwise, to close them down);
 - (ii) request information from domain registrars, internet service providers and banks to track financial flows and identify the source of unlawful practices; and
 - (iii) accept commitments from traders to correct their practices and provide appropriate remedies and compensation to harmed consumers.
- *Increased financial penalties:* fines or periodic penalty payments for breaches of consumer law and/or for failure to comply with any interim

¹ *Consumer Protection Cooperation Regulation (EU) 2017/2394*

measure. In addition, when the new Directive on enforcement and modernisation of consumer law (the “Modernising Directive”)² comes into force, these penalties could be 4% or more of the concerned business’ annual turnover in the Member States in question. (Note that Member States are free to set higher penalties for non-compliance and base fines on the business’ worldwide turnover.)

(b) Adoption of the Modernising Directive

The Modernising Directive (adopted on 7 January 2020 and to be transposed into national law by 28 November 2020, with domestic measures to be enforced in Member States by 28 May 2022), was adopted in the context of the EU’s ‘New Deal for Consumers’ initiative. It updates a number of existing consumer rights directives. Key developments include:

- *Stronger enforcement powers* for national regulators to target misleading marketing of goods which have significantly different composition or characteristics but which are presented by the trader as identical.
- *A right to individual compensation* for consumers affected by unfair commercial practices such as aggressive or misleading marketing. These remedies include the right to end the contract, pay a reduced price, or receive an award of damages.
- *Enhanced transparency in online transactions* such as: (i) the ranking of search results (the criteria on which these are based and whether any paid advertising or other payments were made to achieve a higher ranking); (ii) the information provided by marketplaces to online customers as to the origin of the purchased goods (whether from a private individual or professional trader); (iii) online reviews and the steps taken by traders to ensure that these are genuine; and (iv) any use of personalised pricing for specific consumers based on algorithms and customer profiles.

Although the UK does not need to implement the Modernising Directive (given the current end date for the Brexit transition period), UK traders selling to EU consumers will still be affected by the new rules. In any event, the UK has indicated that it is likely to adopt similar enforcement measures and penalties in the coming months to ensure harmonisation with the EU regime.

² *Directive 2019/2161/EU amending Council Directive 93/13/EEC (unfair contract terms) and Directives 98/6/EC (price indications), 2005/29/EC (unfair commercial practices) and 2011/83/EU (consumer rights) as regards the better enforcement and modernisation of EU consumer protection rules.*

2. The position in the UK

As new technologies and commercial practices develop to adapt to our increasingly digitalised lives, the protection of consumer rights is at the forefront of the UK's legislative agenda. Following the UK government's 2018 Green Paper on modernising consumer markets, we await a government White Paper that is expected to propose:

- *Extended powers for the Competition and Markets Authority* (the "CMA") to investigate any consumer law breaches and fine infringing businesses directly. In particular, the CMA would have the authority to find a consumer law violation without having to resort to the courts (as is currently the case). If the proposals in the Green Paper are adopted, fines of up to 10% of the business' worldwide turnover could be levied by the regulator for breaches of consumer protection legislation.
- *New powers to regulators* such as Ofcom and the Financial Conduct Authority to stop loyal customers being unfairly exploited and targeted by businesses.

In addition to this, in February 2020, the UK government published its response to the Online Harm White Paper Consultation as part of its commitment to address online harm such as child exploitation, self-harming and terrorist content. These legislative proposals:

- *Introduce a new statutory duty of care* to make companies take more responsibility for the safety of their users.
- *Impose an obligation for companies to demonstrate the steps taken to meet the duty of care*, such as ensuring the accessibility and clarity of their terms and conditions (including to children and vulnerable adults).
- *Make Ofcom responsible* for: (i) enforcing the new duty of care and liaising with other enforcement authorities if necessary; (ii) issuing further guidance and codes of practices on the practical application of the rules; and (iii) imposing fines for any infringement under the new rules.

Whilst the UK would be the first country to implement regulations guarding against online harm, the UK government estimates that the regulations would apply to less than 5% of UK businesses (this is because the regulations are expected to apply to companies that provide services or use functionality on their websites that facilitate the sharing of user generated content or user interactions, for example through comments, forums or video sharing).

3. What this means for UK businesses in practice

As the UK is required to continue to apply EU law until the end of the Brexit transition period, current EU consumer law will continue to apply to all UK businesses (whether or not trading abroad) at least until the end of 2020, and then until the UK government legislates to replace any aspect of EU consumer law currently applicable in the UK. The government has introduced a statutory instrument to revoke the 2006 Co-operation Regulations (the predecessor to the CPC Regulation) but has not yet taken any steps in relation to the CPC Regulation, which will therefore be converted into domestic law at the end of the Brexit transition period (unless repealed).

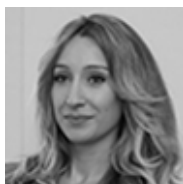
After the Brexit transition period, and subject to the outcome of trade negotiations with the EU, UK traders selling in the EU will need to comply with: (i) the UK's proposed reforms; (ii) the new CPC Regulation; and (iii) national Member State legislation implementing the Modernising Directive.

UK businesses may therefore face a heavier regulatory burden if the UK government opts to diverge too far from EU legislation (potentially; both domestic and EU Member State sanctions for breach). UK traders are therefore advised to familiarise themselves with UK and EU legislative proposals to ensure full compliance and avoid the risk of any penalties.

If you would like any information on the topics raised in this Client Alert, please get in touch with your BCLP contact or any member of BCLP's Retail and Consumer Products Group.



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