

## Putting consumers first: A new era for consumer protection

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There have been growing concerns of late that the current legal framework is insufficient to adequately protect consumers in the rapidly-evolving digital economy. The European Council stated in 2016 that “*Effective consumer protection needs to respond in particular to the challenges of the digital economy and the development of cross-border retail trade in the EU*”. Against this backdrop, a wave of reforms to existing consumer protection laws, which protect consumers against unfair, misleading and aggressive business practices, are being ushered in across Europe. These will affect any consumer-facing business, whether online or offline and whether supplying goods or services, ranging from online platforms to brick-and-mortar retailers.

This briefing focuses on some of the key new policy initiatives at the EU level and in the UK, and considers the (likely) impact of Brexit on certain existing EU-derived consumer rights in the UK.

### Initiatives at EU level

Several initiatives under the European Commission’s “Digital Single Market” policy in recent years have already sought to improve life for consumers within the digital economy, including new rules prohibiting unjustified geo-blocking and a ban on mobile roaming charges.

#### *Strengthening cross-border enforcement of the current regime - revising the CPC Regulation*

National authorities with responsibility for consumer enforcement (competent authorities) are obliged by the Consumer Protection Cooperation (CPC) Regulation to work together to promote cross-border consumer protection coordination and enforcement between Member States.

The CPC Regulation has been updated to extend and strengthen its remit, and the [revised regulation](#) came into force on Friday 17 January 2020. Three key developments are:

- **Europe-wide enforcement actions:** National authorities will be able to launch pan-European enforcement actions, to be coordinated by the Commission. A one-stop-shop approach to consumer law (akin to that for competition law) will allow enforcement authorities to notify the businesses concerned, ask them to change their practices and, if necessary, to compensate affected consumers. Authorities will be given the formal ability to accept commitments from traders to provide remedies to affected consumers - formalising something the CPC Network has in practice been doing already under the more informal “coordinated actions”.
- **Financial penalties:** The reformed CPC Regulation empowers authorities to impose penalties proportionate to the cross-border dimension of the practice. Currently, disparities amongst national rules on fines mean that consumer protection law breaches are not dealt with in a coordinated manner. For widespread infringements affecting consumers in several EU Member States, national authorities should therefore have the power to impose effective, proportionate fines. The new Directive Modernising Consumer Law, which complements the CPC Regulation by containing harmonising provisions on financial penalties, stipulates that Member States should introduce legislation setting the level of maximum potential fines under the CPC Regulation and other Directives of at least 4 per cent of the

trader's annual turnover in the respective Member State. This fine is the minimum standard - Member States can allow higher maximum fines, as well as for fines to be based on the trader's worldwide turnover. This means companies could in future be subject to fines equivalent to those under the GDPR for breaches of consumer protection law, heightening the stakes for those who get it wrong.

- **Interim measures:** Where there is a risk of serious harm to consumers, competent authorities will be able to impose interim measures to stop infringements quickly, including the removal of online content or ordering the explicit display of a warning to consumers. On a related note, increased use of interim measures in competition enforcement actions is also on the radar (see e.g. the Broadcom case).

## A 'new deal' for consumers?

In April 2018, the Commission proposed an update to the Consumer Rights Directive to address “*various consumer issues, including penalties for infringements, transparency on online marketplaces, protection for consumers of 'free' digital services, the right of withdrawal and dual quality of products*”. This is part of the Commission's flagship consumer policy reform in recent years, its “[New Deal for Consumers](#)” (New Deal), which comprises two proposals:

- A directive to make representative group actions available in all Member States to protect the collective interests of consumers (collective redress); and
- A directive to modernise EU law on consumer protection and facilitate the enforcement of consumer rights (the Directive Modernising Consumer Law).

Adoption of the first proposal is still pending. However, the Directive Modernising Consumer Law has been adopted by the Council following agreement with the European Parliament. Member States will have to implement the directive by November 2021 and the new measures will start to apply by May 2022. The Directive amends a number of existing consumer directives.<sup>1</sup> Key updates are:

- **Individual redress:** Consumers harmed by unfair commercial practices (e.g. aggressive marketing) will be able to seek remedies to facilitate private enforcement. The proposal stipulates that consumers should have access to compensation for damage and a price reduction or termination of the contract, with Member States free to introduce other remedies; and
- **Enhanced transparency:** Traders who allow users to search for products or services must explain the basis on which search results are ranked and disclose any paid advertising or payments that influence the ranking results. Users must also be informed (i) whether they are dealing with a trader or non-trader; and (ii) when a price is personalised for them on the basis of algorithmic decision-making.

## UK initiatives

Enhancing the existing consumer rights regime is also centre of mind in the UK. The Competition and Markets Authority (CMA) has been increasingly active of late with recent investigations ranging from the online hotel booking sector and secondary ticketing sites to celebrity social media influencers, all of which were ultimately resolved by way of commitments.

However, the CMA currently lacks fining powers for consumer law infringements, unlike its ability to impose fines for breaches of competition law. Currently, the CMA must go to court to obtain a binding order to stop

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<sup>1</sup> The amended directives are: the Council Directive on unfair terms in consumer contracts, the Directive on consumer protection in the indication of the prices of products offered to consumers, the Directive concerning unfair business-to-consumer commercial practices and the Directive on consumer rights.

businesses from engaging in illegal practices, with no civil fines available for a win. Even when it obtains undertakings from firms it has no powers to fine them for non-compliance.

In April 2018, the then-UK government published a consumer green paper titled “Modernising Consumer Markets”. The paper proposed, among other things, to give civil courts the power to fine businesses for breaches of consumer law up to a maximum of 10 per cent of a company’s worldwide turnover - a headline-grabbing amount even higher than that introduced by the EU.

In February 2019, the CMA itself then [proposed a series of reforms](#) - which would significantly shake up its existing legal powers - designed to address concerns with its abilities under the current legal framework to adequately protect consumers. Two significant powers proposed were (i) giving the CMA the ability to order the cessation of practices, including on an interim basis and (ii) empowering the CMA to itself impose fines, instead of by recourse to the courts.

In response, Theresa May’s government [agreed in June](#) to consult on giving the CMA tough new powers in a forthcoming Consumer White Paper, including giving it the power to decide for itself whether consumer law has been broken (as opposed to needing to go through the courts) and the ability to fine businesses directly. The White Paper has not yet been published and details of the precise mechanisms and specific sanction levels are therefore unknown. However, if this level is close to the 10 per cent of global turnover fining threshold available to the CMA for competition law breaches this would be a significant shake-up of the current status quo, and send a clear message that consumer law infringements will not be tolerated.

The new Conservative government is not bound by May’s promises, but its manifesto did pledge to enhance consumer rights. This is therefore a space to watch.

## ***Impact of Brexit***

As for the interaction between European and UK consumer protection law after the UK’s withdrawal from the EU (Brexit) and a transition period,<sup>2</sup> the European Union (Withdrawal) Act 2018<sup>3</sup> brings across certain EU law to form part of the UK’s domestic law, including UK consumer rights based on EU law. This means that post-Brexit UK consumers will largely be able to rely on the same rights they had before Brexit (at least until the domestic legislation is amended). However, unless the agreement on the future EU-UK relationship provides otherwise, consumers will no longer be able to pursue claims against EU-based retailers through courts in the UK. Cross-border coordination on enforcement of consumer rights in the future will also be a matter for negotiation with the EU as the UK government has announced its intention to revoke the CPC Regulation post-transition period.

## **Concluding remarks**

Companies have already seen an increasing crackdown by European regulators, including the CMA, on practices considered to be causing consumer detriment. This trend is not going away, with the additional prospect of significant fining powers for infringements in the future - both on the EU and UK stage. Businesses should gear up for a wave of change: placing consumer protection, welfare and responsible business at the heart of their decision-making. However, from a practical perspective, the impact of Brexit means businesses now need to be prepared to stay on top of fast-moving changes to both the EU and UK regimes - which, although initially aligned, may well begin to diverge.

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<sup>2</sup> The Withdrawal Agreement between the EU and the UK provides for a transition period during which, with a few exceptions, the status quo is preserved. If no extension is agreed, this period will end on 31 December 2020.

<sup>3</sup> As amended by the European Union (Withdrawal Agreement) Act 2020.

# SLAUGHTER AND MAY



Philippe Chappatte  
T +44 (0)20 7090 4424  
E philippe.chappatte@slaughterandmay.com



Shweta Vasani  
T. +44 (0)20 7090 3928  
E. shweta.vasani@slaughterandmay.com



Katie Hudson  
T +44 (0)20 7090 4535  
E katie.hudson@slaughterandmay.com

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