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Scottish Universities Legal Network on Europe

Paper on Consumer Rights

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1. Please explain the key rights that are protected and are therefore at risk following the UK's exit from the EU?

For the purposes of considering how Scotland may continue to protect these rights following an exit from the EU and for exploration of further future devolution of powers in certain areas to Scotland, please explain whether the rights fall within areas devolved to Scotland or currently reserved areas.

Please also identify, broadly, the main EU and implementing (UK/Scotland) legal sources (and where relevant make reference to other international legal sources for example, the Council of Europe).

Consumer protection is a reserved matter.¹

There are many consumer rights protected by EU law.² It is not possible to mention all consumer rights in this paper. Instead the focus is on key rights afforded to consumers as a result of EU law. Details of the main consumer rights and their EU and domestic sources, where relevant, are set out below:

1. Sale of Goods

The Consumer Rights Act 2015 implements *inter alia* Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. Of particular note is the range of remedies available to consumers (which are not available to non-consumer buyers). A consumer can seek repair or replacement of goods that do not conform to the contract of sale.³ Where repair or replacement are either impossible or disproportionate the consumer may seek a price reduction or rescission (termination) of the sales contract. In addition, any lack of conformity resulting from incorrect installation of the goods is deemed to be equivalent to lack of conformity of the goods if installation forms part of the contract for the sale of goods and the goods were either (i) installed by the seller or under his responsibility; or (ii) installed by the consumer and the installation is due to a problem with the installation instructions. Finally, consumers benefit from a presumption that any lack of conformity in the goods which appears within 6 months of the date of delivery of the goods existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the non-conformity. Where there is evidence to the contrary (that the goods conformed at the date of delivery) the presumption will not apply.

The Consumer Rights Act 2015 also implements certain aspects of the Consumer Rights Directive (Directive 2011/83/EU) in making provision for delivery of the goods to the consumer within 30 days from conclusion of the sales contract, unless the parties have agreed otherwise; and in specifying that the risk of damage or destruction of the goods passes to the consumer when he/she or a third party indicated by the consumer acquires physical possession of the goods.

The Consumer Contracts (Information Cancellation and Additional Charges) Regulations 2013 (a UK statutory instrument) implements other aspects of the Consumer Rights Directive in requiring

¹ Para C7 Schedule 5 of the Scotland Act 1998

² See the EU Commission's Consumer website at <http://ec.europa.eu/consumers/>.

³ It should be noted that the Consumer Rights Act 2015 also gives the consumer a further remedy: the short-term right to reject which is not found in Directive 1999/44/EC.

certain information⁴ to be provided by the trader to the consumer before the consumer is bound by the sales contract.

2. Goods and Services Supplied using E-commerce

The Electronic Commerce (EC Directive) Regulations 2002 (a UK statutory instrument) implement many of the obligations in the Electronic Commerce Directive (Directive 2000/31/EC).

The 2002 Regulations⁵ require information regarding (i) the supplier and (ii) the technical steps that must be followed to conclude a contract to be provided to the recipient. They also require the supplier to acknowledge receipt of an order and to provide any terms and conditions applicable to the contract to the recipient in a way that allows the recipient to store and reproduce them.

The Consumer Contracts (Information Cancellation and Additional Charges) Regulations 2013, referred to in 1.1, implement many of the requirements of the Consumer Rights Directive (Directive 2011/83/EU). Where the contract is a distance contract (concluded without the simultaneous physical presence of the trader and consumer) the consumer has additional rights. As well as requiring traders to supply certain information about themselves to the consumer,⁶ the consumer has the right to cancel the contract. Consumers can cancel the contract, without giving any reasons or incurring any liability within a set period of time.⁷ Cancellation is therefore different to, and a wider right than the ability to terminate the contract due to breach of contract by the trader.⁸

3. Unfair Contract Terms

The Consumer Rights Act 2015 also implements the Unfair Terms in Consumer Contracts Directive (Directive 93/13/EEC) in terms of which an unfair term is not binding on a consumer. It should be noted that the 2015 Act goes further than the Directive in that the Directive only applies to contract terms that have not been individually negotiated whereas the 2015 Act relates to all contractual terms.⁹

A term is unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. Terms which set out the main subject matter of the contract; or the price payable for the goods or services the consumer is to receive are not subject to an assessment of fairness. Both the Act and the Directive contain an indicative and non-exhaustive list of terms that may be regarded as unfair.

Action can be taken by enforcement authorities to protect consumers, for instance, by seeking an interdict to prevent the use of unfair terms in consumer contracts.

4. Unfair Trading Practices

⁴ As set out in Schedule 1 of the Regulations.

⁵ The 2002 Regulations impose requirements on all recipients of goods or services, whether a consumer or not, although many of the requirements are mandatory where the recipient is a consumer and may be contracted out of where the recipient is not a consumer.

⁶ As set out in Schedule 2 of the Regulations.

⁷ 14 days after goods come into the consumer's possession; or 14 days from conclusion of the contract where it relates to services.

⁸ The 2013 Regulations also require certain information to be provided where an off-premises contract is entered into between a trader and consumer. A consumer in such a contract also has a right to cancel. An off-premises contract is a contract where the trader and consumer are physically present in the same place but enter into the contract on premises other than the trader's premises.

⁹ The 2015 Act also applies to notices issued to or that may be read by consumers. No provision is made for such notices in the Directive.

The Consumer Protection from Unfair Trading Regulations 2008 (a UK statutory instrument) implement the Unfair Commercial Practices Directive (Directive 2005/29/EC). Under the 2008 Regulations unfair commercial practices (those which contravene the requirements of professional diligence; are misleading; or aggressive) are prohibited. A trader who engages in such practices is guilty of an offence.¹⁰

5. Excessive Fees

The Consumer Rights (Payment Surcharges) Regulations 2012 (a UK statutory instrument) and the Consumer Contracts (Information Cancellation and Additional Charges) Regulations 2013 (mentioned above) implement further aspects of the Consumer Rights Directive (Directive 2011/83/EU) in relation to excessive fees charged by traders.

The 2012 Regulations prevent traders from charging consumers fees that exceed the cost borne by traders for the use of any given means of payment. The 2013 Regulations provide that where traders operate a telephone line so that consumers can contact them in relation to their contracts consumers should not be charged more than the basic rate for the call. These Regulations also provide that traders must seek consumers' express consent to any extra payment beyond the remuneration agreed for the trader's main contractual obligation. This consent cannot be inferred from a default position that consumers are required to reject.

6. Consumer Safety and Protection from Defective Products

The General Product Safety Regulations 2005 (a UK statutory instrument) implement the General Product Safety Directive (Directive 2001/95/EEC). The rules set out in the Regulations apply where there are no specific rules governing a particular product or products. There are a number of pieces of EU legislation on the safety of specific products, implemented by a number of Acts and UK statutory instruments, many of which affect consumers.¹¹ However, it is not possible in this paper to deal with the specific legislation and, as such, the discussion below relates to the general product safety legislation noted above.

The 2005 Regulations make it an offence for a producer (manufacturers, importers or those who associate themselves with products) or distributors to place or agree to place unsafe products on the market. Producers must adopt appropriate measures to be informed of risks associated with products they supply and must be able to take appropriate measures to warn consumers of risks, withdraw and recall products from the market. Distributors must pass on information regarding risks posed by any product and keep documentation to trace the origins of products. Failure to comply with these obligations is an offence. The Regulations are enforced by enforcement authorities who can require producers to do or refrain from doing various things, for instance suspend a product from the market for a period of time or having to mark a product with particular warnings.

Finally, the 2005 Regulations make provision for co-operation between member states, particularly when an unsafe product has entered the market or action has been taken by enforcement authorities in the UK to withdraw or recall a product and the product has been marketed beyond the

¹⁰ The 2008 Regulations go further than the Unfair Commercial Practices Directive in providing consumers with individual remedies where the trader has used an unfair commercial practices – for these remedies see Part 4A of the Regulations.

¹¹ For details see <http://www.hse.gov.uk/work-equipment-machinery/uk-law-design-supply-products.htm>. It should also be noted that under Part II of the Consumer Protection Act 1987 the Secretary of State may make provisions regarding the safety of goods by regulation (safety regulations). Many safety regulations have been made. As such there is law instigated within the UK and law from the EU on product safety. The two regimes work alongside each other and overlap.

UK. The Secretary of State will likewise be notified of any action taken by enforcement authorities in other member states likely to affect UK consumers.

Part I of the Consumer Protection Act 1987 implements the Product Liability Directive (Directive 85/374/EEC), in terms of which producers are liable in damages for physical loss to persons or private property caused by a defect in a product.

7. Consumer Credit

There has been significant regulation of consumer credit domestically since the Consumer Credit Act 1974 came into force. EU legislation in this area has expanded on areas that were regulated domestically and also introduced some new protections.¹² The Consumer Credit Directive (Directive 2008/48/EC) has been implemented by making changes to the Consumer Credit Act 1974, the Consumer Credit (Disclosure of Information) Regulations 2010, the Consumer Credit (Agreements) Regulations 2010 (both UK statutory instruments) and by provisions found in the Financial Conduct Authority Consumer Credit Sourcebook.

The Consumer Credit Directive applies to credit agreements between Eur 200 and 75,000. Certain credit agreements are excluded from the scope of the Directive, including credit agreements secured by a mortgage or where the consumer pledges an item as security (pawning). The Directive requires certain information to be set out in (i) adverts for credit and (ii) consumer credit agreements. The Directive also requires certain items of information to be given to consumers in advance of the credit agreement being entered into, which may be given by way of the Standard European Consumer Credit Information form set out in the Directive. The creditor must also explain the pre-contractual information to the consumer so that the consumer is in a position to assess whether the proposed credit agreement suits his needs and financial situation. The Directive also sets out how the APR must be calculated. The creditor is also required to assess the consumer's creditworthiness before entering into the credit agreement. The consumer has the right to withdraw from the credit agreement, without incurring liability, within a set period of time.¹³ The Directive gives the consumer the right to repay all or part of the credit early and also sets a limit to the amount that can be charged by a creditor on early repayment. The Directive also requires out-of-court dispute resolution procedures for disputes relating to consumer credit to be established.¹⁴

8. Choice of Law Governing Consumer Contracts

Article 6 of the Rome 1 Regulation (Regulation 593/2008) of 17 June 2008 provides that the choice of law governing a consumer contract is the law of the country in which the consumer has his / her habitual residence. Furthermore, Article 6 provides that even where the parties to the contract have chosen a law to govern their contract (which law may not be that of the country where the consumer habitually resides) such a choice of law does not deprive the consumer of mandatory protections available to him / her in his /her country of habitual residence.

9. Dispute Resolution

Section 4 of the recast Brussels Regulation (Regulation 1215/2012/EU) of 12 December 2012 provides that a consumer can sue a trader in either the member state in which the trader or the consumer is domiciled. This section also provides that if a trader raises proceedings against the consumer he / she must do so in the courts of the member state in which the consumer is domiciled.

¹² In particular the right to withdraw and limiting the sum payable to the creditor on early repayment.

¹³ 14 days from conclusion of the credit agreement or 14 days from receiving the contractual terms and conditions, if later.

¹⁴ In the UK consumers can refer complaints to the Financial Ombudsman Service.

The Alternative Dispute Resolution Directive (Directive 2013/11/EU) has been implemented in the UK by the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (a UK statutory instrument). The Regulations set out processes in terms of which ADR entities can be approved by competent authorities to carry out consumer ADR. The ADR entity must be able to satisfy the competent authority that it has the necessary expertise, impartiality and effectiveness to be approved. The competent authorities collect information on all approved ADR entities and provide that to the Secretary of State, who then provides this information to the European Commission. In this way the European Commission can disseminate across all member states details of all approved ADR entities in all member states. A consumer or a trader can seek to refer a dispute regarding a sales or services contract to an approved ADR entity for resolution, however parties are not obliged to do so.¹⁵

An online platform for ADR has been created under the Online Dispute Resolution Regulation (Regulation 524/2013/EU). The platform is designed to operate as a first point of contact for consumers or traders in a dispute regarding an online sales or services contract.¹⁶ The ODR platform¹⁷ will help the parties identify an appropriate ADR entity to deal with their dispute. The Regulation also requires each member state to designate an ODR contact point.¹⁸ The ODR contact point must provide certain advice to parties to a cross-border dispute and may provide this advice where the parties are habitually resident in the same member state. As with ADR, ODR is not compulsory and parties must agree to the dispute being referred to an ADR entity. The Regulation does however require traders engaging in online sale or services contracts and online marketplaces to provide a link to the ODR platform on their websites.

A summary of the main consumer rights, EU and implementing UK legislation are set out in Annex I.

2. Please explain as clearly as possible the impact these rights have; what are the public benefits of these rights? Give specific examples where possible.

Some of the benefits of the rights are set out in 1 above. Of particular note are the following benefits:

Where goods are sold that do not conform to the contract of sale the remedies noted in 1.1 above allow consumers to obtain goods that accord with the contract. The consumer can have the goods repaired or replaced by the trader rather than having to obtain the goods from elsewhere and seek damages from the trader. In addition, where a defect arises within the first 6 months the consumer does not need to prove that goods did not comply with the contract at the date of delivery. That is presumed and it is for the trader to prove otherwise, making it easier for consumers to obtain redress. Furthermore, consumer do not bear the risk of the goods being destroyed or damaged until they come into the consumers' physical possession, which is likely to align with consumers' expectations rather than the risk passing when ownership rather than possession passes.

In relation to e-commerce (1.2) consumers can be more confident in entering into contracts online as they are provided with information on the trader or supplier with whom they are contracting. The right to cancel is a very important right. When buying by e-commerce consumers are unable to

¹⁵ Some traders may be obliged to refer disputes to ADR by legislation (eg financial services or estates agency) or under the rules of a trade association.

¹⁶ It should be noted that online contracts may be concluded on a website or by other electronic means – see Reg4(e) of the Online Dispute Resolution Regulation.

¹⁷ Accessible at <https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.show&lng=EN>.

¹⁸ The website of the UK contact point is accessible here: <http://www.ukecc.net/index.cfm>.

handle the goods in the way they would in a shop. The right to cancel means they can return goods and obtain a refund where the goods, while complying with the contract, are just not what the consumer expected. The right to cancel also offers consumers a “cooling off period” where they may, without incurring liability, change their mind about the contract.

In relation to product safety (1.6) the co-operation required between members states in the event of an unsafe product entering the market means that these products can be identified and removed from circulation as quickly as possible. Furthermore, obligations placed on producers and distributors mean that affected products can be identified more quickly.

In relation to consumer credit (1.7) consumers should be better informed about the credit offered to them, the terms on which it is offered, the cost of the credit and what payments they will have to make. Credit should only be provided to consumers whose creditworthiness suggests they are able to repay the credit provided. The right to cancel gives consumers a “cooling off period” where they may, without incurring liability, change their mind about the credit agreement. Where a consumer finds that he / she can repay the credit early he / she is able to do so and may, as a result, make significant savings.

The provisions on choice of law (1.8) mean that in cross-border consumer contracts the law governing the contract, in the absence of the parties agreeing to the contrary, is the law where the consumer resides and, as such is the law the consumer is most likely to be familiar with. Furthermore, where the parties have chosen a law to govern the contract, which is not the law of the consumer’s country, the consumer will have the benefit of consumer protection measures provided to him / her by his country of habitual residence. As a result consumers can purchase cross-border in the confidence that the protections he / she is familiar with will apply. It should be noted that the Rome I Regulation will still apply to UK consumers following the UK leaving the EU. The Regulation must be applied by courts in the member states regardless of the parties’ connection to the EU. However, the UK courts will not be required to apply Rome I once the UK leaves the EU. This may reduce the number of consumers in other member states willing to enter into contracts with UK traders.

The benefits of the dispute resolution provisions (1.9) mean that consumers will not have to raise or defend court proceedings in another member state thus making it easier and cheaper to deal with court action. The provisions on online dispute resolution allow consumers and traders to go to one place, where information is provided and where they can be assisted in finding an ADR entity to deal with their dispute. The publicity to be given to the ODR platform by online traders may open up the possibility of ADR to those who would not have considered it previously. Consumers are more likely to buy goods and services online where they believe that quick and cost-effective resolutions to disputes can be achieved. This is likely to be especially important in encouraging cross-border sales.

3. What are the reasonably anticipated developments in this area of rights? (At the EU and / or Council of Europe).

How might this be found out and explored further (contacts in Brussels/Strasbourg?)

The European Commission is currently giving priority to proposals to realise the potential of the Digital Single Market.¹⁹ Many of the proposals will involve consumers.

Different contract law rules in different member states hamper the potential of the single market. The Commission is therefore considering ways of mitigating the effect of these differences by harmonising the law of the member states in certain areas. The Commission has recently issued two draft Directives on the distance sale of goods to consumers²⁰; and on the supply of digital content to consumers.²¹ The proposed Directives will harmonise the law in relation to such contracts to encourage suppliers and consumers to trade cross-border. It should however be noted that the proposed Directives deal only with obligations incumbent on the supplier regarding the goods or digital content provided; and remedies for the consumer where those obligations have been breached. The proposed Directives do not deal with matters beyond that, such as the formation or the validity of the contract, which will continue to be governed by national laws.

The Committees involved in the proposed Directive on digital content are the Internal Market and Consumer Protection and Legal Affairs committees. The rapporteurs are [Redacted]. The Internal Market and Consumer Protection Committee is overseeing the proposed Directive on distance sale of goods and the rapporteur is [Redacted].

The Commission has also recently announced a new and enhanced Consumer Protection Cooperation Regulation,²² which would enable enforcement authorities in member states to work together faster and more efficiently to deal with cross-border breaches of consumer protection laws. The Committee overseeing this work is again the Internal Market and Consumer Protection Committee and the rapporteur is [Redacted].

The Commission has also published a draft Regulation to end unjustified geo-blocking (where online sellers deny access to their websites from other member states).²³ The Internal Market and Consumer Protection Committee is overseeing this proposal and the rapporteur is [Redacted].

4. What is the sectoral potential for Scotland to progress/lead in this area of social protection/rights? Practically, how might it do so? (For example what kind of engagement could Scotland pursue with supra-national and international treaty bodies or organisations?)

You may wish to consider: a) current devolved position;

¹⁹ See http://ec.europa.eu/priorities/digital-single-market_en.

²⁰ See COM(2015) 635 FINAL.

²¹ See COM(2015) 634 FINAL.

²² See COM(2016) 283 final.

²³ See COM(2016) 289 final.

b) with further devolution of powers (explaining which powers would need to be devolved to enable Scotland to be a leader);

c) as an independent nation.

There is limited potential for Scotland to progress in this area given consumer protection is a reserved matter. If power to legislate in this area were to become devolved careful consideration would have to be given to implementing EU law in this area. While this may allow greater cross-border trade with other EU member states different consumer protection laws in Scotland and rUK may be problematic. Consideration would have to be given to the amount and potential for cross-border EU trade in this sector compared to intra-UK trade in this sector.

Annex I

	Consumer Rights	Main EU Legal Source	Main Implementing UK Legal Source(s)
1	Sale of goods	- Directive 1999/44EC on certain aspects of the sale of consumer goods and associated guarantees - Consumer Rights Directive (Directive 2011/83/EU)	- Consumer Rights Act 2015 - Consumer Contracts (Information Cancellation and Additional Charges) Regulations 2013
2	Goods and services supplied using e-commerce	- Electronic Commerce Directive (Directive 2000/31/EC) - Consumer Rights Directive (Directive 2011/83/EU)	- Electronic Commerce (EC Directive) Regulations 2002 - Consumer Contracts (Information Cancellation and Additional Charges) Regulations 2013
3	Unfair contract terms	Unfair Terms in Consumer Contracts Directive (Directive 93/13/EEC)	Consumer Rights Act 2015
4	Unfair trading practices	Unfair Commercial Practices Directive (Directive 2005/29/EC)	Consumer Protection from Unfair Trading Regulations 2008
5	Excessive fees	Consumer Rights Directive (Directive 2011/83/EU)	- Consumer Rights (Payment Surcharges) Regulations 2012 - Consumer Contracts (Information Cancellation and Additional Charges) Regulations 2013
6	Consumer safety and protection from defective products	- Product Liability Directive (Directive 85/374/EEC) - General Product Safety Directive (Directive 2001/95/EC)	- Part I Consumer Protection Act 1987 - The General product Safety Regulations 2005
7	Consumer Credit	- Consumer Credit Directive (Directive 2008/48/EC)	- Amendments made to the Consumer Credit Act 1974 by the Consumer Credit (EU Directive) Regulations 2010 - Consumer Credit (Disclosure of Information) Regulations 2010 - Consumer Credit (Agreements) Regulations 2010 - The Financial Conduct Authority Consumer Credit Sourcebook
8	Choice of law	Rome 1 Regulation (Regulation 593/2008) of 17 June 2008	n/a EU Regulations directly applicable in UK
9	Dispute resolution	- Recast Brussels Regulation (Regulation 1215/2012/EU) of 12 December 2012 - Alternative Dispute	For the EU Regulations no UK implementing legislation is required.*

		Resolution Directive (Directive 2013/11/EU) - Online Dispute Resolution Regulation (Regulation 524/2013) of 21 May 2013	- Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015
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* However certain matters have been clarified in relation to the Online Dispute Resolution Regulation in the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015.