

Written submission

Post-Brexit Scrutiny of EU Law and Policy

European Scrutiny Committee Inquiry

- 1. Which? is the largest independent consumer organisation in the UK with more than 1.3 million members and supporters. Which?'s purpose is to tackle consumer harm and help individuals to be as powerful as the organisations they deal with in their daily lives. Which? empowers consumers to make informed decisions and campaigns to make people's lives fairer, simpler and safer.**

Summary

2. It is currently unclear as to the terms of the UK's future relationship with the EU, however across all exit scenarios it is highly likely that future EU law and policy will have an impact on the UK either because of a level of alignment, or simply because of interlinked trade and geographic proximity.
3. It is therefore vital, in Which?'s view, that proper mechanisms and systems are put in place by both Government and Parliament to scrutinise the development of EU law and policy so as to understand the impact it will have on UK consumers.
4. Proper scrutiny of future EU law and policy will present opportunities to benefit from learnings to be taken from EU policy decisions, with the potential to adapt proposals to fit the UK market and UK consumers where it is deemed advantageous, or to consciously choose a different route with the benefit of a wider evidence base. Such assessment will also enable necessary reactive decisions to be made when EU laws or policy impact UK consumers, for example through changes to markets or through experiences such as cross-border shopping.
5. In the event the UK agrees to become a 'rule taker' either through a transition period or future alignment, it is vital that mechanisms are in place to ensure proposed EU law and policy that will be applied in the UK is thoroughly scrutinised to fully understand the implications. Additionally, in case of such an event, the Government needs to set out the processes that will be used to then use the findings of this scrutiny to influence - to the benefit of UK consumers - the outcome at an EU level.
6. In the event of divergence through a no deal, it will be important that the UK does not lose beneficial pending consumer legislation, and that decisions around pending EU law are transparent and open to scrutiny. In the longer term, if the UK is able to - and chooses to - diverge from EU policy and law it will bring opportunities and challenges for consumers - enabling the improvement of some ill-fitted consumer law, but also potentially creating a more complex environment for consumers to operate in. Transparency and scrutiny will once again play a vital role in any changes made.

Introduction

7. Which? welcomes this opportunity to submit evidence to the European Scrutiny Committee's inquiry into the post-Brexit scrutiny of EU law and policy. As the UK looks to the post-Brexit landscape it is vital that consumer interests are taken into account and prioritised so as to ensure that the best outcomes are delivered for consumers in the UK.
8. Our vision for the future is clear, for an economy where people are supported by high levels of rights and protection – and with greater access than ever before to quality, affordable products and services.

9. In March 2018 we published our *Consumer Charter for Brexit*¹ outlining the Brexit outcomes that should be delivered for consumers in the areas that matter to them most, such as financial services, travel, food, energy and product safety. The charter also set four consumer tests on choice, prices, standards and rights - on the outcomes that are delivered. Throughout the Brexit process Which? has worked to maximise the opportunities and minimise the risks for consumers.
10. It is currently unclear as to the terms of the UK's future relationship with the EU, however across all exit scenarios it is highly likely that future EU law and policy will have an impact on the UK either because of a level of alignment or simply because of interlinked trade and geographic proximity.
11. It is therefore vital, in Which?'s view, that proper mechanisms and systems are put in place by both Government and Parliament to scrutinise the future development of EU law and policy so as to understand the impact it will have on UK consumers. This will also present opportunities to benefit from the learnings to be taken from EU policy decisions and to inform the UK's own decision making for future policy making in areas where there is overlap in interest. Such assessment will also enable necessary reactive decisions to be made when EU laws or policy impact UK consumers, for example through changes to markets or through experiences such as cross-border shopping.
12. This should also be accompanied by the establishing of mechanisms to scrutinise the decisions taken by the Government for pending EU legislation at the time the UK leaves, as well as scrutiny mechanisms for changes made to EU law that has been transposed into UK law.

The future impact of EU law and policy on UK consumers

13. The future impact of EU law and policy on UK consumers will depend heavily on the future EU-UK relationship, including whether or not a deal is reached with the EU before 31st October 2019 and the shape of that agreement, as well as whether or not it includes a transition period.
14. Given our geography, trade and the historic ties between the UK and European countries, it is clear that both parties will continue to shape each other's law and policy be it directly or indirectly. To help understand this we explore the potential impact of future impact of EU law and policy on UK consumers post exit.

Transition period

15. Under previous proposals for a transition period, the UK would be obliged to implement new EU directives and regulations throughout this time period without having had the opportunity to influence those files through the EU legislative process.
16. As has been well documented, this would be a clear change for the UK becoming a 'rule taker', as opposed to 'rule maker' as it is currently. This would clearly impact on consumers. Take for example the new Directive 2019/77 on certain aspects concerning contracts for the sale of goods, otherwise known as the Tangible Goods Directive. This Directive underwent significant changes as it went through the legislative process and the UK's ability to influence the evolution of the Directive resulted in significant improvements for UK consumers compared to the original proposal from the European Commission.
17. If the Directive had been implemented as originally proposed, it would have resulted in the diminution of UK consumer rights in a number of important areas including in relation to our limitation period and the choice of remedies available to consumers if they purchase faulty goods. Unlike other European consumers, UK consumers benefit from a short term right to

¹ [Consumer Charter for Brexit](#), Which?, March 2018

reject faulty goods and receive a full refund within the first thirty days of receipt. UK consumers' ability to return a product following sale is well-established, well-understood and ingrained with the public.

18. In response to a survey conducted on this issue in December 2015, an overwhelming majority of Which? members told us that if they bought a product online and subsequently discovered it to be faulty, they would expect to be able to both ask for a replacement or demand a full refund². The European Commission's original proposal would have abolished this right - instead limiting consumers to the choice between the goods being repaired or replaced. However, the UK was able to protect the UK's short term right to reject by securing an amendment to the proposal that the Directive would not affect the freedom of Member States to allow consumers to choose a specific remedy, if the fault becomes apparent within 30 days.
19. This demonstrates the importance of the UK being able to shape proposals directly. If a similar issue arose in respect of future legislation and the UK was bound to implement it in any event, it could result in a diminution of consumer rights due to the UK's position as a rule taker and not a rule maker.
20. In the event a transition period remains a possible future scenario, it is vital that mechanisms are in place to ensure proposed EU law and policy that will be applied in the UK is fully scrutinised to fully understand the implications, but also that the Government sets out the processes that will be used to then influence use the findings of this scrutiny to influence the outcome to the benefit of UK consumers.

Divergence between UK and EU law

21. Depending on how the UK leaves the EU, and the policies pursued by both sides subsequently, there is a wide ranging spectrum to the level of divergence that may emerge between the UK and the EU in the future.
22. The ability to diverge brings both potential benefits and challenges for consumers. Put very simply - there are benefits in divergence for the UK in enabling it to go above and beyond hitherto harmonised levels on consumer issues, and tailor existing EU laws more specifically to the needs of UK consumers than may have been possible as EU Members.
23. Yet, on the other hand, UK consumers will continue to shop cross border and will therefore experience a more complex environment as differences emerge between their domestic market and the EU market. Additionally, if the UK doesn't stay on the front foot on consumer issues such as rights and product safety, there is the potential that the UK could become a depository for poorer consumer goods and poorer business practices.

a. Pending EU legislation

24. The rate of divergence will depend on many factors, in the event of a no-deal Brexit, a clear cross roads between EU and UK law will appear in relation to pending EU law which is awaiting implementation. For consumers, these include:
 - Directives on Legal Guarantee Rights for Digital and Tangible products, which is in force but has not yet been transposed into domestic law;
 - New Consumer Deal 1 - otherwise known as the Omnibus Directive, where a deal has been concluded but it has not yet been adopted;
 - New market surveillance rules, which have been adopted but are not yet in force; and
 - New Consumer Deal 2, relating to collective redress, which is at an earlier stage.
25. These pending EU files will bring benefits for consumers including by providing rights in relation to security updates for tangible goods with embedded digital content or "Internet of Things" connected smart products; by requiring increased transparency from online platforms in

² Which? conducted an online survey of 4153 Which? members between 3rd and 9th December 2015.

relation to the order of listings and reviews; and by seeking to address product safety concerns in online marketplaces by making fulfilment houses “economic operators”.

26. If the Government chooses not to implement this legislation (or equivalent legislation) following a no deal, there is a risk that European consumers will benefit from enhanced protections in certain areas to the detriment of UK consumers. This could result in products with a lower level of compliance making their way to the UK market both because the requirements are not as stringent (potentially in the area of “Internet of Things” updates) or because the enforcement mechanisms are not as robust, for example in relation to fulfilment service providers, or if the EU brings in a collective redress mechanism across members states, which UK consumers would be excluded from.
27. To ensure that informed decisions are made on the future of pending EU law, it is important that the scrutiny system in Parliament is adapted to encompass decisions regarding the future of EU law pending on exit so as to ensure the decisions made are transparent and that beneficial laws such as the above are not lost.

b. The outcomes of divergence for UK consumers

28. Once the UK has left the EU, either with or without a deal, there is scope for divergence bringing both opportunities and challenges for UK consumers.
29. With regard to the opportunities, EU exit could allow the UK to review legislation which is hindering UK consumers. There are many examples of this from the inability to roll out popular traffic light labelling schemes to more food products, to the current rules around the presentation of APR for mortgage products - a practice Which? has long flagged as being misleading for consumers.
30. There will also be the opportunity to look more broadly at the systems we have in place - such as our food system. In developing what will replace the Common Agricultural Policy there is a clear opportunity to look at our whole food system - creating a joined up food system and accompanying strategy that ensures the way we produce food in the UK, as well as what we decide to import, reflects what consumers need and want, such as high standards and strong animal welfare.
31. Alongside these opportunities, divergence will also bring challenges for consumers. As well as the potential detriment to UK consumers as outlined previously if the Government does not reflect the pending consumer directives, UK consumers could also see a more complex environment to navigate, particularly when things go wrong. Harmonised standards allow improved access for consumers who wish to shop cross-border accompanied by redress mechanisms for dealing with disputes.
32. With divergence consumers could see an increasing gap between their experience shopping in the EU versus the UK. This could of course be because the UK goes above and beyond whilst the EU keeps its consumer rules the same, or vice versa. Either way, this will create new challenges for consumers to overcome in understanding their differing rights based on where they are shopping.
33. One example of this is that EU rules will continue to apply to transactions that are not specifically targeted to the UK. For example, if a UK consumer makes a purchase on a French website and pays in euros, or if they buy something on holiday in the EU, the rights they have will be EU based, not from UK law which could be confusing if they diverge significantly. There are also issues in relation to the ability of UK consumers to easily enforce their rights against EU traders, which are expanded on below.
34. With respect to scrutiny it is therefore important that the current scrutiny system is also adapted to deal with these changes. Firstly, ensuring that changes to EU laws which are now on the UK statute book are done in a transparent manner with the ability of proper scrutiny. Secondly, with the ability for ongoing scrutiny of EU law and policy to help inform changes UK

consumers may face when interacting with this law, enabling Government and relevant bodies to support and advise consumers to relevant changes were pertinent. Ensuring consumers are making decisions and purchases with the best information base possible when they may be impacted by divergence issues.

Ensuring the best outcomes for consumers in the future

35. The UK and EU's future relationship will depend very much on whether or not a deal is reached with the EU before 31st October and, what any subsequent deal may cover in terms of the extent of trade and potential regulatory and wider policy alignment, as well as the extent to which the UK would seek to be party to technical and regulatory networks and co-operation discussions.
36. In the interim period, while there remains uncertainty about the future relationship, EU legislation is still being debated and evolving, with potential implications for the UK further down the line, particularly in areas which could underpin trade, such as food and consumer product standards. It is therefore important that the UK keeps abreast of this legislation and seeks to influence it. The approach it will need to adopt will again depend on what is agreed ahead of 31st October and therefore whether the UK is a member of the EU or will need to develop an influencing strategy as a third country/ possible trading partner.
37. Examples of the types of issues that are now on the EU's agenda, which could have implications for consumer policy, include plans for a new Digital Services Act, that would replace the current e-Commerce Directive that has been implemented into UK law, forthcoming proposals on revisions to food labelling and plans to update energy labelling as part of the circular economy action plan.
38. While the UK has committed to carry over EU law at the time of exit, it is important that there is a process for engaging with and scrutinising the implications of any revisions to EU law by the UK Government in the future. As a principle, the UK must ensure that it is able to update legislation in order to maintain and ideally enhance consumer protection
39. It is difficult to predict the future direction of EU policy and legislative changes in this respect. There may be examples of where the UK wishes to adopt the same or a similar approach as EU legislation evolves to reflect new challenges or market conditions that will also apply to the UK. However, it may also be the case that without the UK playing an active role as a Member State, some EU proposals may go in a different direction that would not be appropriate for the UK.
40. When it comes to post-exit scrutiny of EU policy and law, it is vital that Parliament and Government have appropriate scrutiny and monitoring processes in place to assess policy developments in the EU and to understand the potential impact new legislation may have on UK consumers.
41. This will enable the UK to benefit from learnings to be taken from EU policy decisions, with the potential to adapt to fit the UK market and UK consumers where advantageous, or to consciously choose a different route with the benefit of a wider evidence base. From a broader perspective such engagement will also ensure there is a clear understanding of any knock on impact EU policy and legislation may have on the UK market and UK consumers - for example if rights for goods purchased online significantly change in the EU, it may be pertinent for the UK Government to work with online platforms in the UK to ensure these changes are highlighted at point of purchase to UK consumers.
42. The extent to which the UK will be able to deviate from future EU law and policy will also depend on the nature of the future relationship and extent to which alignment is desirable, or even necessary, to deliver on any trade agreement.
43. It will be important that measures for regulatory co-operation are built into any future trade deals - and as a former member of the EU, it is hoped that this can be a deeper relationship

than has been achieved between the EU and other third countries as part of recent trade deals. More generally, it will be important to develop mechanisms to continue to learn and share best practice, in order to achieve the best outcome for UK and EU consumers.

44. People have become used to cross-border shopping, buying products from other EU countries, as well as beyond. The UK is currently part of early warning and intelligence sharing systems as part of the EU and should try to retain membership to these important sources of information and influence. This includes for example the Rapid Alert System for Non-Food Consumer Products (RAPEX), as well as the Rapid Alert System for Food and Feed (RASFF). The UK is also part of the EU's Consumer Protection Co-operation Partnership which enables joint consumer enforcement actions across member states and wider initiatives, such as the US-China-EU initiative on consumer product safety, which has been particularly focusing on product safety issues raised by online marketplaces.
45. The UK also needs to engage effectively with international standards bodies and ensure that it is able to effectively influence the outcomes as these may be the deciding factor in any trade disputes further down the line where there is divergence. These include the Codex Alimentaris Commission which sets international food standards and the International Standards Organisation (ISO) for example.

Government advice to consumers

46. It is vital that, as the UK prepares to leave the EU, consumers are prepared by being made aware of potential changes and what steps they need to take. The previous Government's no deal advice campaign was a significant cause for concern. In the run up to March 31st 2019, information provided was opaque, technical and very difficult to find.
47. It was therefore unsurprising that 4 in 5 (79%) consumers said the Government had either communicated too little or no information at all about the impact of no deal on consumers³. Likewise, we also found people's knowledge of the consequences of a no deal Brexit for them as a consumer remained static between January 2019 and July 2019.
48. In light of this, reports that the new Government will be launching a public information campaign to help prepare both business and people with actionable steps they can take to prepare for a no deal is most welcome. Which?'s own advice on no deal has been exceptionally popular, to ensure maximum impact the Government should partner with consumer groups and businesses to ensure a strong and clear message is being shared, providing the best chance of it reaching people across the UK.

Addressing challenges proactively

49. There is also more that can be done to proactively step up in areas where there will be clear challenges for consumers in the event of a no deal, for example when things go wrong shopping cross border to the EU.
50. Consumers are increasingly international in how they shop, indeed the UK has a thriving e-commerce sector that has seen an increase in cross-border shopping. With this in mind, their rights when things go wrong are very important, as are the mechanisms that help deliver redress and enforcement.
51. At present, the UK authorities (eg the Competition and Markets Authority) can work with their counterparts in other Member States to ensure that consumer cases are investigated through the Consumer Protection Cooperation (CPC) Network. Likewise, there are reciprocal arrangements for alternative dispute resolution (eg ombudsman schemes) that people can use where a business has failed to deal with their complaint. The EU's online dispute resolution

³ Which? surveyed 2,189 UK adults between 17th and 18th July 2019. Fieldwork was carried out online by Populus and data have been weighted to be representative of the UK population (aged 18+).

(ODR) platform gives people access to the appropriate bodies to pursue cases in different member states.

52. In the event of a no deal, resolving issues with cross-border purchases could become significantly more complex for people. While existing consumer rights would continue in UK law, through the UK Withdrawal Act, consumers would see a dramatic loss of these rights in practice because it would be much more complicated to enforce them where goods or services originate in the EU. This includes consumer rights where they have been misled or sold faulty goods – but also for specific protections, including those relating to package travel or timeshares, for example.
53. The reciprocal arrangements for enforcement and market surveillance between the UK and public authorities in EU countries – whether for product safety or issues relating to unfair trading and consumer rights – would immediately end in the event of a no deal.
54. This would make it harder to get issues resolved such as being ripped off by a hire car company, being mis-sold holiday accommodation, or getting a refund for goods bought online from a company originating in an EU country that were faulty, or did not fit with the way that they had been described. People would have to take these up with the authorities in the country the business was based in.
55. In the Government's no deal advice published earlier this year, advice to consumers on how to resolve issues with cross border purchases was particularly unhelpful, mainly directing them to check the law of the country they are making their purchase from. Realistically, most consumers will not be able to do this due to the language barrier, as well as ability to then understand what the law means in practise. This advice now appears to have been altered to say "If the UK leaves the EU without a deal, you may have to deal with the court system in the country you bought from to get compensation"⁴.
56. Which? would welcome the Government taking a more proactive approach to support consumers in the event of a no deal - perhaps working with cross border retailers to help provide a summary of how to resolve issues with businesses in each member state in the event of a no deal, or setting out the intention to develop bilateral mechanisms in the event of a no deal.
57. In more extreme cases, where people needed to take legal action against a company in an EU member state (for example for a faulty or unsafe good or misleading good or service they have been sold), current arrangements allowing them to issue their claim in their home courts and for judgments to be more easily enforced across the EU would no longer apply – or be much more limited. The Government has advised that: "Any party to a cross-border legal dispute, including businesses, consumers and families, would need to consider the effect that these changes would have on any existing or future cases involving parties in EU countries. Where appropriate you may wish to seek professional legal advice on the implications of these changes for your individual circumstances"⁵.
58. Again, this is an area where bilateral solutions could be sought, a more proactive and ambitious stance from the Government would be welcomed.
59. In the event a deal is reached, the main issue around the enforcement of rights will be dependent on the mechanisms the UK agrees with the EU27 to resolve issues, as well as how much our rights framework diverges.

⁴ *Buying things from Europe after Brexit*, Government website Gov.uk - <https://www.gov.uk/buying-europe-brexit>

⁵ Information formerly published on the Government website at <https://www.gov.uk/government/publications/handling-civil-legal-cases-thatinvolve-eu-countries-if-theres-no-brexit-deal> - this has now been removed.

Conclusion

60. Overall Which? sees there being significant benefit in ensuring that mechanisms are provided for in Parliament and Government to scrutinise EU law and policy once the UK has left, regardless of the future relationship.
61. In addition to this, in the event of a transition period, or future relationship, where the UK becomes a rule taker through alignment with the EU, it is vital that the Government sets out how it will influence the policies and laws that will apply to the UK

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