

# Brexit Conference

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# Introduction and Overview

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# Our objectives

- > To outline actual and potential changes in key sectors for consumer lawyers
  - > Consumer contracts
  - > Food law and other products
  - > Unfair commercial practices
  - > Data Protection
  - > Regulated lending
  
- > To identify challenges and opportunities within those sectors
  - > What do we need to prepare for?
  - > Are there chances now or in the future to influence change?
  
- > To hit a fast-moving target
  - > Two White Papers to consider already
  - > The start of an arduous negotiation

# A brief history

- 23 June 2016      The referendum
- 17 January 2017    The PM's 12 Principles
- 24 January 2017    The Supreme Court decision in *Miller*
- 2 February 2017    White Paper on Brexit
- 16 March 2017      European Union (Notification of Withdrawal) Act 2017
- 29 March 2017      Article 50 process triggered
- 30 March 2017      White Paper on the “Great Repeal Bill”
- 20 April 2017       GSC Brexit Conference

## But no-one knows what's going to happen!

- The knowns (and a few known unknowns):
  - We've got two years (or less, or maybe a bit more)
  - We are keeping all our existing law (if we do it properly)
  - That includes existing, but (probably?) not future, CJEU decisions
  - After that we can make it all our own (if we have any energy left)
  
- The unknowns
  - How long have you got?
  - Where might we look for some guidance?

## A case study: Unfair terms

- Part 2 of the Consumer Rights Act 2015
  - Why this example?
    - It came from Europe (Directive 93/13/EEC)
    - It made common lawyers think about civil law concepts (“good faith”)
    - We have re-enacted it in our own way in the CRA:
      - codifying CJEU decisions (s.71 CRA; *Mostaza Claro C-168/05*, *Pannon C-243/08*)
      - including our own legislative slant – s.64 – core terms exclusion following *OFT v Abbey National*
  - A template for the future?
  - And what can it tell us about the present?

## The present

- All business as usual
  - No need to re-enact the CRA to give effect to the Directive
  - All CJEU decisions will be given the status of UKSC decisions
    - A moot point as to whether we needed that in light of *Beavis v ParkingEye* and its reliance on *Aziz C-415/11*
    - Freedom to depart from those decisions?
  - It was always the job of the national court to decide on fairness anyway – *Freiburger C-237/02*

## The future

- Future CJEU decisions will not be binding
  - But will they have no status at all?
  - Or the same status as Commonwealth decisions have now?
  - Or some form of hybrid, depending on the ratio of the decision?
  
- Future EU change
  - The Directive is under review as part of the Commission REFIT programme
  - We will be free to adopt or ignore, at least in theory
  - Is divergence a significant problem?
  - Do we have the capacity to legislate for ourselves (not just here, but everywhere)?
  
- Future domestic change
  - Consumers and Markets Green Paper announced in the Budget statement
  - Considering how to make Ts & Cs clearer, simpler and shorter





## Opportunities

- Are unpopular CJEU decisions now fair game?
- Does the GRB process afford an opportunity for reform?
- If not now, will HMG be more open in the future to a “bonfire of red tape” without Europe as a constraint?
- How can we help our clients to position themselves best for a rocky road and an uncertain future?

# Food Law and other Products

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# The scope of food law

- > Food law currently is almost derived from EU law and is harmonised
- > There are a wide range of issues for Brexit laws to cover within this:
  - > Food Safety;
  - > Food hygiene;
  - > Food labelling;
  - > Food Standards;
  - > Food composition - both inclusive and exclusive;
    - > Inclusive might involve compliance with, say, rules on entitlement to use a statement of origin
    - > Exclusive might include matters such as GMO, pesticide residues, organic production;
  - > Claims
  - > Official Controls;
  - > How to provide for other enforcement.

## The main one.....

- Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.
  - *This Regulation provides the basis for the assurance of a high level of protection of human health and consumers' interest in relation to food, taking into account in particular the diversity in the supply of food including traditional products, whilst ensuring the effective functioning of the internal market.*
  - “internal market”/ “market in the Community”
  - Networking of laboratories
  - Use of risk analysis
  - The precautionary principle
  - EFSA (financed by the general budget of the EU) “to reinforce the present system of scientific and technical support “ (no longer involved in the rotation of control of the management board)



# Food Hygiene

- The current legislation is contained mainly in three EU Regulations:
  - Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs
    - Microbiological criteria, target setting, temp controls, cold chain, sampling
    - HACCP
    - Specific controls
  - Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin
    - all products of animal origin to bear either a health mark or an identification mark
    - Rules on meat, raw eggs, milk
    - (Since 2004 this has been amended 18 times)
  - Regulation (EC) No 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption

## Food Information

- Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers
  - Applies to labelling and advertising
  - Information is to be given in a language easily understood by consumers in the place of marketing (article 9).
  - The person taking responsibility for food information must be an importer located within “the Union market” (article 8).
  - The mandatory particulars must include the name/ business name and address of an importer (article 9).
  - The legislation is capable of being amended by the Commission under delegated powers (article 10).
  - Delegated legislation (COOL)
  - There is a prohibition on national measures (article 38).

## Food Standards

- Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products
- Eg. Horticultural Grading
  - Agriculture and Horticulture Act 1984
  - The House of Lords confirmed in *Defra v ASDA Stores Ltd and another* [2003] UKHL 71 that the reference to “Community grading rules” in section 11(3) of the Horticultural Grading Act 1964 was to Community grading rules in force at the time of the application of the 1964 Act, irrespective of when the Community grading rules in question were made.
  - Legislative and Regulatory Reform Act 2006

## Composition

- Regulation (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products
  - Entitlement to make geographical claims – eg “champagne”
  - Eg. Regulation (EC) No 1829/2003 on genetically modified food and feed
  - Regulation (EU) 2015/2283 on novel foods, amending Regulation (EU) No 1169/2011 of the European Parliament and of the Council and repealing Regulation (EC) No 258/97 of the European Parliament and of the Council and Commission Regulation
  - The additives regime





# Claims

- Regulation (EC) No 1924/2006 on Health and Nutrition claims
- EU Register of Nutrition and Health Claims
- Comparative advertising
  - Foods in the same category
  - Nutrition claims - cannot compare with foods which can also bear a nutrition claim

## Official Controls

- REGULATION (EU) 2017/625 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products
  - Mainly applicable from December 2019
  - Repeals 882/2004
- Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules
- Verification is currently the task of Directorate-General for Health and Food Safety (DG SANTE), through its Health and Food Audits and Analysis Directorate It carries out inspections in EU Member States and in non-EU countries exporting to the EU to evaluate compliance with EU standards.



## Other Products

- General Product Safety
- Cosmetic Products
- Directives of the New Legislative Framework

# Unfair commercial practices

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# The 2008 Regulations – EU derived law from the UCPD

- > Unfair Commercial Practices Directive 2005 implemented in our Consumer Protection from Unfair Trading Regulations 2008 (CPRs)
- > Key enforcement mechanism relating to manner in which goods and services sold to consumers
- > Aim to stop consumers falling prey to unfair commercial practices
- > Enforceable in criminal and civil courts
- > It will be our law the day after the UK leaves the EU



# Key Concepts

- Commercial practice
- Trader
- Average Consumer
- Transactional Decision
- Misleading actions and misleading omissions
- Aggressive commercial practices
- Contravening professional diligence

# Key Concepts and the Courts

- Defined in the UCPD and implemented in the CPRs
- Familiar now to practitioners
- Domestic decisions
  - *SSE Plc* [2012] CTLC 1 – trader/commercial practice – widely defined
  - *X Ltd* [2013] EWCA 1862 – commercial practice may be derived from single incident
- CJEU decisions
  - *Trento* (C-281/2) – transactional decision
  - *UPC* (C-388/13) – one off transactions/single acts



## What will change?

- High level of consumer protection underpins the directive
- Exit day plus 1 – the law will remain exactly the same (known)
- Exit day plus 1 – *Trento, UPC etc* – same status as Supreme Court authority (known)
- Future CJEU decisions – what will we do with them? (unknown)
- Future legislative change ( return to TDA 1968? – unknown)



# Potential for divergence from CJEU decisions

- Decisions of CJEU have been fundamental in development of consumer protection jurisprudence
- Pre – exit binding nature of CJEU decisions.
- Potential for divergence in future illustrated in relation to ‘transactional decision’
  - *Purely Creative Ltd* [2011] EWHC 106 (Ch). High Court suggested some economic consequence required
  - *Trento* (CJEU)– entering a shop sufficient
- How would this be dealt with now in the domestic Courts?

## Treatment of future CJEU decisions?

- Unless the UK depart entirely from the existing Consumer Protection regime CJEU decisions will be relevant to the concepts concerned
- Will the approach be that they are persuasive?
- Should we pay 'due account' to CJEU decisions ?
- Is it really likely that no status will be given to future CJEU decisions?



## Prospects of a return to the TDA 1968?

- TDA 1968 was workable over 40 years and many lamented its demise, but some notable gaps in its scope
  - Property was not caught
  - Aggressive sales practices absent
  - Promises as to the future hard to deal with
- UK buy into high level of consumer protection
- Policy change to lessen consumer protection highly unlikely
- Prospects of the TDA 'rising from the ashes' is remote

## The Future

- Many unknowns
- However, any significant change in Consumer Protection policy must be considered unlikely
- UK consumer law often goes beyond EU minimum requirements
- Civil Redress for misleading and aggressive commercial practices is a domestic measure added to the CPRs as Part 4A in 2014.

# General Data Protection Regulation

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## GENERAL DATA PROTECTION REGULATION

- Follows the Directive.
- Is EU regulation applicable in UK, so will fall away unless adopted
- Introduction date 25<sup>th</sup> May 2018. Brexit end of March 2019?
- Summary of new obligations.
  - Applies to personal data (including an IP address) and automated personal data
  - Right to be informed
  - Right of Access
  - Right to Erasure
  - Right to restrict processing
  - Right to Data Portability
  - The Right to Object
  - Rights in relation to automated decision making and profiling
  - Right to obtain human intervention, express their point of view and obtain an explanation of the decision and challenge it

## WILL APPLY IN EU POST BREXIT

- Guiding point is that whatever happens in the UK, any company who does business in the EU will have to comply with the GDPR
- So logic dictates that the simple solution will be applied: it will be adopted in UK law with minor alteration;
  - European Data Protection Board
    - Replaces the Article 29 working group
    - One stop shop
  - Cooperation between member states.
  - Cross border enforcement
  - ICO as a supervisory authority ( no longer a member of the EDPB)
- **IAPP reported that the government has confirmed it will adopt the legislation while in the EU and mirror it once it leaves.**
- **Designed to capture US tech companies**

## NEW METHODS OF COMPLIANCE

- ***“There’s a lot in the GDPR you’ll recognise from the current law, but make no mistake, this one’s a game changer for everyone”*** (Elizabeth Denham (ICO) 17/01/17)
- No ‘due diligence’ defence in the Regulation – but must apply.
- Accountability by Privacy Impact Assessments
  - Not new but good for new high risk activities
  - Aimed at identification of risks
  - Use of pseudonymisation
- Data Protection Audits
  - Identify the source and who it is shared with
  - Map the data flows
- Policy Reviews
  - Including a policy statement for stakeholders
- Activity Reports
  - To demonstrate compliance



## DETAILED GUIDANCE STILL EMERGING

- Article 29 Working Party December 2016
- Demonstrates that the scope for confusion is immense:
  - Privacy Shield - co operation with the US
- Guidelines on data portability
- Guidelines on Data Protection Officers
- Guidelines on Lead Supervising Authorities

## CURRENT ISSUES

- **Lead Supervising Authority:**
  - enough problems working this out for multinationals within the current EU *'affects or is likely to substantially affect data subjects in more than one Member State'*.
- **Data Protection Officers:** extensive guidance issued
  - Required for large scale operations or data – hospitals, city transport
  - Defines the 'core activities' i.e record keeping, blockchain
  - Responsible to the Supervisory Authority so independent.
- **Data Portability**
  - It allows for data subjects **to receive a subset of** the personal data that they have provided to a controller, in a structured, commonly used and machine-readable format, and to transmit those data to another data controller without hindrance ( Art 20 (1) )
  - Guidance being given on issues such as time limits to comply, detail such as webmail categories of recipients, can fees be charged, how should the material be supplied

## THE EU SAFE ZONE

- Now: transfers of personal data to outside EEA can only be made lawfully in certain circumstances due to need to safeguard relevant personal data
- Post Brexit transfers to the UK from EU would no longer be automatically adequate
- UK will probably apply to be an EU Commission approved white listed country: deemed compliant without the need for additional measures
- Privacy Shield
  - Launched July 2016 for transatlantic data flows
  - New Framework protects the rights of anyone in the EU whose personal data is transferred to the US as well as bringing legal clarity for businesses relying on transatlantic data transfers
  - Strong obligations on companies handling data: US Dept of commerce will sit on companies - particular interest in onward transfer to 3<sup>rd</sup> parties.
  - Clear safeguards and transparency given re US government access including a redress mechanism
  - Protection of individual rights by Dispute Resolution mechanism

## FURTHER NEW GUIDANCE COMING ON:

- Consent
- Transparency
- Profiling
- High Risk Processing
- Certification
- Administrative Fines
- Breach notification
- Data Transfers.

## CONSENT:

- The difference between ‘consent’ and ‘explicit consent’ is unclear in GDPR so Brexit adds uncertainty
- It must be freely given, specific, informed and unambiguous.
- Due Diligence
  - How and when was the consent obtained
  - Who obtained it and in what context
  - Did it specifically mention texts, emails and automated calls?
  - Did it list organisations by name, description, or was consent given for disclosure to a third party?

## ICO current position for this conference.

- Privacy Shield Route for an Adequacy Determination
- Will depend on the nature of BREXIT in other fields – i.e passporting for financial services.
- Major issue is, who is going to fund the ICO –will be a requirement for registration fees. (Level of sanction \$23m or 4% of worldwide revenue)
- Charity sector is campaigning for a transitional period for them to comply with the opt in/consent issue but nothing has been conceded yet.
- <https://www.gov.uk/government/consultations/general-data-protection-regulation-call-for-views>

# Regulated Lending

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# Passporting or Equivalence

- > “Passport” allows firms authorised in one of the 31 EEA Member States (EU + Iceland, Liechtenstein and Norway) to provide services cross border from its home state, and set up branches in other states.
- > Alternatively, bespoke agreements based on nascent “equivalence” or “third party passport” regimes.
- > Without either, UK firms would have to provide services through a subsidiary set up and authorised in an EEA country, entailing a shift of capital, functions and jobs out of the UK.



# Recognition and Enforcement of Judgments

- Recognition and enforcement of UK judgments in the EU, and the avoidance of the necessity of parallel proceedings could become problematic
- Continued application of the Recast Brussels I Regulations may be dependent on the UK agreeing to refer cases to the CJEU, and take due account of its decisions, as Denmark was required to do in 2005.
- Alternatively, to ratify its sister Convention, Lugano II, would require the unanimous agreement of the EU, Switzerland, Norway, Iceland and Denmark.

# No effective EU single market in consumer lending

- EU 2007 Green Paper: aim to establish a single market in retail financial services so consumers shop all over Europe for the best loans.
- YouGov 2010 report for the FSA: less than 1% of UK consumers had bought any financial product at a distance from a firm situated in another member state. Anecdotal evidence suggests the implementation of the CCD and MCD has made little impact.
- As at July 2016, 12 UK firms held outbound passports under the MCD, and 102 credit institutions held outbound banking and investment service passports under the Capital Requirements Directive IV.
- Any pressure to maintain “equivalence” likely to be driven by need to maintain market access as part of a package with other financial services.

# Clearing up...

The UK's approach was, in most cases, to only implement to the extent required.

## **CCD (implemented 1 Feb 2011)**

- Not applied to hire agreements
- The following changes were not applied if the credit is for:
  - Over £60,260 or for a business purpose: 2010 Disclosure of Information and Agreements Regulations [the old 1983 and 2004 Regulations retained]; provision of copy agreements [ss62 and 63 retained]; s75A linked credit liability and s77B amortisation table.
  - Over £60,260: s66A right of withdrawal [s67 cancellation rights retained].

## **MCD (implemented 21 March 2016)**

Separate category created in MCOB of “MCD RMC” (ie consumer mortgages), and the MCD text is in most cases simply set out in separate chapters: 2A, 3B, 4A, 5A, 6A, 7A, 7B, 10A, and 11A, setting out supplemental disclosure, advising and responsible lending requirements.

New free standing categories of:

- Art 3(1)(b) agreements (“the purpose of which is to acquire or retain property rights in land or in an existing or projected building”) – subject to MCOB 14;
  - “Consumer buy-to-let” – subject to limited supervision.
- 2<sup>nd</sup> (and subsequent) charge lending moved into MCOB.

## “Take back control”: Transferring power back to the UK Parliament and courts?

- The DEEU White Paper states that the UK courts will be the ultimate arbiter of our laws, and future UK legislation will take precedence over “domesticated” EU law.
- However, in the context of regulated lending, decision making is now at the discretion of the FCA.
- The FCA is required to report to HM Treasury by April 2019 on whether retained CCA provisions (which have not yet been absorbed into CONC or MCOB) should be replaced by FCA rules or guidance. Consultation closed on 18 May 2016 (the referendum was in June). The effect of Brexit will be to unshackle the FCA and consider for the first time excision of CCD and MCD provisions.



## A Britain “open for business”

- There is a risk of an economic downturn
- Given the importance of financial services to the UK economy, the Government could be amenable to help lenders
- The Financial Services Consumer Panel is expressing concern that lenders will secure reduction in “red tape”

# The approach of the FCA

- FCA's Response to the European Commission's Call for Evidence on the EU Regulatory Framework for Financial Services, dated February 2016: critical of the EU's "sectorial approach, requiring different disclosures": "we see a significant benefit to rationalise the information consumers receive".
- The FCA has stated that its aim in conducting the review of retained provisions of the CCA is to "simplify the regime where possible".
- The unwillingness to apply the CCD and MCD changes to lending outside the scope of the directives indicates view that at any marginal increase in consumer protection they gave did not justify the greater burden the changes placed on firms.

# What next?

- Little appetite amongst firms for further change to those provisions in the short term.
- Options for negotiating bilateral financial services deals in the period immediately following Brexit if equivalence is maximized.
- In the longer term, the door is now open for the FCA to “simplify and rationalise” regulated lending, by changes to the Handbook. High on the list for consideration are likely to be:
  - Uniform requirements for loans for business and non-business purposes, and loans above and below £60,260;
  - Simplification of the exemptions.
  - Provisions governing art 3(1)(b) and supervision of consumer buy to let vulnerable to repeal
  - Process under CONC moving closer to the MCOB model, following the trajectory of 2<sup>nd</sup> charge lending.