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Consumer policy - the consequences of Brexit for devolved powers

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This briefing looks at the consequences of Brexit for consumer policy - both at a UK level, and for the Scottish Parliament's newly devolved powers of consumer advocacy and advice.



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What this briefing does

The Scotland Act 2016 devolved new powers of consumer advocacy and consumer advice to the Scottish Parliament. Consumer protection policy is heavily influenced by European Union (EU) harmonisation measures.

This briefing examines the implications of the UK's exit from the EU on those powers.

It will be structured as follows:

1. First of all, it will consider how consumer powers currently operate, both in the UK and at EU level. It will look at the nature of these powers, in light of the Treaty on the Functioning of the European Union.
2. Next, the briefing will examine the powers being transferred to the Scottish Parliament as a result of the Scotland Act 2016. It will look at the consumer landscape in Scotland and the Scottish Government's proposals to create a new consumer body.
3. The third part of the brief will look at what Brexit might mean for consumer policy, in the UK and Scotland. It will consider whether the Scottish Parliament can use its existing powers to protect consumer rights by improving access to redress.

Related SPICe briefings look at the competition powers devolved to the Scottish Government by the Scotland Act 2016:

- [Competition policy - The UK framework and the impact of Brexit \(Republished\)](#) (2019)
- [Competition policy - Brexit and the exercise of devolved powers \(Republished\)](#) (2019)

About the author

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Dr Andreangeli has been working with the Scottish Parliament Information Centre (SPICe) as part of its [Academic Fellowship programme](#). This aims to build links between academic expertise and the work of the Scottish Parliament.

The views expressed in this briefing are the views of the author, not those of SPICe or the Scottish Parliament.

Main issues

This briefing concludes that there is a closely knit relationship between EU and UK consumer powers. The devolution of consumer advocacy and advice to the Scottish Parliament adds an additional layer to this relationship.

The current consumer landscape is complex

There are a number of existing stakeholders with an interest in consumer issues, at both a UK and Scottish level. The Competition and Markets Authority takes a strategic role to support competition. Enforcement responsibility is given to trading standards organisations, with advice predominantly delivered by the Citizens Advice Bureau network.

The creation of a strategic consumer body is important to Scottish Government objectives for consumer policy

The Scottish Government has a wide-ranging reform agenda for consumer policy, based on its newly devolved advocacy and advice powers. The creation of Consumer Scotland is going to be key.

This agency has an important role to play in providing a strategic overview. It is also key to the Scottish Government's commitment to adopting evidence-based policy and, in particular, to identifying and tackling situations of consumer harm.

Brexit creates the risk of divergence between UK and EU consumer protection standards

Brexit poses several risks to UK consumer policy. The main risk is that consumer rights in the UK will fail to keep up with developments in the EU. It is also likely to become more difficult to enforce rights in cross-border disputes as the EU mechanisms for doing this may cease to apply in the UK.

Unscrupulous traders may seek to take advantage of lower standards of protection, or enforcement difficulties. Different standards will also make it more difficult for UK businesses to trade in the EU.

Brexit does not appear to threaten the Scottish Government's reform agenda

However, the Scottish Parliament's newly devolved consumer advocacy and advice powers are unlikely to be affected by the repatriation of EU shared competence in this area. Thus, it is expected that the Scottish Government will remain committed to the implementation of its current agenda.

The Scottish Parliament may have the power to protect consumer rights further by legislating for the use of alternative dispute resolution

It is argued that, in principle, the Scottish Parliament has competence to enact legislation designed to improve the existing standards of consumer protection by enhancing access to redress. This could be done by requiring businesses to agree to the use of alternative dispute resolution (ADR) to resolve consumer disputes ¹.

However, this development could threaten the uniformity and consistency of the UK internal market. Thus, the effective functioning of mechanisms for inter-governmental relations is going to be essential. These discussions could even lead to the adoption of more extensive safeguards for the whole of the UK.

Consumer policy in the UK and the EU

The purpose of this section will be to outline the key aspects of EU and UK consumer protection policy. As competency is shared between the EU and member states, there is an interdependence between the powers at each level.

Consumer policy in the UK has been significantly influenced over the years by EU harmonisation, in respect of both legal rights and the provision of remedies.

The consumer landscape is also very complex. Many bodies, belonging to the charitable sector as well as to the state sector, have important roles.

This part of the briefing will look at:

- [consumer powers at an EU level](#);
- [member states' consumer powers](#); and
- [consumer rights in the UK](#).

Consumer powers at an EU level

Consumer protection is conspicuously absent from the EU's founding document, the Treaty of Rome. The objective of guaranteeing high levels of consumer protection became a priority only in the late 1970s – as a necessary part of integrating markets between EU countries. As a result, it was irremediably tied in with the achievement of the internal market².

Consumer competence is shared between the EU and member states

According to Article 169 of the Treaty on the Functioning of the European Union (TFEU), the power to “promote the interests of consumers and to ensure a high level of consumer protection” is shared between the EU and the member states. This differentiates it from things like competition policy, which falls within the exclusive competence of the EU.

Importantly, the last subsection of Article 169 TFEU states that no consumer protection measure adopted by the EU can prevent member states from setting higher standards of protection. This is subject to such a measure being compatible with the Treaty and the requirement that it is notified to the EU Commission.

There are, however, areas in which EU legislation has provided for “maximum harmonisation”. As a result, member states cannot set standards that are stricter than those set by the EU. This is the case, for instance, in relation to the harmonisation of rules governing consumer credit. The argument was that, given the nature of the economic activities concerned, maintaining a high level of consumer protection was essential.

EU legislation creates both consumer rights and procedural remedies

EU legislation confers on individual consumers a number of rights and protections, such as those provided in the Consumer Rights Directive (Directive 2011/83/EU). For example, consumers are entitled to receive core information on the products and services they are about to purchase before the conclusion of the contract.

It also lays down rules of a more procedural nature. For instance, thanks to the Directive on Alternative Dispute Resolution (Directive 2013/11/EU), consumers have a right to access out-of-court mechanisms for the resolution of their disputes. They are also entitled to have their case dealt with in a way which is fair, impartial and transparent.

Consumer enforcement

EU bodies do not have any powers to enforce consumer laws. National authorities at the member state level co-operate on cross-border enforcement matters through the [Consumer Protection Co-operation Network](#).

Member states' consumer powers

The member states, on their part, are responsible for transposing into domestic law the rights and protections that the EU rules confer on individual consumers. Perhaps more importantly, they are responsible for laying down the mechanisms for the enforcement of these rights and protections.

The EU law principle of national autonomy

Under EU law, it is up to member states to set appropriate remedies for breaches of EU-generated law, in line with the general principles of their national legal system. For instance, normal national time limits can apply to raising court action.

However, those remedies must conform with two requirements:

- they must be **equivalent** to the remedies available for breaches of member state-generated laws, so that it is not more difficult to exercise EU rights; and
- they must be **effective** - so that there is a genuine incentive for people to exercise EU rights.

Under the Directive on Alternative Dispute Resolution, member state implementing legislation must:

1. identify the bodies responsible for ensuring EU consumer standards are adhered to;
2. confer to these authorities the necessary powers to oversee the observance of these standards; and
3. provide effective frameworks for the redress of consumer law breaches.

Consumer rights in the UK

The Consumer Rights Act 2015 sets out the legal framework for consumer rights

The 2015 Act represents a good example of the interdependence between EU and national consumer law. Our [Consumer Rights Act case study](#) provides more information.

The Consumer Rights Act 2015 establishes a number of remedies for consumers who are unhappy with their purchases. These start with the right to reject substandard goods or, if more appropriate, the entitlement to obtain a replacement or a repair of the same goods. This progresses to the right to a reduced price or a final right to reject the product.

Should the problem not have been resolved, separate legislationⁱ requires that traders provide consumers with information about a mechanism for resolving disputes alternative to the courts (an "alternative dispute resolution" or ADR scheme). Note though, that the legislation does not require either traders or consumers to use the ADR scheme.

Enforcement falls to the trading standards organisations, the Competition and Markets Authority and sector regulators

- **Trading standards organisations**

The responsibility of **trading standards organisations** (TSOs) is to enforce fair trading rules, monitor product safety and combat illegal sales. TSOs are responsible for day-to-day cases and are therefore local, customer-facing bodies. They operate as part of local authorities³.

The Consumer Rights Act 2015 confers on the TSOs investigative powers, such as the power to require information and to gain entry to commercial premises upon reasonable suspicion. It also creates criminal offences covering traders acting in breach of the legislation.

- **Competition and Markets Authority**

The [Competition and Markets Authority](#) (CMA) is the UK-wide consumer authority, responsible for enforcing consumer protection legislation and for identifying and combating practices that may thwart consumer choice.

The CMA has powers to investigate how markets operate and compel organisations to provide information. It is obliged to respond to complaints placed by designated consumer bodies (known as "super-complaints"). It also has the power to seek court orders to stop misleading advertising¹.

The CMA retains a system-wide view of consumer protection. It usually tackles high profile cases—such as those initiated as a result of a super-complaint—and takes a horizon-scanning and monitoring approach to consumer protection¹.

Enforcement action on the part of the CMA is justified where¹:

“breaches of the law point to systemic failures in a market, (...) where there is an opportunity to set an important legal precedent” or “where there is a strong need for deterrence (...)”

- **Sectoral regulators**

ⁱ The Alternative Dispute Resolution for Disputes (Competent Authorities and Information) Regulations 2015 and the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015.

There are various markets in the UK which have their own sectoral regulator. This is usually because the risk of consumer harm is seen as high.

The main regulated markets in the UK are:

- energy (gas and electricity) - regulated by [Ofgem](#);
- telecommunications - regulated by [Ofcom](#);
- water - regulated in Scotland by the [Water Industry Commissioner for Scotland](#); and
- financial services - regulated by the [Financial Conduct Authority](#).

The CMA and the sector regulators co-ordinate their activities.

The CMA and the Citizens Advice service have a consumer advocacy role

Consumer advocacy involves representing the views and experiences of consumers to businesses and policy-makers.

The CMA is responsible for promoting the values of competition for the benefit of consumers to public agencies, individuals and businesses. It does this by issuing guidance and providing expert input to the formation of policy⁴. This function is fulfilled in partnership with other organisations that enjoy powers in the field of competition policy, such as sector regulators.

Citizens Advice and Citizens Advice Scotland are also publicly funded to carry out consumer advocacy. They base their work on the experiences of clients who contact Citizens Advice Bureaux with consumer problems.

Charitable organisations such as Citizens Advice Bureaux provide advice to individual consumers

Advice to individual consumers is provided by the network of Citizens Advice Bureaux, with which the CMA liaises closely. Citizens Advice Bureaux are independent charities. The Scottish Government has recently decided to fund [Advice Direct Scotland](#) to provide consumer advice too.

Other third sector organisations are also active in the provision of consumer advice. Among them, the Consumers Association, also known as [Which?](#), provides advice and information on product quality. The Consumers' Association is funded by member subscriptions.

Consumer Rights Act case study

The Consumer Rights Act 2015 establishes clear fairness requirements in consumer contracts, including outlawing unfair terms. It also reforms the framework for the enforcement of these standards. In doing so, it amalgamates EU rights with existing UK consumer protections ⁵.

It does this by implementing, in a systematic and more accessible manner, several EU legal measures. These include Directive 99/44 on sale of goods and guarantees, Directive 93/13 on unfair terms, Directive 2011/83 on consumer rights, Directive 2001/95 on product safety and Directive 98/27 governing court orders to stop unfair trading.

From a procedural, remedies-focused standpoint, the CRA 2015 brought UK law in line with two EU Regulations:

- Regulation 2006/2004 on co-operation in cross-border enforcement of consumer standards; and
- Regulation 765/2008 which lays down rules for ensuring basic quality standards for goods and services, including mechanisms for ongoing monitoring and incident reporting.

The landscape for delivering consumer powers in Scotland

The previous section looked at the arrangements for consumer law and policy in the UK as a whole. It highlighted that the Consumer Rights Act 2015 provides a consumer rights framework effective across the whole of the UK.

The Scotland Act 2016 devolved to the Scottish Parliament the power to arrange the delivery of consumer advocacy and advice. This part of the briefing looks at:

- the nature of [Scotland's newly devolved consumer powers](#),
- the main [Scottish consumer stakeholders](#);
- the proposed role for a new agency - [Consumer Scotland](#); and
- the creation of a [duty to consider consumer interests](#) applying to designated public bodies.

It is concluded that the Scottish Government's agenda in the area of consumer policy is ambitious. This is especially so in relation to its plans for advocacy and its commitment to embedding consumer interests in decision-making in devolved areas.

In addition, the creation of Consumer Scotland as a strategic focus point is likely to contribute to the streamlining of the consumer experience. It is expected to improve co-ordination among agencies and increase accessibility of advice aimed at individual consumers.

Scotland's newly devolved consumer powers

The Scotland Act 2016 devolves to the Scottish Parliament the power to take action in the field of consumer advocacy and advice

Section 50 of the 2016 Act enables the Scottish Parliament to legislate for the delivery of consumer advice and advocacy, either directly from a public body, or commissioned through a public body.

Related competition powers are discussed in the SPICe briefing [Competition policy - Brexit and the exercise of devolved powers](#) ⁶.

The provision comes from a Smith Commission recommendation

The Smith Commission was set up in the aftermath of the 2014 Scottish independence referendum to consider the future of devolution.

One of the objectives of the Smith Commission was to consider ways in which prosperity and a healthy economy could be delivered in Scotland. As part of this, the Commission proposed that powers in relation to consumer advice and advocacy be devolved to the Scottish Parliament ⁷.

A number of stakeholders, including the Scottish Government, argued that clearer, more effective frameworks for the provision of consumer advice would be essential for empowering consumers. This in turn would boost their confidence and ability to spend.

A streamlined consumer protecting regime was regarded as important to increasing trust in businesses, thus supporting economic growth ⁸.

The Scottish Government will receive money for consumer support in the energy and post sectors

Businesses in the regulated sectors of electricity, gas and postal services must pay a levy to provide consumer support services in these fields. The levy is paid to the UK Government. The 2016 Act also enables the Secretary of State to make payments to the Scottish Government to support such activities in Scotland.

Scottish consumer stakeholders

Trading Standards

[Trading Standards Scotland](#) co-ordinates the activity of the 31 trading standards services that belong to Scottish local authorities. Its aim is to ³:

- (1) protect consumers from illegal trading practices; and
- (2) support the business community to comply with consumer protection legislation.

Trading Standards Scotland acts under the supervision of the Convention of Scottish Local Authorities (CoSLA). Local trading standards services provide business advice and run several business-facing services.

The Citizens Advice service

The Citizens Advice service, through local Citizens Advice Bureaux, provides advice services to individual consumers. It also operates in a proactive way, by promoting consumer rights education and, more generally, by engaging in consumer advocacy work.

[Citizens Advice Scotland](#) is the national co-ordinating body for the Citizens Advice service in Scotland. It has a Regulated Industries Unit, which is specifically funded to carry out consumer advocacy work in the water, energy and post sectors. It also has an Extra Help Unit, which deals with complex energy and post customer complaints.

Citizens Advice Scotland and Citizens Advice Bureaux are independent charities. They receive public funding — mainly from local government and the Department for Business, Energy and Industrial Strategy — along with charitable support.

Other third sector organisations are also involved in consumer advocacy, such as Energy Action Scotland.

There is a need to share information across the UK

This is done through the **Consumer Protection Partnership**, on which the main consumer organisations from the whole of the UK are represented. It agrees priority areas of action.

Consumer Scotland

The Scottish Government proposes to create a new consumer body - Consumer Scotland - to support the exercise of its devolved consumer powers

As [previously discussed](#), the current consumer protection framework involves numerous players. It could therefore be seen as difficult to navigate for individual consumers. The newly devolved consumer powers offer an opportunity to fashion a new, perhaps more accessible, framework for the provision of advice and advocacy in this area.

The framework for Consumer Scotland is set out in the Consumer Scotland Bill currently making its way through the Scottish Parliament

Consumer Scotland would (Policy Memorandum ⁹, paragraph 26):

"take a strategic and evidence-led approach to identifying how and why consumer experience harm in Scotland and propose solutions to mitigate it."

Consumer Scotland would be an independent body, with the power to gather information and make recommendations to improve the consumer experience

To fulfil its mandate, the new agency is envisaged as being independent, with expert, permanent membership. It would also be endowed with the powers to represent consumer concerns, collect and analyse information, and provide (or commission) advice to consumers.

Consumer Scotland would conduct inquiries in relation to priority issues in order to identify the existence of harm to consumers. It would then make recommendations as to how such harm should be addressed.

These recommendations could be directed not just at businesses but also at other agencies such as sector regulators or government bodies.

Consumer Scotland recommendations would not be binding

The Policy Memorandum ⁹ to the Consumer Scotland Bill recognises (paragraph 38) that such recommendations would not be binding. This is because the power to regulate the sale of goods and services is reserved to the UK Parliament. However, it states that "it is hoped that the body's independence and the credibility of its evidence base will give its recommendations weight".

Consumer Scotland would be able to alert Scottish Ministers when they have found sufficient evidence of market failure. It would then be incumbent on Scottish Ministers to consider what action to take to address these problems.

Scottish Ministers could, for instance, give thought to making a request to the UK Government to support a market investigation by the CMA under Section 63 of the Scotland Act. This process is discussed in more detail in the SPICe briefing [Competition policy - Brexit and the exercise of devolved powers](#)⁶.

The market concerned may be affected by the exercise of devolved powers. In this case, the Scottish Government could consider other action, including legislation, to ensure that the agency's findings of consumer harm would be appropriately addressed.

There will be an impact on the Citizens Advice service

The Scottish Government launched a new service providing advice to consumers in 2019 - [consumeradvice.scot](#). It provides telephone and web advice on consumer and money issues. This service is provided by the charity Advice Direct Scotland.

The role of Citizens Advice Bureaux in providing frontline advice is going to continue. However, how exactly this work fits in with the work of Consumer Scotland remains to be seen.

As [discussed previously](#), the Citizens Advice Service also provides consumer advocacy and education. Funding for these services is expected to be reduced in order to fund the work of Consumer Scotland.

A duty to consider consumer interests

The Consumer Scotland Bill would impose a consumer duty on all "relevant public bodies". These bodies have not yet been designated.

According to Section 20 of the Bill, such a body would be required to consider two issues when making any decision "of a strategic nature about how to exercise its functions".

These are:

- the impact of the decision on consumers in Scotland; and
- the desirability of reducing harm to consumers in Scotland.

Thus, relevant public bodies will have to take consumers' views into account and act in a way that minimises any harm that may come to consumer interests when pursuing other aims.

According to the [Policy Memorandum](#)⁹ accompanying the Bill (paragraph 43):

"By imposing the duty, the [Scottish] Government anticipates that:

- considering and safeguarding the consumer interest will form part of the policy-making process from an early stage;
- there will be an increase in meaningful consultation with consumers and consumer groups during policy development; and
- reviews of consumer impacts of policies will be carried out after implementation to ensure that consumers are not being unreasonably or unintentionally impacted by the real-world consequences of the policy."

The Consumer Scotland Bill, however, would only prescribe the basic duty. Consumer Scotland would be responsible for developing guidance which fleshes out the details of how the duty should be fulfilled, as well as monitoring its impact ⁹ .

Consumer policy in the UK after Brexit

It is generally accepted that consumer law and policy have been heavily influenced by the growth and development of EU law in this area. The next section will therefore examine the challenges posed by Brexit in both the UK and Scottish contexts.

It will also look at options which could be available to meet these challenges. Whether the Scottish Parliament can legislate to introduce additional redress options than those in force throughout the UK remains open to question.

This part of the briefing looks at:

- the main threats to UK consumer policy created by Brexit;
- Scotland's newly devolved consumer powers in the context of Brexit;
- can the Scottish Parliament legislate to protect consumer rights by requiring the use of ADR in consumer disputes? and
- inter-governmental relations.

The main threats to UK consumer policy created by Brexit

As the UK rules are set to fall out of step with the standards applicable across the EU's internal market, greater uncertainty is likely to arise. The main risks are discussed below.

UK consumer protection laws may fail to keep up with those in the rest of the EU

The UK's exit from the EU could lead to domestic consumer legislation being frozen in time, or at the very least not evolving at the same pace as in the other EU member states¹⁰. After Brexit, the UK Parliament will no longer be bound to bring EU legislation into UK law¹¹. Accordingly, it can be asked if UK consumers could be exposed to lower standards of protection compared to EU member states as a result.

The loss of co-operation with member state consumer authorities when dealing with cross-border consumer issues may also reduce protection for UK consumers.

There is a risk that UK traders may exploit this situation to lower standards, to the detriment of both UK and EU consumers

Brexit may also create the risk that traders could engage in a race to the bottom as regards their adherence to consumer protection standards.

According to Article 17 of Council Regulation No 1215/2012ⁱⁱ, consumers may sue traders in their own country even though the trader is based elsewhere in the EU. Come Brexit, however, this important safeguard for consumers may no longer be applicable to consumer claims lodged against UK businesses in EU member states.

ii Regulation No 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition of judgments in civil and commercial matters (the "Brussels Regulation")

Consequently, a situation may be envisaged whereby UK-based traders might resist having cases heard in courts outside the UK where consumer laws may be more generous than they are in the UK. In this way, they may avoid liability in actions launched by consumers in other member states.

Legal standards may no longer develop in the same way as in the rest of the EU

Further concerns could also arise in respect of the role of the UK courts. As a result of Brexit, UK courts will no longer be bound by case decisions from the Courts of Justice of the European Union which interpret EU legal standards.

Nevertheless, many of those standards will remain applicable in the UK, having been retained from EU legislation. This could lead to significant differences or gaps in interpretation.

Differing consumer standards will make smooth trade between the UK and EU more difficult to achieve

The objectives pursued by the UK and the EU in exit negotiations include the creation of "an ambitious, broad, deep and flexible partnership across trade and economic co-operation" ¹² . However, this goal may be jeopardised by a widening gap between the applicable rules in the UK and the evolving body of consumer protection law in the EU ¹³ .

Scotland's newly devolved consumer powers in the context of Brexit

The Scotland Act 2016 devolved powers for consumer advice and advocacy to the Scottish Parliament.

The EU has competence to "contribute to protecting the health, safety and economic interests of consumers", so that their interests are promoted and a high level of protection is ensuredⁱⁱⁱ. This competence is shared between the EU and the member states.

This part of the briefing discusses how these competences interact.

The Scottish Parliament is not constrained in its ability to exercise its consumer powers by EU competence in this area

Under their shared competency on consumer matters, member states remain competent to create their own framework for upholding consumer protection standards. The EU, on its part, is competent to adopt consumer-related harmonisation measures which are necessary to ensure the good functioning of the internal market. It can also support, supplement and monitor the implementation of frameworks within member state competence in this area.

It is consistent with the shared nature of EU powers in this area, and with the [principle of national autonomy](#), that member states are responsible of setting up the structures to support consumers through advice and advocacy.

iii Article 169 of the Treaty on the Functioning of the European Union.

On this basis, there is nothing to prevent the Scottish Government acting in this area, either before or after Brexit. Thus, there is no impediment to the Scottish authorities implementing the agenda outlined earlier.

The competence of devolved institutions may change after Brexit

The need for devolved legislation to comply with EU law has led to legal and regulatory consistency - albeit not complete uniformity - in a number of policy areas. This has created common approaches to policy across the UK, even in areas of devolved competence.

When the EU rules cease to apply, there is an increased potential, post-Brexit, for policy divergence between England, Northern Ireland, Scotland and Wales. In some areas, policy differences may be unproblematic. In others, however, the impact could be significant, potentially creating internal barriers to trade, or gaps in regulation.

The UK Government and devolved administrations have agreed that, after the UK leaves the EU, there will continue to be benefit in having policy uniformity in some areas. It has therefore been proposed that "common frameworks" are put in place for dealing with a range of policy areas after Brexit. These are discussed in more detail in the [Common frameworks](#) section.

However, it is not the current intention to deal with consumer protection through a common framework. The [UK Government's analysis](#) ¹⁴ proposes that no further action is taken in this area. This leaves the Scottish Government free to pursue its own policy objectives, to the extent that competence is devolved.

Common frameworks

The Joint Ministerial Committee on EU negotiations (representing the relevant representatives from the UK and devolved governments) issued a communique containing the following definition of common frameworks ¹⁵ :

Common frameworks

"As the UK leaves the European Union, the Government of the United Kingdom and the devolved administrations agree to work together to establish common approaches in some areas that are currently governed by EU law, but that are otherwise within areas of competence of the devolved administrations or legislatures. A framework will set out a common UK, or GB, approach and how it will be operated and governed.

"This may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition, depending on the policy area and the objectives being pursued. Frameworks may be implemented by legislation, by executive action, by memorandums of understanding, or by other means depending on the context in which the framework is intended to operate."

In April 2019, the UK Government's Cabinet Office published its "[Revised Frameworks Analysis](#)" ¹⁴ . This looked at areas where EU law intersects with devolved competence. It categorised these areas on the basis of three headings:

- subjects where legislation may be necessary to maintain common frameworks;

- subjects where non-legislative frameworks may be needed; and
- subjects where there was no need for further action.

Consumer law was identified as an area where no further action was needed.

Can the Scottish Parliament legislate to protect consumer rights by requiring the use of ADR in consumer disputes?

As the UK exists the EU, the Scottish Parliament has the potential to assume a greater role in improving access to consumer redress.

The possibility that the UK Parliament may introduce a [common framework](#) in the area of consumer redress cannot be excluded. However, it is arguable that the Scottish Parliament can currently take action in this area without impinging upon the limits of its devolved powers.

The Scottish Parliament has general competence to legislate for judicial remedies

Under the current devolution settlement, the Scottish Parliament has general competence in relation to court structures and processes, including the power to legislate for judicial remedies.

In the context of consumer claims, the options for redress are set out in EU legislation, implemented in the UK via the Consumer Rights Act 2015. However, EU law deals with the standards of protection to be set, rather than how member states chose to deliver those standards.

The EU's powers do not extend to the harmonisation of procedural rules in this area. Procedural rules are the rules governing how court or tribunal actions can be raised and dealt with.

Under the principle of [national autonomy](#), EU member states have responsibility for deciding how EU rights can be enforced. Their discretion is limited by the requirements that those rights are effective and treated equivalently to domestic rights.

It is arguable that the Scottish Parliament can legislate to require the use of ADR in consumer disputes

On this basis, it is arguable that the Scottish Parliament could address the need to maintain high standards for the protection of consumers by improving court procedures for dealing with redress. For example, could the Scottish Parliament make it compulsory for businesses to agree to the use of ADR to settle consumer disputes?

ADR is seen as a more accessible way of settling consumer disputes

ADR is regarded as being a more accessible and less intimidating way for consumers to get redress in comparison to formal court action. It is also less costly for the public purse and, provided the quality of decision-making is high, it is capable of ensuring fuller

compliance with consumer protection standards ¹⁶ . There are various initiatives already in place to encourage greater use of ADR.

As discussed, the current law requires businesses to provide information about an ADR scheme when faced with a consumer complaint which cannot be resolved. However, businesses are not required to use such a scheme, even if the consumer wants to.

It could be argued that improved consumer redress options are within the competence of the UK Parliament. Alternatively, such a change should only be delivered through a common framework so that the the good functioning of the UK's internal market is not endangered.

There are, however, doubts that these approaches would be fully in-keeping with maintaining the effectiveness of the current devolution settlement. The House of Commons Select Committee on Public Administration looked at this issue and concluded ¹⁷ :

" . . . in these areas of intersection, it is clearly open to the devolved nations of the UK to legislate differently and, therefore, diverge if they so choose . . . "

In the Committee's view, divergence was not likely to be "problematic" in many areas.

Previous court judgments in devolution disputes support this approach

It is submitted that this statement is consistent with the case law of the UK courts concerning the interpretation of the existing devolution rules.

In the [Imperial Tobacco judgment](#) ¹⁸ , for instance, the UK Supreme Court held that under the existing devolution settlement:

" . . . the Scottish Parliament should be able to legislate effectively about matters that were intended to be devolved to it, while ensuring that there were adequate safeguards for those matters that were intended to be reserved . . . "

It was concluded in that case that legislation restricting the visibility of tobacco products was within the competence of the Scottish Parliament. This was because the policy was aimed at upholding public health objectives, which is devolved.

This was despite the fact that the restrictions affected products supplied by traders based elsewhere in the UK. Lord Hope took the view that any adverse impact on the functioning of the UK internal market resulting from the application of these new rules constituted "simply a consequence of the purpose to promote public health" ¹⁸ .

It is therefore arguable that the Scottish Parliament could introduce procedural consumer redress options that diverge from those in force throughout the UK. This could include making ADR mechanisms compulsory for businesses. If these new rules apply to all traders within Scotland on the basis of objective and non-discriminatory criteria, they are likely to remain consistent with the limits of the powers devolved under the Scotland Act.

Inter-governmental relations

The relationship between the UK Government and the devolved administrations is regulated by the [Memorandum of Understanding](#) ¹⁹. This was negotiated between the UK Government, the Scottish Government, the Welsh Executive and the Northern Ireland Executive in 2012.

The Memorandum is not binding. However, it provides a “statement of political intent” that contains the principles and procedures governing co-operation between the UK Government and the devolved administrations.

The Joint Ministerial Committee provides a forum for discussing devolution issues

Central to the inter-governmental relations framework laid out by the Memorandum is the Joint Ministerial Committee. Its function is to provide a forum for discussion between the relevant ministers of the UK Government and devolved administrations.

The Joint Ministerial Committee is called regularly throughout the year in its “functional composition”. This is when it is constituted by ministers who are competent to deal with the subject matter being discussed.

It can be convened to examine non-devolved matters that may have an impact on devolved competences and devolved matters whose management may affect reserved issues. The Committee also allows the administrations to discuss devolved matters that may be beneficial to consider jointly.

Furthermore, it is the Joint Ministerial Committee's task to offer a forum within which any conflicts concerning the exercise of devolved and reserved matters should be resolved.

Proposals for ADR in consumer disputes could be discussed at the Joint Ministerial Committee

The Joint Ministerial Committee could provide a forum for negotiation before legislation dealing with ADR for consumer complaints was laid before the Scottish Parliament.

Such discussions could even lead to the UK Government reconsidering its policy position on ADR

These discussions could even lead to the UK Government reconsidering its existing stance on the optional nature of ADR in consumer disputes. If the Scottish Parliament were to implement more protective redress rules, it could potentially be more difficult for the UK Government to justify continuing to uphold less consumer-friendly rules. However, this would remain a political decision for the UK Government.

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