

EXPLANATORY MEMORANDUM TO
THE CONSUMER PROTECTION (ENFORCEMENT) (AMENDMENT ETC.)
REGULATIONS 2020

2020 No. 484

1. Introduction

1.1 This explanatory memorandum has been prepared by Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument implements Regulation (EU) 2017/2394 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) 2006/2004 (“**the new CPC Regulation**”) into UK law, where such implementation is necessary.

2.2 While the new CPC Regulation is directly applicable in the UK, this instrument ensures that it operates correctly. It ensures that competent authorities have, in domestic law, the investigation and enforcement powers necessary to perform the functions required by the new CPC Regulation. The instrument ensures that those powers can be exercised in relation to EU laws (as implemented in domestic law) which have been brought in scope of the CPC Regulation for the first time.

2.3 The UK is required to implement the CPC Regulation because the Regulation came into force on 17th January 2020 when the UK was still a member of the EU.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure, there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom. Consumer law enforcement policy is transferred to Northern Ireland, but the Northern Ireland Department for the Economy has agreed that implementation can be carried forward on a UK basis.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 The Minister for Small Business, Consumers and Labour Markets, Paul Scully, has made the following statement regarding human rights:

“In my view, the provisions of the Consumer Protection (Enforcement) (Amendment etc.) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument is being made under sections 210(9) and 212(3) of the Enterprise Act 2002 and section 2(2) of the European Communities Act 1972 to implement certain aspects of the new CPC Regulation. The attached Transposition Note explains the Department’s approach to implementation.
- 6.2 The new CPC Regulation has repealed and replaced the previous CPC Regulation ((EC) No 2006/2004) (“the old Regulation”) on cooperation between national authorities responsible for the enforcement of consumer protection laws. The old Regulation established a set of minimum investigation and enforcement powers to ensure that enforcement activity is consistent and effective in all jurisdictions in relation to infringements of specified EU laws that harm the collective interests of consumers on a cross-border basis.
- 6.3 The enforcement powers under the old Regulation were provided for in UK law by Part 8 of the Enterprise Act 2002 (“Part 8”). Part 8 was originally enacted to transpose the Injunctions Directive¹ and was subsequently amended² to give full effect to the requirements of the old Regulation. The investigation powers were originally provided for in Part 8, but subsequently moved to Schedule 5 to the Consumer Rights Act 2015 (“Schedule 5”) as part of a wide-ranging consolidation of consumer law investigatory powers.
- 6.4 The Proposal for the new CPC Regulation was considered and cleared by the House of Commons European Scrutiny Committee on 13th November 2017. The House of Lords European Union Committee continues to retain the Regulation under scrutiny pending more clarity about the future relationship with the EU.
- 6.5 The CPC Regulation is directly applicable in the UK, but implementation is necessary in certain respects to ensure the effective operation of the Regulation. The UK is obliged to carry out implementation, as the new CPC Regulation came into force when the UK was still a Member State of the EU (17th January 2020). It will continue to apply directly to the UK throughout the transition period provided for by the Withdrawal Agreement between the UK and the EU³.
- 6.6 The new CPC Regulation applies to enforcement of various pieces of sectoral EU legislation with consumer elements, some of which are owned by other Government departments.

7. Policy background

What the new CPC Regulation does

- 7.1 The new CPC Regulation repeals and replaces the old Regulation. The old Regulation established a procedure for relevant competent authorities in Member States to

¹ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (codified version).

² By the Enterprise Act 2002 (Amendment) Regulations 2006 (S.I. 2006/3363).

³ See Articles 126 and 127 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

cooperate to address cross-border infringements of selected EU laws affecting the collective interests of consumers.

- 7.2 The new CPC Regulation reforms the cooperation framework, particularly in response to enforcement challenges posed by new digital practices and technology in consumer markets. The objective is quicker and more efficient enforcement, minimising consumer detriment and increasing certainty for businesses.
- 7.3 It does this in several ways, including:
- Introducing a more streamlined cooperation procedure and increasing the number of EU laws affecting consumers to which it applies;
 - Amending or introducing minimum enforcement and investigation powers;
 - Allowing consumer organisations to provide enforcers with intelligence about consumer detriment through an alert mechanism in Articles 26-27.
- 7.4 It is the updated investigation and enforcement powers in particular which require implementation in UK law in order for the new CPC Regulation to operate effectively. Implementation is discussed further in the following section.

The UK's approach to implementation

- 7.5 The government is taking a proportionate approach to implementation of the new CPC Regulation to reflect EU withdrawal. For instance, the UK has relied on existing provisions in domestic law where those are sufficient to meet the Regulation's requirements.
- 7.6 The government also seeks to avoid this instrument limiting or prejudging consideration of the full range of options for wider consumer law reforms, both to the domestic consumer enforcement landscape and to enforcement powers, that it has committed to bring forward⁴.
- 7.7 Certain aspects of implementation have necessitated policy choices which are summarised below.

Scope of the new CPC Regulation and competent authorities

- 7.8 The new CPC Regulation brings certain pieces of EU legislation affecting consumers within scope for the first time (these are listed in the annex).
- 7.9 In one case, the relevant domestic enforcement authority, the Office of Rail and Road (ORR), was not already a competent authority under the old Regulation. The ORR is therefore being designated as a competent authority and this instrument gives it the investigation and enforcement powers necessary for it to exercise this role.
- 7.10 The Maritime and Coastguard Agency, the Office for the Traffic Commissioner and the Department for Infrastructure (Northern Ireland) were listed as competent authorities for the purposes of the old Regulation but did not have powers under Part 8 and Schedule 5. This instrument therefore amends those pieces of legislation to ensure that these organisations have the investigation and enforcement powers required by the new CPC Regulation.
- 7.11 The new CPC Regulation allows Member States to involve "designated bodies" in the application of the Regulation (Article 7) and to provide for consultations with

⁴ The 'Modernising Consumer Markets: Green Paper' is available online at: <https://www.gov.uk/government/consultations/consumer-green-paper-modernising-consumer-markets>

consumer organisations, trader associations, designated bodies or others regarding the effectiveness of proposed commitments to cease infringements (Article 9(8)). The UK has chosen not to make any specific provision in these respects, in line with its light-touch approach to implementation outlined above.

Enforcement powers

- 7.12 Most of the enforcement powers in the new CPC Regulation already exist in Part 8, pending some minor technical amendments. Some, however, require implementation in domestic law, as follows:

Enforcement powers: online interfaces

- 7.13 The most significant change to the EU framework is the requirement for Member States to give competent authorities express new powers enabling them to, among other things, facilitate the removal of online content from or restrict access to websites⁵. These powers may be exercised where there is a risk of serious harm to the collective interests of consumers and there are no other means that would, by themselves, be wholly effective. These powers may be exercised against third parties or intermediaries who are not themselves responsible for the infringement, as well as against infringing traders.
- 7.14 We have decided that only the CMA, not other competent authorities, will be able to exercise the new powers relating to online interfaces⁶. Furthermore, CMA will do so through the courts rather than under its own authority⁷. These powers are located in Part 8 with the other enforcement powers, which are also court-based. These decisions are for reasons of proportionality and to avoid prejudging possible wider reforms.
- 7.15 The government will work closely with industry and regulators to ensure the new online interface powers remain effective, keep pace with technological developments and remain in line with the government's wider digital and consumer enforcement approach.

Enforcement powers: penalties

- 7.16 The new CPC Regulation requires Member States to give competent authorities the power to impose penalties for relevant infringements and for failure to comply with decisions, orders or measures adopted pursuant to the Regulation. The penalties must be effective, proportionate and dissuasive. We have decided to comply with this requirement by relying on the existing suite of enforcement powers contained in Part 8, rather than developing an entirely new penalty regime. Therefore, EU law that is in-scope of the CPC Regulation for the first time is being brought within scope of Part 8, meaning that the penalty regime is available for these laws.
- 7.17 Competent authorities will therefore be able to seek enforcement orders and undertakings from traders who breach laws in-scope of the new CPC Regulation.

⁵ These powers, which derive from the new CPC Regulation, are separate to the proposals outlined in the DCMS Online Harms White Paper Response [<https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper>].

⁶ Article 9(2) of the new CPC Regulation provides that Member States may decide not to confer every investigation and enforcement power on every competent authority, provided those powers can be exercised effectively.

⁷ Article 10(1) of the CPC Regulation provides four options for exercise of the powers in Article 9, including by application to the courts (Article 10(1)(d)).

Under existing UK law, enforcement orders may also include enhanced consumer measures. Failure to comply with an enforcement order may give rise to contempt of court proceedings, which could result in fines and/or imprisonment.

- 7.18 The Government has, in its 2018 Green Paper, Modernising Consumer Markets⁸, proposed giving civil courts the power to impose financial penalties on traders for breaches of consumer law. The Government is considering the responses to the Green Paper with a view to further policy development.

Investigation powers

- 7.19 The investigation powers set out in the new CPC Regulation already exist in Schedule 5 and do not require further implementation, subject to various technical amendments.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union/trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

- 9.1 There are no plans for consolidation.

10. Consultation outcome

- 10.1 Technical discussions took place with a range of stakeholders in autumn 2019. These considered questions such as who should act as a competent authority and how the powers should operate. The stakeholder groups consulted were public enforcers (including competent authorities), consumer organisations and business representatives.
- 10.2 Respondents broadly welcomed the approach to implementation. Some public enforcers and consumer organisations expressed a preference for the new online interface powers to be conferred on all competent authorities. Two public enforcers made the case for exercising the powers administratively rather than through the courts. However, respondents were also cognisant of proportionality and the need to avoid making decisions in this instrument that would limit or prejudice proposed wider reforms to the domestic consumer enforcement landscape, as discussed in section 7.

11. Guidance

- 11.1 We will publish guidance if necessary.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies as the underlying consumer laws with which businesses are expected to comply are not changing and no new obligations are being imposed on them.
- 12.2 The impact on the public sector is that enforcement bodies such as the CMA will have more laws in scope of enforcement and have new powers for undertaking enforcement, as well as enhanced cooperation procedures. The only direct impact to enforcement bodies will likely be changes to the caseload level and minor

⁸ <https://www.gov.uk/government/consultations/consumer-green-paper-modernising-consumer-markets>

familiarisation costs with the new procedure and laws in scope. We have spoken with the CMA who anticipate in the light of the impact that EU exit has already had on the caseload (reduction in cases) that there will be no significant change to the level of caseload. This impact, however, is inherently uncertain as we do not know how many more cases will arise as a result of the increased scope.

- 12.3 An Impact Assessment has not been prepared for this instrument as net impacts to business are expected to be comfortably below £5m. A 'de minimis' self-certification has been signed off by the Department's Better Regulation Unit to verify that there is reasonable expectation that the aggregate impacts would be below the £5m threshold.
- 12.4 The European Commission published an impact assessment on this regulation. They estimate that the CPC regulation could lead to a legitimate reduction of the non-compliance rate of 10% from 37% through targeted enforcement actions. This would achieve a 30% reduction in consumer detriment.
- 12.5 The legislation may lead to benefits to consumers through an increased likelihood of enforcement action and a reduction in harmful behaviour that is prohibited by the consumer law. This would be in areas of consumer law that have newly come in scope of cross-border enforcement. This increased threat of enforcement through the improved powers and cooperation of competent authorities could encourage firms that are currently non-compliant, to subsequently comply with consumer law.
- 12.6 The legislation does not, however, change the underlying consumer legislation itself. No businesses will need to change their behaviour in order to remain compliant with consumer legislation. As a result, there will be no "compliance costs" as there will be no need to carry out internal processes or system changes in order to remain compliant.
- 12.7 If the level of enforcement and investigation action increases, there will be some additional cost to businesses due to an increased number of businesses going through the investigation process. This leads to costs such as familiarising with official investigation procedures, taking legal advice, responding to requests for information and assisting the case team with the investigation, including time spent in relevant meetings. These costs will vary significantly from case to case, especially depending on the case outcome; a case which progresses to court and enforcement action will involve greater costs to a business than a case that is closed early due to having no grounds for action. As we only expect a small number of increased investigations as a result of the increased scope of CPC enforcement, we do not expect this to represent a large overall additional cost to business.
- 12.8 The number of information and enforcement referrals from EU authorities through the CPC arrangements is relatively low. There are currently around 30 'live' enforcement and information referrals coordinated by the CMA, which acts as the UK's Single Liaison Office, from other EU authorities. Since the EU referendum the number of CPC referrals has significantly decreased from 43 in 2016, to 13 in 2018. Most information requests are actioned by UK enforcement authorities and not UK businesses. Most enforcement requests, on average 10 per year, result in action being taken by a UK trader to become compliant. Therefore, the impact on traders who are already compliant with consumer protection law is negligible.
- 12.9 The new CPC Regulation also contains new arrangements for Member States to respond to 'Widespread Infringements' (those potential infringements which affect more than two Member States). We anticipate these new arrangements will have a

marginal impact on compliant UK traders as the number of cases is expected to be low and will likely involve traders located in other EU jurisdictions. There may also be a reduced burden on business, as enforcers coordinate their information and enforcement activity reducing the need for individual traders to respond to multiple requests.

- 12.10 As this legislation will not materially change the substance of the UK's domestic consumer protection regime, we expect it to lead to a small additional reduction in harmful behaviour and therefore only a small reduction in associated consumer detriment in the UK. This also supports the case that business costs are likely to be low.
- 12.11 The increased scope of consumer law subject to CPC enforcement could lead to an additional cost burden to enforcement agencies as there may be a small increase in the number of requests for action from other CPC members which may lead to a small increase in enforcement caseload.

13. Regulating small business

- 13.1 The legislation applies to enforcement in respect of activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses. This instrument does not change any of the underlying consumer laws in-scope of the new CPC Regulation and therefore does not require businesses to change their behaviour to remain compliant.
- 13.3 The 'de minimis' self-certification highlights that costs to business will arise from familiarising themselves with any extra potential requirements to comply with an investigation. The overall cost to small businesses would largely depend on whether the increased caseload also brings in more small businesses. Most businesses will consider this on a need to know basis i.e. when they are the subject of an investigation. The CMA anticipates no significant change to the caseload, so this is likely to be small. As shown, costs are expected to be small, moreover, they are not expected to have any disproportionate impact on small businesses.

14. Monitoring & review

- 14.1 A review is not appropriate for this legislation because the impacts of the measure are not expected to be significant (under £5 million annualised net business impact), and there are also no other factors that would make a review clause particularly desirable.

15. Contact

- 15.1 Aditi Arora at the Department for Business, Energy and Industrial Strategy Telephone: 020 7215 3984 or email: Aditi.Arora@beis.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 David Marshall, Deputy Director for Consumer Policy and Enforcement, at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Paul Scully, Minister for Small Business, Consumers and Corporate Responsibility, at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

Annex: EU laws newly within scope of the CPC Regulation

Passenger rights

- Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations.
- Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air.
- Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) (Arts 22-24).

Digital

- Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.

Financial services

- Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features.
- Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010.

Miscellaneous

- Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (art 20).
- Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.