

The impact of Brexit on consumer protection and financial market regulation – Financial Inclusion Centre seminars

Introduction

‘Brexit’ could have serious implications for consumer protection and how financial markets are regulated in the UK. How much UK consumer legislation and regulation is affected will depend on which form Brexit takes, which could range from ‘Brexit-lite’ to a ‘hard-Brexit’. Risks would mainly arise if access to the single market in financial services is lost or severely curtailed. Remaining in the single market would require most, if not all, of current EU-derived law to stay in place. Depending on the outcome, we see two key risks emerging.

Firstly, the financial sector already argues disingenuously that the current system of financial regulation stifles innovation and competition. Industry lobbyists will capitalise on the opportunity provided by Brexit to lobby for deregulation and a weakening in consumer protection in financial services.

Secondly, if access to EU markets end up being reduced, the City of London will seek to offset this by attracting additional business from other international financial markets. On the face of it, this could be beneficial for the UK economy. But, the economic and social costs of the 2007/08 financial crisis provided a painful reminder of the risks associated with an over-reliance on financial services. The UK financial sector is already one of the biggest in the world and if the UK’s exposure to international financial markets is increased, this could further threaten the stability of the UK financial system and resilience of the wider economy.

There are big choices to be made and well-resourced financial services industry lobbies are already actively trying to influence the course of Brexit. It is important that consumer groups and civil society understand the potential consequences of Brexit. With this in mind, The Financial Inclusion Centre is providing seminars for consumer groups, civil society organisations, and other stakeholders such as journalists looking for a deeper understanding of Brexit. The seminars cover the framework of EU legislation, the UK’s current approach to implementing EU legislation and, critically, what the implications of various Brexit scenarios might be for UK financial consumers and financial market regulation.

The one day seminars are led by Mick McAteer, one of the UK’s best known consumer advocates with 20 years experience representing UK financial consumers at UK and EU level, and John Crosthwait, previously a senior lawyer with one the leading law firms in the City and a specialist in financial services law and regulation.

The seminar programme is attached. For further information including on costs please contact mick.mcateer@inclusioncentre.org.uk.

Brexit and UK consumer protection and financial regulation

Financial Inclusion Centre 1 day Seminar: Programme Content

Morning sessions

Session I: EU law – the Basics

In this first session, we cover the basics of EU legislation and regulation, and how this interacts with UK legislation and regulation.

1 The EU Constitution itself

- Created and varied by various Treaties. The foundational treaty is the Treaty on European Union, which has gone through various iterations. Its latest version (2007) was shaped by the Lisbon Treaty, which inserted into the TEU the (in)famous Article 50.

2 Directives

- These tell member states what legal results must be achieved, but leave it to each member state to bring about those results by means of domestic law. An example of a directive is MiFID. This is covered in more detail in session III.

3 Regulations

- These have direct effect in member states, without any need to change domestic law (though member states may be advised to do so in order to remove resulting ambiguities and inconsistencies). A well-known example of a regulation is the Unfair Terms in Consumer Contracts Regulation. This is covered in session III.

5 European Court of Justice

- The ECJ interprets EU law and adjudicates on whether it is complied with. Decisions are binding on national courts.

Session II: UK's approach to implementing EU law

In this session, we describe how the UK has approached the implementation of EU law. This is important as it may determine the volume of legislation which has to be unwound or unpicked – depending on which form Brexit takes.

1 European Communities Act 1972 (which has been endlessly amended)

- This essentially provides for the recognition of EU treaties and provides for the primacy of EU laws.
- The ECA grants very wide powers to the Executive (ie the government) to implement EU law (principally by statutory instruments, which can amend existing Acts of Parliament).

2 Statutory Instruments

- As mentioned, vast amounts of EU law have come in via Orders and Regulations (subject to some but usually light Parliamentary scrutiny). These may either amend existing legislation, such as the Financial Services and Markets Act 2000 or be “stand alone”, such as the 2007 Money Laundering Regulations.
- In recent times, governments have adopted a “copy out” approach to implementing EU law. This means that the text of relevant directive is incorporated verbatim into UK legislation (even if the EU text is obscure, or contains concepts which don’t readily fit into existing UK legislation). The reason is to avoid accusations of wrongful implementation.

3 Rules made by made by statutory bodies (such as the Financial Conduct Authority)

- Regulatory rules may implement some directives (or duplicate statutory implementation). This especially true of the recent “Level 2” type directives, which contain specialist technical detail (eg about conduct of business).

4 EU regulations, having direct effect

- As mentioned, EU regulations do not require national implementing measures. However, many such regulations are incorporated into regulatory rulebooks, for the sake of clarity. Such incorporation has consequences following Brexit.

Session III: Examples of EU law implemented or having direct effect in the UK

In this session we provide examples of EU legislation and regulations which: i. have already been implemented or have direct effect in the UK and ii. forthcoming legislation and regulations, yet to be implemented which may be affected by Brexit.

1 Financial Services – wholesale

- *Capital Requirements Directive* (in this area of standards for banks’ capital, the EU generally follows the world-wide Basel recommendations)
- *Solvency II Directive*- prudential requirements for banks
- *Markets in Financial Instruments Directive (MiFID)* – the key directive creating the single market in financial services, by providing for “home” state authorisation of firms and for a “passport “ right to establish branches or provide cross-border services elsewhere in the EU without the need for local authorisation. MiFID and subsidiary legislation also lays out common conduct of business requirements, and harmonised rules for financial markets and trading platforms
- *Undertakings for Collective Investment in Transferable Securities Directive (UCITS)* – provides a harmonised regime for the standards to be met for collective investment products, such as unit trusts, and the managers of investment vehicles
- *Insurance Mediation Directive* – another harmonising directive applying to the sale of insurance across the EU
- *Many other directives and regulations* covering standards for issuers of securities, hedge funds, depository and settlement systems, benchmarks such as LIBOR, payment systems, money laundering and market abuse

2 Financial services – retail

- *MiFID* sets up a comprehensive conduct of business regime for investor protection. Mainly implemented through the rulebook of the Financial Conduct Authority (FCA)
- *Mortgage Credit Directive and Consumer Credit Directive* aimed at establishing standards for both mortgage and general credit, with a high level of consumer protection
- *Payment Accounts Directive* establishes, among other things, a legal right to a basic bank account
- *Measures* providing for deposit protection and other forms of consumer compensation

3 Consumer protections – general

- *Unfair Terms in Consumer Contracts Regulation* seeks to restrict or outlaw legal terms in consumer contracts which are overly biased in favour of the service provider or seller
- *Unfair Commercial Practices [Regulation]* outlaws certain high pressure sales techniques
- Numerous measures safeguarding consumer rights in areas such as data protection, distance selling, and e-commerce which impact on financial services

Afternoon sessions

Session IV: Brexit – which form might it take?

In this session, we describe the different forms Brexit might take, and what this might mean for the approach taken by the UK government to consumer protection and financial regulation.

1 European Economic Area

- If the UK joins the EEA (Brexit-very-lite) nothing much would change (in financial services and general consumer protection) areas: except that the UK would not have a say, apart from being consulted, in the formulation of the EU legislation that has to be adopted by EEA members.
- The EEA comprises the EU and the non-member states of Norway, Iceland and Lichtenstein and is in effect the extension of the single market to include the latter three but without them taking part in the EU's political institutions

2 Brexit-lite (outside the EEA)

- Here one envisages arrangements that keep UK and EU law closely aligned in certain key sectors (eg financial services). EU law already in theory allows for the recognition of non-EU “equivalent” financial services regimes, which would permit firms to sell products and services into the EU without further licensing (but only at present in professional markets markets).
- The UK would still need to unpick, amend or replace EU legislation to create a coherent new regulatory framework even if it works broadly in the same way as the pre-Brexit regime, because of “equivalence”.
- EU regulations having direct effect would lapse unless replaced by similar UK legislation.
- The EU would probably insist that consumer protection rules remain broadly equivalent in the relevant sectors kept aligned

3 Hard Brexit (back turned on EU)

- Root and branch rewriting of UK law- the work of years.
- Widespread deregulation? Consumer detriment re-embedded?
- Being “competitive” on the world stage may become a race to the bottom in terms of attracting footloose global businesses

Session V: Workshop and discussion

In the final session, we discuss with participants what this might mean for their own particular areas of work, and identify priority areas of consumer protection and financial regulation which are at greatest risk from Brexit.

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