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Tech Week: Online Retail Update 2021

Helen Brown & Julia Hemmings | Thursday 11 November 2021



Speakers



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Agenda

1 EU GOODS DIRECTIVE

2 EU DIGITAL CONTENT AND SERVICES DIRECTIVE

3 OMNIBUS DIRECTIVE

4 UK REGULATORY UPDATE

5 GREEN CLAIMS

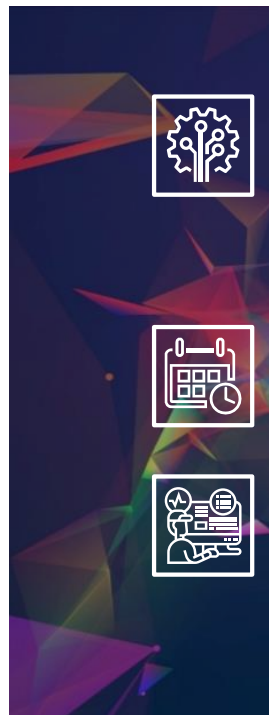


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EU Goods Directive

Goods directive: Key changes

EU directive 2019/771 – applies across EU from 1 January 2022



Overview	Detail	Aligns with UK Consumer Rights Act?
Goods with a "digital element"	Covers goods that include digital content or digital services that is incorporated or interconnected with such goods and the absence of that content or service would prevent the goods from performing their function	Yes – similar approach
Conformity period	2 years (no change from Guarantees Directive) Consumer must notify the trader within 2 months	No – conformity period based on expected lifetime of the product No strict notification period
Updates to digital content	Consumers entitled to updates necessary to keep goods in conformity	No obligation to provide updates

Goods directive: Key changes

EU directive 2019/771 – applies across EU from 1 January 2022



Overview	Detail	Aligns with UK Consumer Rights Act?
Burden of proof	With trader for 1 year (although member states can extend to 2 years)	No – burden of proof with trader for 6 months
Remedies	Tiered remedies. First Tier: repair or replacement; Second Tier: price reduction or termination and refund. No short term right to reject	Yes – but with some variations. In UK trader only gets one chance to get First Tier remedies right before consumer can exercise Second Tier.
Manufacturer Guarantee	If guarantee given, manufacturer directly liable to consumer on same terms as seller. Guarantee statement must be provided in durable medium no later than time of delivery	Some differences Manufacturer can determine the extent of obligation in the guarantee terms. More flexibility in providing statement - "on request" from consumer







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EU Digital Content and Services Directive

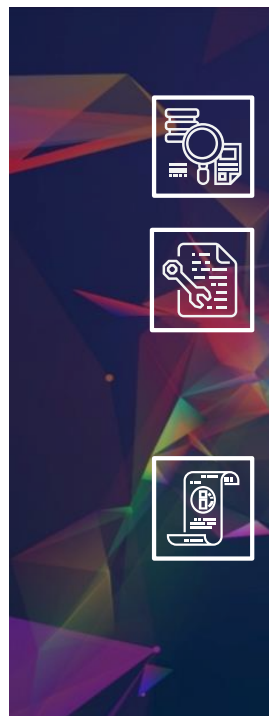
Digital content and services directive: Key changes

EU directive 2019/770 – applies across EU from 1 January 2022

	Overview	Detail	Aligns with UK Consumer Rights Act?
	Digital content and digital services	Applies to digital content (e-books, apps, software, music files) and digital services (cloud services, streaming content and social media)	No – CRA refers only to digital content – so some uncertainty around digital services - whether they are subject to remedies for services or digital content
	Paid for or free?	Applies to paid for and free content and services – where the consumer "pays" with data	No – CRA Only applies where consumer pays a monetary consideration
	Conformity period	2 years for one time supply or for duration of supply where supply is continuous	No express 2 year warranty period but subject to 6 year limitation period
	Updates	Consumers entitled to updates necessary to keep content and service in conformity	No obligation – but allows traders to update provided that the modified content continues to match the description and functionality at the time of original supply

Digital content and services directive: Key changes

EU directive 2019/770 – applies across EU from 1 January 2022



Overview	Detail	Aligns with UK Consumer Rights Act?
Burden of proof	With trader for 1 year from the date of delivery	With the trader for 6 months from delivery
Remedies	Tiered remedies First Tier: trader to bring content or service into conformity by issuing update or new copy Second Tier: consumer entitled to either price reduction or termination and refund	Yes - generally similar but no right to terminate
On termination	At consumer's request trader must make consumer content available in commonly used and machine-readable format	No obligation to make content available

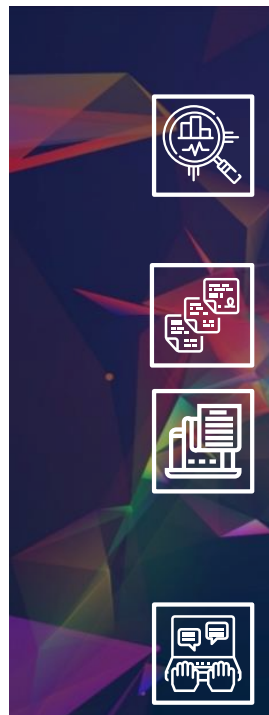


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EU Omnibus Directive

Omnibus directive: Key changes

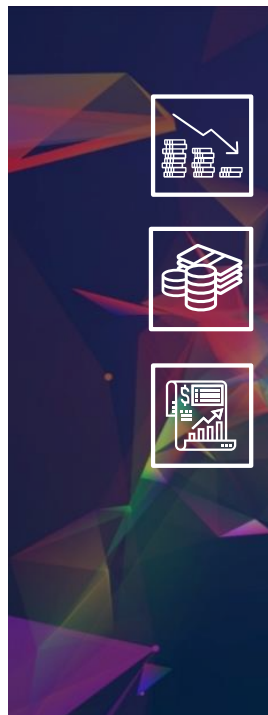
Transparency and online rights



Overview	Detail	Legislation amended
Ranking and search results	Clear information about the main criteria used to rank Clear disclosure of paid ads/payments for rankings	2005/29/EC Unfair Commercial Practices Directive
Information Requirements	Private individual or trader?	2005/29/EC Unfair Commercial Practices Directive & 2011/83/EU Consumer Rights Directive
Reviews and endorsements	Express prohibition submitting/commissioning fake review or endorsement Traders to justify the reasonable and proportionate steps taken to ensure that the reviews on their site are genuine	2005/29/EC Unfair Commercial Practices Directive
Written record of online communication	Chat bots for example must allow consumers to keep a written record of correspondence on a durable medium.	2011/83/EU Consumer Rights Directive

Omnibus directive: Key changes

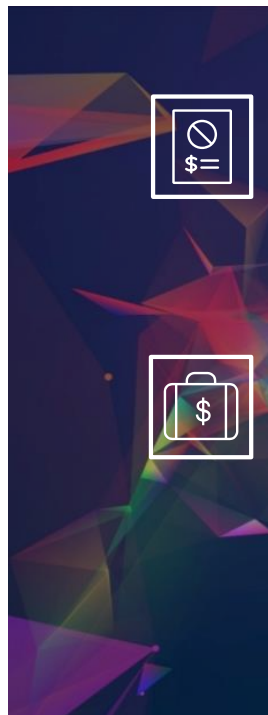
Transparency and online rights



Overview	Detail	Legislation amended
Price reductions	Price reductions must show the "prior price" – prior price being the lowest price that item was sold for before the price reduction	98/6/EC Price Indications Directive
Personalised pricing	Traders to inform consumers each time that a price presented to them is based on personal pricing algorithm	2011/83/EU Consumer Rights Directive
Payment with personal data	Definition of "price" to include payment with personal data. Includes digital content/ services supplied for "free" but in exchange for which the consumer provides the trader with personal data	2011/83/EU Consumer Rights Directive

Omnibus directive: Key changes

Consumer rights enforcement



Overview	Detail	Legislation amended
Penalties & Cooperation	<p>National authorities can impose penalties in a coordinated manner</p> <p>And can work together on widespread cross-border infringements across a number of EU member states</p> <p>Fines: 4% of the trader's annual turnover</p>	<p>93/13/EEC Unfair Contract Terms Directive</p> <p>2005/29/EC Unfair Commercial Practices Directive</p> <p>98/6/EC Price Indications Directive</p> <p>2011/83/EU Consumer Rights Directive</p>
Compensation	<p>Direct right to compensation for unfair commercial practices</p>	<p>2005/29/EC Unfair Commercial Practices Directive</p>



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UK Reforms to Consumer Law

UK reforms to consumer law

BEIS consultation: Reforming competition and consumer policy – 20 July 2021

- The consultation covered reforms to:
 - competition policy
 - consumer policy
 - consumer law enforcement
- Follows on the back of the 2018 Consumer Green Paper and Penrose Report of February 2021
- Closed on 1 October 2021



Proposed changes to UK consumer law



Subscriptions

- New pre-contract information requirements
- Controls on auto-renewal
- New rules on making exiting a subscription easier



Fake reviews

- Add commissioning / incentivising fake review as a new black listed practice in CPRs
- Add hosting reviews without taking steps to ensure they are genuine as a new lack listed practice in CPRs



Online exploitation

- New rules to take action against online behavioural techniques that influence consumers
- Including drip pricing, and transparency on ranking search results

Proposed changes to UK consumer law



Contract formation

- Law Commission recommendation to clarify when a consumer acquires ownership of goods
- Considering this alongside greater protection for consumer pre-payments



Enforcement

Give the CMA the power to:

- decide if business is in breach of consumer law
- order redress to victims of breach
- order business to pay financial penalty – up to 10 % of global turnover



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Green Claims

General rules under consumer protection law



Banned practices



**Prohibition of
misleading acts and
misleading omissions**



**General prohibition
on unfair practices**



ASA Rules

Rule 3.1: Marketing communications must not materially mislead or be likely to do so.

Rule 3.7: Before distributing or submitting a marketing communication for publication, marketers must hold **documentary evidence** to prove claims that consumers are likely to regard as objective and that are capable of **objective substantiation**. The ASA may regard claims as misleading in the absence of adequate substantiation.

ASA: Examples of enforcement action

Colourful Coffins Ltd

"100% Recycled cardboard"

Cannot make this claim if the
outer layer was not recycled
cardboard

Carpet Recycling UK Ltd (Not upheld)

The claims made could be
substantiated by robust
evidence

Howies Ltd (Upheld in part)

Overarching claims must be
backed up by evidence
applying to the product
as a whole



CMA guidance & EU initiative



Principles

- Truthful and accurate
- Clear and unambiguous
- Not omit or hide important information
- Fair and meaningful
- Full life cycle of the product
- Substantiated



Green Claims Code



European Green Deal



“

The Green Claims Code has been written for all businesses — from fashion giants and supermarket chains to local shops.

We're concerned that too many businesses are falsely taking credit for being green, while genuinely eco-friendly firms don't get the recognition they deserve.

Any business that fails to comply with the law risks damaging its reputation with customers and could face action from the CMA.

Andrea Coscelli, Head of the CMA, September 2021

Questions

The background features a large, white, irregular circular shape on the left side. The rest of the image is a dark blue gradient. In the top right and bottom left corners, there are abstract, low-poly geometric shapes in shades of purple, pink, and yellow. A network of small, colorful dots connected by thin lines is visible in the upper right corner.



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