Consequences of Brexit in the area of consumer protection

Dr. Malte Kramme
Schedule

1. EEA Agreement
2. WTO rules
3. Conclusion
EEA-Model

- Consumer protection under the EEA Agreement is comparable to the EU consumer protection level
- EEA Agreement incorporates the four fundamental freedoms (goods, services, persons, capital)
- At the time of signing, the EC *acquis* was implemented in the EEA Agreement and its Annexes
- Annex XIX covers consumer protection
EEA Model
Procedure of adoption

• Mechanism for dynamic adoption of new EU secondary law (Article 98 EEA Agreement):
  – Commission informs EFTA on planned legislation in fields governed by EEA Agreement and seeks advise from EEA experts (Article 99 EEA Agreement)
  – After adoption of the new act by the EU, EEA Joint Committee “shall take a decision” to adopt that act “with a view to permitting a simultaneous application” of the respective act (Article 102 EEA Agreement)

→ EFTA states have no direct influence on the legislative process, but are obliged to adopt EU legislation
EEA-Model Coverage (1)

• Wide coverage of EU consumer protection *acquis*
  – **Product safety:** General Product Safety Directive (2001/95/EC), Regulation (EC) on requirements on accreditation and surveillance for the marketing of products No 765/2008, numerous sector-specific product safety legislation
EEA–Model Coverage (2)


EEA–Model Coverage (3)

Regulations in the field of **Judicial Cooperation in Civil Matters** are not covered:

- Brussels I bis Regulation
- Uncontested Claims Regulation No (EC) 805/2004
- Order for Payment Procedure Regulation No (EC) 1896/2006/EU
- Small Claims Regulation No (EC) 861/2007
- Rome I, Rome II

However: **Lugano Convention** (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) is applicable (overrules Brussels I bis for courts in EFTA and EU member states, if disputes concern EFTA member states)
WTO Model

- Irrespective of possible EU-UK relation agreement, the EU Treaties cease to apply two years after the notification.
- Consequence: UK has same relations to EU as other third countries not associated by an agreement.
- UK would neither be bound nor entitled by EU law.
- EU and UK are WTO members.
WTO Model:
Consumer Protection as a Question of Applicability of EU Law

Impact on consumer protection level

• If EU law will still be applicable after Brexit, depends, inter alia, on the UK legislation:
  – Primary UK legislation implementing EU Directives are part of UK legal order → not directly affected by Brexit
  – Applicability of UK secondary legislation implementing UK Directives and applicability of EU Regulations depend on continuous validity/amendment of the UK European Communities Act 1972

• At least at long term, the consumer protection legislation of EU and UK are likely to drift apart (due to changes of EU or UK law or due to different interpretations)

→ From perspective of EU27 consumers, applicability of EU law (conflict of laws rules) will gain in importance
WTO-Model
Example: Online Shopping

Example: UK based operator of an online-shop delivers a defective good to a consumer situated in the EU.

Which legal basis governs the jurisdiction?
• Before Brexit: Brussels I bis Regulation
• After Brexit:
  – Unclear and disputed, if Brussels Convention 1968 overrules Brussels I bis Regulation in member states that are contracting parties of Brussels Convention 1968
  – Courts in other member states (non-contracting parties of Brussels Convention): Brussels I bis Regulation (as far as it is applicable with regard to third countries); as far as it is not applicable, autonomous national rules apply
WTO Model: Example: Online Shopping

Does the consumer have the rights granted by the Consumer Sales Directive (1999/44/EC) if the good is defective?

• At least, if a member state law (implementing 1999/44/EC) is applicable

Determination of applicable conflict of law rules (from the perspective of EU member state courts):

– Applicable law for contractual obligations is governed by Rome I Regulation (593/2008/EC); also applicable with respect to third countries (universal application)

– However it is debatable, if, after Brexit, Rome Convention 1980 takes precedence over Rome I Regulation
WTO Model:
Example: Online Shopping

Applicability of EU consumer law

• Art. 6 lit. c Rome I Regulation: Consumer contracts shall be governed by the law of the country of the consumer if that professional: (a) pursues his activities in the country of the consumer, or (b) directs such activities to that country (…).
  – What means “directs”? (criteria: online-shop in English?; price indications in EUR; deliveries to EU member states, etc)

• Art. 5 (3) Rome Convention: Consumer contract is governed by the law of the country of the consumer if in that country the conclusion of the contract was preceded by a specific invitation or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract.
  – Comparable, but not identical scope and interpretation problems
Conclusion

• **EEA-Model**
  – provides for a comparable consumer protection level;
  – however: reduced harmonisation in field of *Judicial Cooperation in Civil Matters*

• **WTO-Model**
  – UK will not be bound to EU consumer protection law
  – To what extend UK sets forth comparable consumer protection standards (by means of autonomous adaption) is in the discretion of the UK legislator
  – Consequence: Protection of EU27 consumers by EU depends on jurisdiction, applicable law and cross-border enforcement
  – Uncertainty with regard to applicable legal framework and its interpretation → **topic for negotiations** (role model: Denmark?)

• **Other models:** Level of consumer protection depends on outcome of negotiations
Thank you for your attention!