

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 advice 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*
 - **Consumer contract law:** Consumer Rights Directive (2011/83/EU), Unfair Terms Directive (1993/13/EEC), Consumer Sales Directive (1999/44/EC)
 - **Redress:** Injunctions Directive (2009/22/EC), Regulation on Consumer Protection Cooperation (EC) No 2006/2004, ADR Directive (2013/11/EU) (under scrutiny by EEA/EFTA), ODR Regulation (EU) No 2015/524 (under scrutiny by EEA/EFTA)
 - **Commercial practices with consumer relevance:** Unfair B2C Commercial Practices Directive (2005/29/EC), Misleading Comparative Advertisement Directive (2006/114/EC), Price Indication Directive (98/6/EC)
 - **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)

- **Travel and Transport:** Package Travel Directive (1990/314/EEC); Package Travel Directive (2015/2302/EU) (currently under scrutiny by EEA/EFTA), Timeshare Directive (2008/122/EC), Air Transport Regulation (EC) No 1008/2008, Air Passenger Rights Regulation (EC) 261/2004, Rail Passenger Rights Regulation (EU) No 1371/2007, Bus Passenger Rights Regulation (EU) No 181/2011
- **Financial Services:** Distance Marketing Directive (2002/65/EU), Banking Directive (2013/36/EU) (under scrutiny by EEA/EFTA), Payment Services Directive (2007/64/EC), Consumer Credit Directive (2008/48/EC), Mortgage Credit Directive (2014/17/EU) (under scrutiny by EEA/EFTA), E-money-Directive (2009/110/EC), Payment Services Directive (2007/64/EC)

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
- Legal Aid for Cross-Border Disputes Directive (2003/8/EC)
- 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 extent 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!