

British-European Relations Post-Brexit: A Legal Kaleidoscope



21 September 2020

Consumer Law

By Malte Kramme

Consumer Interests and Brexit – An Underestimated Problem?

1. What changes will consumers on both sides of the channel have to face at the end of this year?

Consumer protection does not seem to be a main area of concern for the UK and EU in the withdrawal process. The withdrawal agreement lacks a chapter addressing consumer protection expressly. Consumer protection is also not a specific topic of the negotiations for the future relationship agreement. But this does not mean that consumers will not have to face major changes at the end of the transition period. The opposite is true. The reason consumer protection is not explicitly addressed is because it is a cross-cutting issue. Consumer interests, such as security of supply, personal and physical integrity, price fairness and protection of assets,¹ are affected by almost all of the topics addressed in the withdrawal agreement and in the negotiations of the future relationship agreement. In the following only a few key areas can be addressed in which consumer interests are at stake. In particular, the judicial cooperation in civil matters has been left out as this was already discussed in the second panel.

When going into the details of the EU's plans for the negotiations,² it becomes obvious that many changes which will be visible and tangible to consumers are not meant to be cushioned by the future relationship agreement. Maybe these burdens for consumers shall serve as proof to the Commission that it has stood firm and has not allowed "cherry-picking". As the cross-border activities of companies are less in the public eye, the Commission may be more willing to make concessions in this area.

a) Travelling

Most of all, consumers will notice that the UK is no longer a member of the EU when they travel. This is because consumers from both sides of the channel will become subject to another jurisdiction and thus will be treated as foreigners. In particular, the strategy to cushion the consequences of Brexit by retaining EU law will reach its limits.

- *Visa free travelling and travelling with pets*: One positive thing is that neither tourists from the UK nor from the EU will need a visa for stays of up to 90 days. Cats and

¹ See *Schmidt-Kessel*, Lehrbuch Verbraucherrecht (2018), p. 49 et seq. The UK consumer protection association „Which?“ uses in its “Consumer Charter for Brexit” (p. 3) the following criteria: standards, choice, rights and price.

² For the plans of the EU, see *European Commission*, Draft text of the Agreement on the New Partnership with the United Kingdom, 13 March 2020; Directives for the Negotiation of a new partnership with the United Kingdom of Great Britain and Northern Ireland, 5870/20 ADD 1 REV 3; Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (2019/C 384 I/02), OJ C 384 I/178; *European Commission*, Getting ready for changes – Communication on readiness at the end of the transition period between the European Union and the United Kingdom, COM(2020) 324 final; *European Commission*, Future EU-UK Partnership: Question and Answers on the negotiating directives, 25 February 2020.

dogs are apparently less trustworthy than humans. The EU pet passport will no longer suffice.³ This means that travelling with pets becomes a very complicated operation.⁴

- *Roaming*: Within the EU roaming charges are forbidden. But the respective regulation⁵ does not apply to roaming customers from third countries.⁶ The Commission has stated expressly that roam-like-at-home is not a topic that is up for negotiation.⁷ The introduction of roaming surcharges is therefore up to the mobile operators. However, the UK legislator has provided some safeguards for UK customers.⁸
- *Passenger rights*: Passenger rights are one of the few travel related topics where the effects of Brexit can be cushioned by the retention of EU law. On the one side, the geographical scope of EU regulations on passenger rights is narrowing. On the other side, the Passenger Rights Regulations form part of the converted UK legislation.⁹ Hence, passenger rights formally granted under EU law will now be granted under UK law. This would (e.g.) apply to compensation claims for delayed or cancelled flights from the UK to the EU with an UK air carrier.¹⁰

b) Trade in services

Changes in the legal framework of trade in services will also affect consumer interests. Depending on the sector, trade in services might require a license or be subject to other forms of regulation. This affects *inter alia* the banking, insurance and transportation sector. In such cases, the EU often applies the country of origin approach or passporting concepts in order to avoid the necessity of obtaining licenses in all member states.¹¹ As of 1 January 2021, licenses, authorisations or permits

³ *European Commission*, Getting ready for changes – Communication on readiness at the end of the transition period between the European Union and the United Kingdom, COM(2020) 324 final, p. 19.

⁴ For details, see *Which*, Brexit no deal: a consumer catastrophe?, October 2018, p. 9; see also <https://www.gov.uk/guidance/pet-travel-to-europe-after-brexit>.

⁵ Regulation (EU) 2015/2120 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union.

⁶ See Article 6a Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, consolidated version as of 15 June 2017.

⁷ *European Commission*, Getting ready for changes – Communication on readiness at the end of the transition period between the European Union and the United Kingdom, COM(2020) 324 final, p. 20; see also *European Commission*, Future EU-UK Partnership: Question and Answers on the negotiating directives, 25 February 2020, "What about roaming?"

⁸ The Mobile Roaming (EU Exit) Regulations 2019 (no. 587).

⁹ The Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019 (no. 278).

¹⁰ See <https://www.gov.uk/guidance/passenger-travel-to-the-eu-by-air-rail-or-sea-after-brexit>. For the exact amount granted under the UK legislation, see <https://www.fliightright.co.uk/your-rights/air-passenger-rights-brexit>.

¹¹ See *European Commission*, Getting ready for changes – Communication on readiness at the end of the transition period between the European Union and the United Kingdom, COM(2020) 324 final, p. 11.

granted by UK agencies will no longer provide access to such sectors in the EU.¹² Instead, UK based businesses must comply with the requirements for foreign businesses. The same applies to EU companies operating in the UK. They must comply with the respective UK rules and need to obtain all necessary authorisations.¹³

This might affect consumers in different ways:

First, it is possible that a service provider lacks the necessary permit to provide a certain service. In this case the question arises if the contract with the consumer under which the company is obliged to perform the service may be void.¹⁴ This could be the case if the permit is not only necessary to offer the service on the market, but also to perform the service.

Second, the administrative burden for the service providers might be higher. Consequently, foreign service providers might lose their competitiveness. This could lead to higher prices on the market.

c) Trade in Goods

The UK will no longer be part of the EU Customs Union and of the EU's VAT and excise territory. Thus, goods that enter the EU from the UK and vice versa will be subject to the respective customs formalities and taxation procedures (of the EU or the UK).¹⁵ There will also be different legal frameworks concerning technical rules, safety and environmental standards.¹⁶ This will cause administrative efforts and financial burdens for importing and exporting companies. For example, if the EU applies the same tariffs that it does to other third countries importing food to the EU, the increase in retail prices attributable to tariffs would on average be 22%.¹⁷ It can also not be ruled out, that supply chains will be disturbed for a certain period of time after the end of the transition period.¹⁸

d) Cross-border enforcement of consumer rights

Further, the cross-border enforcement of consumer protection laws will be weakened. UK agencies, such as the Competition and Market Authority (CMA) will no longer take

¹² See *European Commission*, Getting ready for changes – Communication on readiness at the end of the transition period between the European Union and the United Kingdom, COM(2020) 324 final, p. 12.

¹³ *European Commission*, Getting ready for changes – Communication on readiness at the end of the transition period between the European Union and the United Kingdom COM(2020) 324 final, p. 12.

¹⁴ See *Hirte/Schmidt-Kessel* in: Kramme/Baldus/Schmidt-Kessel (ed.), *Brexit – Privat- und Wirtschaftsrechtliche Folgen*, § 28 Legislative Vorsorge für den Brexit: Deutsche Begleitgesetzgebung zum Brexit und unregelte Felder, mn. 151 et seq.

¹⁵ *European Commission*, Getting ready for changes – Communication on readiness at the end of the transition period between the European Union and the United Kingdom, COM(2020) 324 final, p. 6 et seq.

¹⁶ *European Commission*, Getting ready for changes – Communication on readiness at the end of the transition period between the European Union and the United Kingdom, COM(2020) 324 final, p. 9.

¹⁷ *Which*, Brexit no deal: a consumer catastrophe?, October 2018, p. 14.

¹⁸ See *Which*, Brexit no deal: a consumer catastrophe?, October 2018, p. 18.

part in the Consumer Protection Cooperation Network (CPC).¹⁹ The network has effective tools to enforce compliance with EU consumer protection standards if they are infringed in cross-border cases, e. g. they can impose penalties or even order a hosting service provider to deny its services to a fraudulent online-shop.²⁰

2. Does Brexit also provide opportunities for consumers in the UK?

Brexit gives the UK the opportunity to embark on ambitious consumer protection projects for which there would probably not have been a majority in the EU. The chances for that are not that bad, as the UK was sometimes a pioneer of modern consumer protection. One need only think of the Consumer Rights Act, which introduced comprehensive regulations on contracts for digital content as early as 2015. At that time, the EU was still drafting the first proposal for the Digital Content Directive.

But what could such projects be? The EU applies a fairly narrow definition of “consumer”, which is a natural person, who acts for purposes which are outside of his trade, business, craft or profession. In the UK legislation there is evidence for a wider understanding. Under the Unfair Contract Terms Act 1977 (Section 12), a consumer could also be a legal person if the transaction did not concern the business purpose.²¹ The legislator could take up the old definition of consumer and extend consumer protection to small businesses.

An area where the EU has hindered consumer-friendly policies is the agriculture and food sector. The Common Agricultural Policy is focused on supporting producers. Other interests, however, have been neglected. In particular, consumer health which is affected by food that is too fatty and too sugary, and animal welfare, which still lags far too far behind economic interests, are being neglected by the current EU policies.²² But it is very doubtful whether the UK will actually gain sovereignty in this area. The UK is dependent on food imports.²³ It is therefore an attractive market for countries with a strong agricultural sector. In the negotiations for free trade agreements, these countries might insist that food standards not restrict market access.²⁴

Ultimately, from the point of view of consumer protection, it is rather difficult to see the bright side of Brexit.

¹⁹ The retained Regulation (EC) No 2006/2004 has already been revoked by The Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019, no. 203 (Part 4). See also *Which*, *Brexit no deal: a consumer catastrophe?*, October 2018, p. 22.

²⁰ Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004.

²¹ *Bisping/Twigg-Flesner*, in: Kramme/Baldus/Schmidt-Kessel (ed.), *Brexit – Privat- und Wirtschaftsrechtliche Folgen*, § 27 Preparing for withdrawal from the European Union in the United Kingdom, mn. 22.

²² In this sense *Which*, *Consumer Charter for Brexit*, p. 8.

²³ The dependency on food imports is dropping slowly. According to *Which*, *Consumer Charter for Brexit*, p. 9 with reference to *Food Statistics Pocketbook (2017)*, in 2017 49% of food products consumed in the UK were imported. 30 % were imported from EU member states, see *Which*, *Brexit no deal: a consumer catastrophe?*, October 2018, p. 14. In 2019 45% of food consumed was imported, 26% was imported from the EU, see *Food Statistic Pocket Book 2020, Summary*, no. 9 (<https://www.gov.uk/government/publications/food-statistics-pocketbook/food-statistics-in-your-pocket-summary#origins-of-food-consumed-in-the-uk-2019>).

²⁴ In this sense *Which*, *Brexit no deal: a consumer catastrophe?*, October 2018, p. 17.