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Brexit – Marriage ‘With’ Divorce? – The Legal Consequences for Consumer Law

Dr. Susanne Augenhofer*

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ARTICLE

BREXIT – MARRIAGE ‘WITH’ DIVORCE?¹ – THE LEGAL CONSEQUENCES FOR CONSUMER LAW

*Dr. Susanne Augenhofer**

I. INTRODUCTORY REMARKS	1476
II. EUROPEAN CONSUMER LAW – SETTING THE SCENE	1478
A. European Provisions	1479
B. Consumer Law Regulations and Directions	1483
C. The Role of the European Court of Justice	1483
III. THE UK WITHOUT THE EU/THE EU WITHOUT THE UK.....	1484
A. Enduring Provisions	1484
1. Air Passenger Rights	1485
2. Product Liability.....	1485
B. Areas Where Changes are Likely to be Expected....	1486
1. Consumer Benchmark	1486
2. Unfair Contract Terms and Unfair Commercial Practices	1488
C. UK Rules as a Role Model for the EU?	1491
1. Consumer Contract Law Provisions.....	1491
2. Privacy Law	1495
3. Enforcement	1496
IV. ‘A MARKET SOLUTION’	1499
V. CONCLUSIONS AND OUTLOOK.....	1502

* LLM (Yale), Professor of Law, Humboldt-University Berlin.

1. See Valéry Giscard d’Estaing (the original quotation reads ‘*mariage sans divorce*’ (marriage without divorce) who was one of the authors of the European Constitution (which never came into force and was replaced by the Treaty of Lisbon). He was referring to his picture of the European Union); see also Skouris, *Rechtliche Vorgaben für den Austritt aus der EU*, 27 EuZW (2016) 806, 811 (for a modification of the quote).

I. INTRODUCTORY REMARKS

When the United Kingdom (UK) joined the European Union (EU) in 1972, a world like today's was hardly imaginable: Over the decades, Europe withstood the Cold War, and in 1989 the fall of the Berlin Wall sounded the bell for a new era, making the way free for the Union's eastward enlargement. European citizens² live in an extraordinarily connected world, where frontiers, customs, different currencies and even national citizenship within the European Union were of less importance.³ However, recent developments have led to a new focus and different interpretations of those achievements. The Europe of today faces many challenges, starting with political issues such as financial instability in Greece, migration and its consequences for the Schengen Agreement,⁴ a strong right-wing movement in almost every European country and, of course, the questions regarding the future of Europe after Brexit.

The outcome of the referendum of 23 June 2016,⁵ leading to the initiation of a Brexit whose details still remain to be defined, certainly marks an important turning point within the history of the European Union. The fear that all the political, legal and economic achievements

2. As of February 28, the EU consists of 28 Member States: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

3. See European Parliament Eurobarometer, *European Youth in 2016* (May 21, 2016), http://www.europarl.europa.eu/pdf/eurobarometre/2016/eye2016/eb85_1_eye_2016_analytical_overview_en.pdf at 18 & 15 (showing that 90% of the respondents say that it is important for young European to learn about the EU and how its institutions work.; however, a large majority of young Europeans (61%) do not want to study, undergo training or work in another EU country whereas only 32% would like to do so.); see also European Commission, *Erasmus Impact Study of 2014*, at 14, http://ec.europa.eu/dgs/education_culture/repository/education/library/study/2014/erasmus-impact_en.pdf (17.02.2017) (according to which those students who have participated in the international exchange program are better positioned to find their first job).

4. The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 2000 O.J. L 239, [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:42000A0922\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:42000A0922(01)&from=EN) (13.02.2017). In the so-created Schengen Area, international border checks have largely been abolished.

5. *EU Referendum, results*, BBC NEWS, http://www.bbc.com/news/politics/eu_referendum/results. The referendum yielded 17,410,742 (51.9%) votes to leave and 16,141,241 (48.1%) votes to remain.

of the past decades will disappear and be replaced by archaic and long-forgotten methods and strategies is present and real. And indeed it does not help that the political and legal evolution of this process is more than a little uncertain. However, the general direction has been shaped by British Prime Minister Theresa May, who declared on 17 January 2017 that she is willing to negotiate the conditions of what is termed a 'hard Brexit', meaning thereby the UK's unequivocal departure from the European Single Market by 2019. Accordingly, the notice required under Art. 50 TEU⁶ was given on 29 March 2017.⁷ Nevertheless, the Supreme Court had to decide whether it was permissible for notice to be given without the consent of the British Parliament.⁸ The subsequent judgment of 24 January 2017 was decided by a majority of eight to three. The judges pointed out that a decision of such importance includes a considerable amount of lost rights for the British people. The Court therefore stated that for the Government to trigger Art. 50 TEU, both chambers of the UK's Parliament had to authorize the process beforehand with an Act of Parliament.⁹

Acknowledging the importance of the forthcoming two years of negotiations, the final objective for both sides should include a comprehensive agreement that provides legal certainty rather than the radical effect of leaving the EU without any further arrangements.

6. Consolidated Version of the Treaty on European Union, 2012 O.J. C 326/13 [hereinafter TEU post-Lisbon]; Consolidated Version of the Treaty on the Functioning of the European Union 2012 O.J. C 326/47 [hereinafter TFEU]; Consolidated version of the Treaty on European Union - Protocols - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on December 13, 2007 - Tables of equivalences, 2012 O.J. C 326/1, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=EN>. As a subsequence of the Treaty of Lisbon, the Treaty on European Union is one of the two primary treaties and forms the basis of EU law, stating legal principles and regulating the individual institutions.

7. See *Article 50: Theresa May statement to MPs as letter delivered*, BBC NEWS (Mar. 29, 2017), <http://www.bbc.com/news/uk-politics-39434293>; see also Theresa May, Prime Minister, United Kingdom, Speech: The Government's Negotiating Objectives for Exiting the EU (Jan. 17, 2017), available at <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>.

8. Michael Gordon, *Brexit: a challenge for the UK constitution, of the UK constitution?*, 12 E.C.L. REV. 409, 422 (2016).

9. *R (on the application of Yalland) v. Secretary of State for Exiting the European Union* [2017] EWHC 630 (Admin) at 48. The 'Brexit Bill' passed both chambers of Parliament on 14 March 2017. The Amendments introduced by the House of Lords were not adopted.

II. EUROPEAN CONSUMER LAW – SETTING THE SCENE

The legal and economic consequences of a Brexit are hard to determine as its uncertainty has a strong impact on several areas of consumers' and businesses' daily lives. Economically, new customs and migration agreements will be required, as well as new arrangements regarding commerce and related fields, to name only a few examples.

All these aspects are connected to many different fields of law – a fact that makes the upcoming negotiations even harder. EU law – in all its complexity – has been a part of the UK's national legislation for a long time. To untangle the cobweb will therefore represent one of the most challenging tasks during and after negotiations between the EU and the UK. Several options have been presented over the past months. But questions such as whether the UK will follow the example of Norway¹⁰ or Switzerland,¹¹ or whether it will remain a 'third party' or

10. See Kaiser, *Auf dem Weg zum "Brexit", Die Europäische Union im britischen Verfassungsrecht*, 6 EUR 593, 605 *et seq.* (2016). Since Norway is part of the European Free Trade Association ("EFTA") as well as a member of the European Economic Area ("EEA"), its relationship to the EU has to be distinguished from the arrangements of the EU and Switzerland. According to its EEA-membership, Norway has to adopt a certain part of EU secondary law without having a participation right. Moreover, Norway is obliged to accept the jurisdiction of the EFTA-court as well as the competences of the EFTA-supervising agency. The most important point of the EEA is the elimination of customs duties and the adoption of almost 80 percent of the *acquis communautaire*. Nevertheless, the EEA is not a customs union with a common customs tariff. In conclusion, Norway is probably the closest partner of the EU that is not part of it, considering its access to the internal market. As "consideration" for this access, Norway has to pay a "cohesion fee" every five years (~ 1.8 billion €). Given the British attempt to achieve a 'hard Brexit', the model seems unlikely to be followed.

11. See Astrid Epiney, *Die Beziehungen Schweiz-EU als Modell für die Gestaltung des Verhältnisses Großbritanniens zur EU*, in *BREXIT: DIE JURISTISCHEN FOLGEN* 77, 79 (Malte Kramme, Christian Baldus, Martin Schmidt-Kessel eds., Baden-Baden: Nomos 2017). Compared to treaties of the EU with "regular" third countries, the relationship between Switzerland and the EU is based on several international law treaties that contain a lot more specifications. This also follows from the Swiss location in the center of Europe and its EFTA-membership the EFTA was first developed to act as a counterbalance to the EU, since it was founded by Switzerland, Liechtenstein, Norway, Iceland, Great Britain and Denmark. As opposed to Norway and to the other EFTA-countries, Switzerland is not part of the EEA. Hence, Switzerland is not as integrated in the internal market as the aforementioned countries. Nevertheless, Switzerland adopted a huge part of the EU *acquis communautaire*: The relationship between both parties consists of two overarching treaties which include regulations concerning, inter alia, the free movement of people, participation in the Dublin- (considering migration) and Schengen-acquis, air transport and agriculture. Each treaty comprises varying agreements on specific areas. These can be distinguished in cooperation agreements (slight commitment), harmonization agreements (more intense commitment) and integration agreements (intense commitment) such as the Schengen agreement and the Dublin regime.

come up with an individual solution can hardly be predicted and are therefore not subjects of this contribution. Too many variables are part of this massive equation and too many decisions are still pending. Given this background, this paper aims to draw a picture of possible consequences for consumer law in the EU as well as in the UK. Before doing so, we must outline some of the more general aspects of European consumer law and its importance for European contract law and hence the free internal market.

A. European Provisions

European law aims to achieve the historically developed idea of a 'united Europe'.¹² As a consequence, both the general idea of uniform provisions for all Member States and the preservation of national sovereignty¹³ have to be combined in a practicable way. It follows that the result is a highly complex legal framework that has to be accepted and executed by all Member States. The structure of EU law distinguishes between primary law, in its core consisting of the TEU and the TFEU,¹⁴ and secondary law. Primary law sets out the EU principals, institutions and competencies, whereas secondary law governs further specific legislative areas. The central provision in this respect is Art. 288 TFEU, providing for different instruments, as there are regulations, directives, decisions, recommendations and opinions.¹⁵ European consumer law is primarily regulated through directives and to a minor extent through regulations.¹⁶

Both directives and regulations are suitable for simultaneously assuring uniformity and sovereignty. Regulations have a general application. Their legal provisions are binding and enter into force on the specified determined date. In order to develop a consistent

12. DAMIAN CHALMERS, GARETH DAVIES & GIORGIO MONTI, *EUROPEAN UNION LAW* 7 (Cambridge: Cambridge University Press, 3rd ed. 2014).

13. TEU post-Lisbon *supra* note 6, art.4, 5.

14. TFEU, *supra* note 6. The Treaty on the Functioning of the European Union is the second primary treaty. It sets forth a detailed basis of EU law as well as the scope of the EU's competencies.

15. Ruffert, *Art. 288 TFEU*, in *EUV/AEUV – COMMENTARY* 15 (Calliess & Ruffert eds., München: C.H. Beck, 5th ed. 2016). Moreover, the provision binds the EU institutions as well as the Member States, as far as they are addressed. *Cf.* CHALMERS, DAVIES & MONTI, *supra* note 12, at 112).

16. *Cf.* MICKLITZ, STUYCK & TERRY, *CONSUMER LAW* 58 *et seq.* (Oxford, Hart Publishing, 2010). While European consumer law is primarily regulated through directives, the general principles of EU law are important for the shaping and interpretation of consumer law. *See generally* TFEU, *supra* note 6, art. 169.

application of provisions throughout the EU, they do not need to be transposed into national law. Consequently, they offer a high standard of uniformity and are used where this requirement is of crucial importance.¹⁷ Despite operating within the EU's legal competencies, they also interfere with the Member State's sovereignty to a certain extent. Therefore, directives provide a different and important option. They are also binding, but only regarding the result to be achieved. It is up to the individual countries to devise their own laws on how to reach these goals.¹⁸ This option gives Member States the important decisional power on how to implement the provisions and how to make sure that they will fit in the national system. To adjust the respective outcomes, the differentiation of full harmonization and minimum harmonization directives is highly important. Minimum harmonization directives provide for a minimum standard that Member States have to meet, but for which they are free to introduce or maintain a higher level of protection. In contrast, full harmonization directives do not provide this option. Their standards are binding so that Member States are not allowed to deviate at all. The differentiation between regulations and full and minimum harmonization directives plays a very important role in consumer law, especially since the different Member States pursue different approaches as to where consumer law should be located within their respective legal systems and Member States generally prefer to have some leeway as to how to implement national rules.¹⁹

The scope of the individual consumer law provisions is very diverse and a considerable amount of legislation has been passed. Important regulations tackling consumer law include: the Rome I Regulation,²⁰ the Brussels Ia Regulation,²¹ the Air Passenger Rights

17. For further argumentation, see Dorota Lecykiewicz & Stephen Weatherill, *The Images of the Consumer in EU Law*, in *THE IMAGES OF THE CONSUMER IN EU LAW: LEGISLATION, FREE MOVEMENT AND COMPETITION LAW* (Dorota Lecykiewicz & Stephen Weatherill eds., Oxford: Hart Publishing 2016).

18. See also Chalmers, Davies & Monti *supra* note 12, at 111 *et seq.*

19. France, for instance, decided to create a Consumer Code, whereas Germany has implemented all the provisions into the German Civil Code.

20. Commission Regulation 593/2008, 2008 O.J. L 177/6 (on the law applicable to contractual obligations).

21. Commission Regulation 1215/2012, 2012 O.J. L 351/1 (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

Regulation,²² the Online Dispute Resolution Regulation,²³ the Food Labelling Regulation²⁴ and the General Data Protection Regulation.²⁵ As far as directives are concerned, the most important ones are: the Consumer Rights Directive,²⁶ the Consumer Sales Directive,²⁷ the Unfair Contract Terms Directive,²⁸ the Consumer Credit Directive,²⁹ the Alternative Dispute Resolution Directive,³⁰ the Product Safety Directive,³¹ the Package Travel Directive³² and the Unfair Commercial Practices Directive.³³

Given the range of areas of law affected, one cannot deny or underestimate the importance of European consumer law for the development of a European contract law. This is especially true as a major European principle states that interference in the respective national civil law of the Member States is allowed only to a limited extent.³⁴ Hence, national civil code provisions, e.g. concerning regulations on how a contract comes into force or regarding minors, cannot be regulated by European law since the EU lacks a corresponding competence. Therefore, one single and uniform European contract law does not exist. This leads to the fact that

22. Commission Regulation 261/2004, 2004 O.J. L 046/1 (establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights).

23. Commission Regulation 24/2013, 2013 O.J. L 165/1 (on online dispute resolution for consumer disputes).

24. Commission Regulation 1169/2011, 2011 O.J. L304/18 (on the provision of food information to consumers).

25. Commission Regulation 2016/679, 2016 O.J. L 119/1 (on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC).

26. Directive 2011/83/EC of the European Parliament and of the Council on Consumer Rights, 2011 O.J. L 304/64.

27. Directive 99/44/EC of the European Parliament and of the Council on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, 1999 O.J. L 171/12-16.

28. Directive 93/13/EEC of the Council of the European Communities on Unfair Terms in Consumer Contracts, 1993 O.J. L 095/29.

29. Directive 2008/48/EC of the European Parliament and of the Council on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC, 2008 O.J. L 133/66.

30. Directive 2013/11/EU of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes, 2013 O.J. L 165/63.

31. Directive 2001/95/EC of the European Parliament and of the Council on General Product Safety, 2001 O.J. L 011/4.

32. Directive (EU) 2015/2302/EC of the European Parliament and of the Council on Package Travel and Linked Travel Arrangements, 2015 O.J. L 326/1.

33. Directive 2005/29/EC of the European Parliament and of the Council Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market, 2005 O.J. L 149/22.

34. TEU post-Lisbon, *supra* note 6, art. 5, at 18.

consumer law provisions are basically the only existing – although concededly still fragmented – provisions of a European contract law. *Kötz* has described the phenomenon as ‘tiny islands of unified law within an ocean of national laws’.³⁵

Lately, however, there have been several attempts to unify the different provisions by means of analyzing and considering the contract law of all Member States. The Draft Common Frame of Reference³⁶ accordingly identified and formulated the common (contract) law principles of all Member States.³⁷ Departing from that effort, a Common European Sales Law (CESL)³⁸ was drafted. However, the proposal was subject to much criticism³⁹ and never passed, leading the European Commission back to the general approach of using directives and regulations. Subsequently, the EU has presented two new draft directives as part of the Digital Single Market Strategy,⁴⁰ dealing with consumer contracts for the supply of digital content (Digital Content Directive⁴¹) and certain aspects of online and other distance sales of goods (Online Goods Directive⁴²).

35. “In einem Meer nationalen Rechts winzige Inseln vereinheitlichten Rechts.” Cf. *Kötz, Rechtsvereinheitlichung: Nutzen, Kosten, Methode, Ziele*, 50 *RABELSZ* 1-50 (1986).

36. See generally PRINCIPLES, DEFINITIONS, AND MODEL RULES OF EUROPEAN PRIVATE LAW (Christian von Bar et al. eds., 2009).

37. In 1980, the Danish lawyer *Ole Lando* founded the Commission on European Contract Law that elaborated the Principles of European Contract Law (“PECL”), which had been the starting point for the DCFR. See generally THE PRINCIPLES OF EUROPEAN CONTRACT LAW Parts I, II, & III (2002).

38. See generally Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM (2011) 635 final (Nov. 10, 2011).

39. The UK expressed criticism especially regarding the progress and organization of the Draft Common Frame of Reference, see EUROPEAN UNION COMMITTEE (HL), EUROPEAN CONTRACT LAW: THE WAY FORWARD, REPORT WITH EVIDENCE, HL 95-I, at 3 (UK); Hugh Beale, *The European Commission’s Common Frame of Reference Project: A Progress Report*, 2 *EUROPEAN REVIEW OF CONTRACT LAW* 303 (2006). The UK also underlined problematic issues in the CESL, such as cross-border sales, language, the right to terminate, damages for distress and inconvenience, telephone selling, and doorstep selling. See THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION (EDS.), AN OPTIONAL COMMON EUROPEAN SALES LAW: ADVANTAGES AND PROBLEMS, ADVICE TO THE UK GOVERNMENT, 2011, at VIII-XI (UK) (offering a rather positive evaluation at the end).

40. European Commission, A Digital Single Market for Europe (July 2, 2017), available at: https://ec.europa.eu/priorities/publications/digital-single-market-two-years_en.

41. Proposal for a Directive of the European Parliament and of the Council on Certain Aspects Concerning Contracts for the Supply of Digital Content, COM (2015) 634 final (Sep. 12, 2015).

42. Proposal for a Directive of the European Parliament and of the Council on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods, COM (2015) 635 final (Sep. 12, 2015).

B. Consumer Law Regulations and Directions

As far as Brexit is concerned, a number of provisions will be subjected to major changes. Primary law itself is covered by Art. 50 Subsection 3 TEU and will cease to be applicable to the UK two years after its withdrawal. However, Art. 50 TEU only states that by not applying EU law and its principles anymore, the ‘former’ Member State will not infringe any EU provisions. Consequently, whether the provisions of a regulation or directive will still be applicable in the future must be decided by the UK government and formally approved by its Parliament.⁴³

With regard to regulations, the binding force and the scope of application will end no later than the end of the two-year period.⁴⁴ On the national level, the adopted European Communities Act 1972,⁴⁵ once implemented to ensure the primacy of application of EU law,⁴⁶ will have to be overruled by a new Act of Parliament. This new Act will form the core of Brexit, since a lot of details will need to be included.⁴⁷ Although lately a considerable amount of regulations has been passed, most parts of consumer law typically consist of directives; hence, the respective provisions are already part of the UK’s national law, primarily implemented through UK statutory instruments.⁴⁸ Any changes after a Brexit are consequently in the hands of British legislators. Therefore, with a reform of the current legal basis, changes in national law are also to be expected. The individual drafting of new legislation probably depends on further bilateral agreements, these having the EU or the individual remaining Member States on the one side and the UK on the other.

C. The Role of the European Court of Justice

In this fragmented legal environment, the Court of Justice of the European Union (CJEU) has an important role within the institutional structure of the EU, since it is its highest court. Through its judgments, the CJEU ensures, on the one hand, the uniform interpretation of EU

43. Basedow, *Brexit und das Private- und Wirtschaftsrecht*, 25 ZEuP 567, 570 (2016).

44. TFEU, *supra* note 6, art. 50, at 43.

45. *See generally* European Communities Act 1972, c. 68.

46. TEU post-Lisbon, *supra* note 6, art. 4, at 18; *Costa v. ENEL*, Case 6-6/64, [1964] E.C.R. I-1251.

47. McMillan, *The Impact of Brexit upon English Contract Law*, 27 KING’S LAW JOURNAL 420, 424 (2016).

48. *Id.* at 423

law for every Member State and, on the other, the compliance of Member States and EU institutions with EU law.

Therefore, by deciding on questions of interpretation, the CJEU constitutes a part of the constant process of harmonization of law. The primacy of the interpretation of European legislative acts serves to guarantee this process. Art. 267 TFEU introduces the important procedure of preliminary rulings. National courts of EU Member States are obliged to ensure the proper application of EU law. In case of doubts regarding the interpretation of European legislative acts, every court of a Member State can request the CJEU to give clarification on the interpretation.⁴⁹ By these means, the CJEU also enhances legal certainty. When it comes to directives, not only the transposition of a directive but also the uniform application of the transposed law can thereby be achieved.

III. THE UK WITHOUT THE EU/THE EU WITHOUT THE UK

As stated above, UK consumer law is strongly connected with EU law. Therefore, no major changes are expected for now, given that triggering Art. 50 TEU only serves to start the two-year transition period. At the moment, consumer law in the UK conforms to the EU standards and provisions, including its interpretation by the CJEU.

In the following section of the paper we will look at some areas of consumer law which are currently of great importance, and we will analyze the possible impact of Brexit on them. We suggest grouping those areas into three different categories: (1) provisions which will likely remain unaffected; (2) provisions where the UK always had a different point of view than most other Member States and where therefore Brexit will most likely lead to changes in both UK law as well as European provisions and (3) areas where new developments in the UK might serve as a role model for European provisions.

A. Enduring Provisions

It is arguably simplest to start with areas in which changes are unlikely. To identify provisions which will remain mostly unaffected, we assume that this will be the case in either provisions which (a) have strong ties with other States and will thus have a potential to raise conflicts or (b) which were initiated by the UK and have respectively

49. TFEU, *supra* note 6, art. 267, at 164.

been incorporated in British law without major concerns. We will briefly introduce two possible areas.

1. Air Passenger Rights

An important example of such an area is the Air Passengers Rights Regulation. This regulation provides rights for air passengers in cases of denied boarding, cancellation and a delay of the flight.⁵⁰ The perpetuation of the current rules may be assumed given the international importance of the subject matter – cancelled or delayed flights are primarily of concern with regard to long-distance travel. Moreover, the regulation has a wide scope of applicability: Art. 3 states that the regulation applies also to non-EU carriers that depart from an airport of a Member State. Given this wide scope of applicability, autonomous provisions on a national basis after Brexit seem rather impracticable. From a technical point of view, however, one has to note that the regulation has to be adopted into UK national law after Brexit as it will no longer be directly applicable.

2. Product Liability

Product liability in the UK is regulated in the Consumer Protection Act 1987.⁵¹ The Act implemented the Product Liability Directive,⁵² which introduced a regime of strict liability for damage arising from defective products. The provision is 30 years old and forms an enduring part of the UK's national law, remaining untouched by any legal reform during all the years subsequent to its enactment.⁵³

50. Bruggen, *European air passenger rights: the concept of "flight"*, 3 EUVR 2014, 233-250.

51. See generally Consumer Protection Act 1987, 1987 Chapter 43, available at: <http://www.legislation.gov.uk/ukpga/1987/43> (UK).

52. See generally The Council of the European Communities, Council Directive 85/374/EEC, (1985) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31985L0374:en:HTML>.

53. The UK was the first Member State to implement the Product Liability Directive. Since the introduced concept of strict liability was unknown to the UK's legal system, it provoked a rather 'strong response' from the UK (see HOWELLS & WEATHERILL, CONSUMER PROTECTION LAW 234 (Oxford, 2nd ed. 2005); Mc Kenna & Co, Report for the Commission of the European Communities on the Application of Directive 85/374/EEC on Liability for Defective Products, p. 1, 4, Commission of the European Communities Report, (Aug. 20 1992). In that respect, the European Court of Justice reviewed the wording of the development risks defense in the Consumer Protection Act 1987 but held in favor of the UK's implementation, , Case C-300/95, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland.

Hence, a change regarding any requirements or legal consequences seems unlikely. Any other approach would increase legal uncertainty and put both UK businesses and remaining EU businesses under enormous pressure. Additionally, it can be fairly comfortably concluded that product liability will not be one of the most urgent issues that will arise and be addressed during Brexit negotiations. Since the system is implemented and working, there seems to be no need in changing it.

B. Areas Where Changes are Likely to be Expected

Even though describing future changes is like ‘reading tea leaves’, in some areas the UK particularly struggled with the transposition of EU legislation into the national legal system. In contrast to the above discussed areas, we assume that changes are likely to expect as far as concepts have been introduced which deviated from British legal standards or have been generally unknown before. In those areas it is possible that the future construction and application of legal concepts inspired by EU law will revert to the genuinely national concepts. Especially if we consider that Brexit is about regaining ‘national sovereignty’ – which it is in the mindset of the ‘Leave’ campaign –⁵⁴ emphasizing common law and constructing provisions in a rather ‘British’ way might be at least a possible option for conservative judges. Obvious areas in this context are the notion of the ‘consumer benchmark’ as well as the concept of ‘good faith’ in both the law of unfair contract terms and also unfair commercial practices law.

1. Consumer Benchmark

The question of how consumers are perceived in the eyes of the law – and what expectations they have to live up to – remains one of the key points in consumer law. The benchmark of the average consumer⁵⁵ has been introduced and constantly developed in judgments of the CJEU, who defined the European consumer as

54. The ‘Leave’ campaign was advertised with slogans as ‘Vote Leave, take back control’ and statements as ‘The European Court already overrules us on everything from how much tax we pay, to who we can let in and out of the country, and on what terms’ showing that they believe the EU threatens or reduces the sovereignty of the British people; materials available at e.g. http://www.voteleavetakecontrol.org/why_vote_leave.html.

55. See Leczykiewicz & Weatherill, *The Images of the Consumer in EU Law*, in *THE IMAGES OF THE CONSUMER IN EU LAW: LEGISLATION, FREE MOVEMENT AND COMPETITION LAW* 1, 8, (Dorota Leczykiewicz & Stephen Weatherill eds., Oxford: Hart Publishing 2016).

rational and confident. The Court's jurisprudence states that consumers are considered to be reasonably well-informed, reasonably observant and circumspect.⁵⁶ The consumer benchmark thereby follows an approach that is based on the information paradigm – focusing on the enormous relevance of information within consumer protection law. It has been developed in terms of unfair commercial practices⁵⁷ and consequently has had to be transposed into other aspects of consumer law.⁵⁸ Thus, European consumer law generally is premised on the rational and confident consumer when it comes to consumer protection and its legal structuring. Nevertheless, how a court in one of the 28 Member States defines 'rational' may differ.

Different occasions have shown that, under the consumer benchmark in the UK, the rational and average consumer is very well informed and able to act autonomously – and hence in less need of protection.⁵⁹ The following case⁶⁰ may serve as an illustrative example: British Airways sued Ryanair for trademark infringement and malicious falsehood in respect of a comparative press advertisement released by Ryanair.⁶¹ The advertisement referred primarily to the price difference between the two airlines regarding their flights to several explicitly named airports. However, although named in the same manner, it was not mentioned that British Airways offered their flights to the main airports whereas Ryanair used smaller airports in the same region that were not as close to the specific cities at issue. The British High Court ruled that the average and reasonable consumer could be expected to be well informed and would therefore not be misled by the comparison of prices in relation to two different airports.

By contrast, in Germany for example, the rational consumer was considered to need significantly more protection. Several courts had to deal with a comparable situation to that of *British Airways v Ryanair*.

56. See generally Verein gegen Unwesen in Handel und Gewerbe Köln eV v. Mars GmbH, Case C-470/93; Gut Springenheide and Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt-Amt für Lebensmittelüberwachung, Case C-210/96.

57. See generally Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Federal Monopoly Administration for Spirits) C-120/78; Estée Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH, Case C-220/98.

58. Andreas Wiebe, *Das Leid des Verbrauchers mit dem Verbraucherleitbild*, in FESTSCHRIFT FÜR HELMUT KÖHLER 804, 811 (Tobias Lettl et al. eds., München: C.H. Beck 2014).

59. Cf. Straetmans, *Misleading Practices, The Consumer Information Model and Consumer Protection*, 5 EUCML 199, 204 (2016).

60. *British Airways v. Ryanair* 2001 FLR 541.

61. The advertisement described British Airways as 'Expensive BA...DS'.

Specifically, the denomination of a (small) destination airport in Germany was similar to the main airport in the same region, e.g. Frankfurt (a.M.) and Frankfurt (Hahn).⁶² The flights to the smaller airport (provided by a low-budget airline) were cheaper, but those airports were badly connected with the public transportation system and 80-120 kilometers outside of the cities in question – these being facts about which the airlines did not openly inform consumers. According to the German Higher Regional Courts, rational consumers were misled in that situation and could not be expected to know and investigate the difference between two similarly promoted and named airports.⁶³

Although there is no doubt that the approach is based on the same standard of a rational and responsible consumer, the courts in different Member States apply different levels of protection. It has been shown that the UK has followed a more liberal approach. Once the binding force of European law disappears in the future, an even deeper divergence in this respect seems very likely.

2. Unfair Contract Terms and Unfair Commercial Practices

Beginning in the 1960s courts developed mechanisms for protection against unfair contract terms in contracts. Exemption and exclusion of liability clauses, the question of the notice (surprising clauses) and invalid types of contracts were the cornerstones of the case law⁶⁴ that originally was closely connected with the concepts of ‘undue influence’ and ‘unconscionability’.⁶⁵ It is noteworthy that the personal scope of this case law was not limited to consumers in the European sense. The case law was later partly summarized by the Unfair Contract Terms Act of 1977 (UCTA), which considerably restricted the effectiveness of exemption and limitation clauses not only in consumer contracts but also in commercial contracts.⁶⁶ The Act included a list of terms automatically ineffective as well as terms that needed to be tested for their ‘reasonableness’.⁶⁷

62. OLG Hamburg Dec/ 19, 2002, 5 U 137/02 *Frankfurt-Hahn*.

63. See also OLG Köln Dec. 5, 2003, 6 U 107/03 *Flughafen Niederrhein (Düsseldorf)*.

64. For common law on contract terms cf. O’SULLIVAN & HILLIARD, *THE LAW OF CONTRACT* 192 (Oxford: Oxford University Press, 3d ed. 2008); Whittaker, in 1 CHITTY ON CONTRACTS 15-002 (Hugh Beale ed., London: Sweet & Maxwell, 32nd ed. 2015).

65. HUGH COLLINS, *THE LAW OF CONTRACTS* 274 (LexisNexis, 4th ed. 2003).

66. Whittaker, *supra* note 64, at 15-003.

67. For details on the reasonableness test, compare O’Sullivan & Hilliard, *supra*, note 64, at 201.

In 1994, the UK then transposed the Directive on Unfair Terms in Consumer Contracts⁶⁸ into national law in a ‘minimalistic manner’.⁶⁹ Essentially, this means the British legislature mostly copied and pasted the text of the directive word-for-word into the Unfair Terms on Consumer Contracts Regulations 1994, which was slightly amended by the Unfair Terms on Consumer Regulations 1999.⁷⁰ Besides the limited personal scope and the extended scope of application in comparison to UCTA and the common law, the major legal problem brought by the directive was the introduction of ‘good faith’ and the concept of a broad general clause. Although the introduction of this concept was seen as presenting ‘a fascinating challenge to the traditions of the common law’⁷¹ which ‘is mysterious and exciting to an English lawyer’,⁷² there was nevertheless a major dispute on how to deal with this concept.⁷³

Some argued that ‘good faith’ requires a test of the contract’s substantive fairness and an assessment whether there is a significant imbalance between the parties.⁷⁴ Others saw a mixture of substantive and procedural fairness and emphasized that the concept of ‘reasonableness’ known from UCTA was already familiar.⁷⁵ A different set of authors, by contrast, argued that the notion predominantly pertains to procedural fairness, as the concept is known in German law,⁷⁶ and thus some scholars demanded that the United Kingdom import criteria from the civil law concept of ‘good faith’. But, as always, the truth normally lies somewhere in between: Consequently, it was also argued that it would be improper to define the concept in accordance with the tradition of any single Member State

68. Directive 93/13/EEC, 1993 L 95/29.

69. Whittaker, *supra* note 64, at 15-005.

70. Pfeiffer, in *DAS RECHT DER EUROPÄISCHEN UNION*, Einl., zu Art. 1 RL 93/13/EWG (Grabitz & Hilf eds., München: C.H. Beck, 40th ed. 2009).

71. Collins, *Good Faith in European Contract Law*, 14 OJLS 229, 245-249 (1994); *see also* Beatson, *The Incorporation of the EC Directive on Unfair Consumer Contracts into English Law*, 6 ZEUP 957, 964 (1998).

72. Collins, *supra* note 71, at 245, 249.

73. For a summary, compare O’SULLIVAN & HILLIARD, *THE LAW OF CONTRACT* 210 (Oxford: Oxford University Press, 2d ed. 2006).

74. SMITH, *CONTRACT*, 48 CURRENT LEGAL PROBLEMS 5, 8 (1995).

75. Collins, *supra* note 71, at 249.

76. Beale, *Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts*, in *GOOD FAITH AND FAULT IN CONTRACT LAW* 243 (Jack Beatson & Daniel Friedman eds., Oxford: Oxford University Press 1995).

and, as such, that it had to be interpreted autonomously from a European perspective and with a comparative method.⁷⁷

In a far-reaching decision, the House of Lords voted in favor of this European view on the Unfair Terms on Consumer Regulations 1999.⁷⁸ They reasoned that the construction of provisions in national law had always to be oriented on the respective directive they were based on. This results from the prevailing nature of European Union legislation and the interpretation of EU law by the CJEU,⁷⁹ which follows a more purpose-based approach than British courts were used to.⁸⁰ The House of Lords adopted this style of interpretation in its decision by taking the recitals and legislative aims into account.⁸¹ The judgment had a major impact on the understanding of European private law in the UK. In a way, it confirmed the thesis that with the implementation of ‘good faith’ in the UK, ‘English contract lawyers are forced to become comparative lawyers’⁸². However, after Brexit it is not unlikely that courts will start to interpret the transposing statutes in isolation from the directive, which could lead to different outcomes.

With regard to the Directive on Unfair Commercial Practices (UCPD),⁸³ the UK legal system had to deal with a similar challenge as the European Union’s law introduced subsidiary⁸⁴ and broad general-clauses,⁸⁵ operating with the concept of ‘good faith’.⁸⁶ Considering the

77. Whittaker, *Assessing the Fairness of Contract Terms: The Parties’ ‘Essential Bargain’, its Regulatory Context and the Significance of the Requirement of Good Faith*, 12 ZEU 75, 89 (2004); Weatherill, *Prospects for the Development of European Private Law through ‘Europeanisation’ in the European Court – the Case for the Directive on Unfair Terms in Consumer Contracts*, 3 ERPL 307, 318 (1995) (speaking of “comparative europeanisation”).

78. *Director General of Fair Trading v First National Bank Plc.* [2001] UKHL 52, [2002] 1 A.C. 481.

79. For an introduction, see HEIDERHOFF, *EUROPÄISCHES PRIVATRECHT* 16 (Heidelberg: C.F. Müller, 4th ed. 2016).

80. Whittaker, *supra* note 64, at 15-007.

81. *Director General of Fair Trading v First National Bank Plc.* [2001] UKHL 52, [2002] 1 A.C. 481.

82. Beatson, *The Incorporation of the EC Directive on Unfair Consumer Contracts into English Law*, 6 ZEU 957, 968 (1998).

83. Directive 2005/29/EC, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>.

84. The general clause is subsidiary to the so-called ‘minor’ general-clauses of Art. 6 UCPD (aggressive commercial practices) and Art. 8 UCPD (misleading commercial practices).

85. UCPD, Art. 5.

86. ‘Good faith’ is there part of the definition of professional diligence. UCPD, Art. 2.

liberal British approach towards unfair competition,⁸⁷ Brexit might be a starting point for a diverging development in unfair commercial practices law in the UK and the EU.⁸⁸

Especially as regards the argument that cross-border shopping by consumers serves to enhance the EU's single market,⁸⁹ courts will need to find other justifications for the protection of consumers. Considering the skepticism toward this concept in respect of the Unfair Contract Terms Directive,⁹⁰ a recourse to common law concepts does not appear unlikely. This also shows the dependence on methodological questions when assessing Brexit's impact on consumer law.

C. UK Rules as a Role Model for the EU?

Finally, in our view changes are most likely to be expected where the UK already in the past expressed concerns over European provisions. Brexit will enable the UK to depart from European standards. By doing so the UK might also have the possibility to react sooner to current developments than the EU, thereby functioning even as a potential role model for European law. On the other hand, Brexit might 'rejuvenate' European projects, which were abandoned due to the UK's resistance. The following three areas of law might serve as examples:

1. Consumer Contract Law Provisions

After a process of partial consolidation of some provisions in EU consumer law, the Consumer Rights Directive was introduced and

87. Wendland, *Die Auswirkungen des Brexit auf das EU Wettbewerbsrecht*, in BREXIT UND DIE JURISTISCHEN FOLGEN 231, 244 (Kramme, Baldus & Schmidt-Kessel, eds., Baden-Baden: Nomos 2017).

88. Cf. Collins, *Harmonisation by Example: European Laws against Unfair Commercial Practices*, 73 THE MODERN L. REV. 89, 116 (2010); Collins, *Good Faith in European Contract Law*, 14 OJLS 229,238 (1994).

89. The notion that the implementation of the EU's single market is to be achieved by the consumer purchasing across the national borders is a major justification for the harmonisation of EU consumer law, therefore see e.g. HEIDERHOFF, *EUROPÄISCHES PRIVATRECHT* 9 (Heidelberg: C.F. Müller, 4th ed. 2016); see also RIESENHUBER, *EU-VERTRAGSRECHT* 44 (Tübingen: Mohr Siebeck 2013).

90. Beatson, *The Incorporation of the EC Directive on Unfair Consumer Contracts into English Law*, 6 ZEUP 957, 959 (1998); see also Witthaker, *Assessing the Fairness of Contract Terms: The Parties' 'Essential Bargain', its Regulatory Context and the Significance of the Requirement of Good Faith*, 12 ZEUP 75 (2004) with further references.

adopted.⁹¹ The instrument aims to enable a high consumer protection standard and strengthen the functioning of the internal market.⁹² Therefore, it can be seen as an important step toward a further harmonization of consumer law within the internal market. It prescribes not only general information requirements that have to be provided in consumer contracts and special information requirements for distance or off-premises contracts,⁹³ but also the right of withdrawal in distance and off-premises contracts. The information requirements and the right of withdrawal are based on two different regulatory directions in EU consumer law. While the former advances the goal of facilitating well-informed decisions by consumers and thereby removing any information asymmetry between consumers and businesses,⁹⁴ the latter aims to protect the consumer from hasty decisions and gives them a right of reconsideration.⁹⁵

In 2013 the UK implemented the directive in the Consumer Contracts Regulation,⁹⁶ and this was later followed in 2015 by the elaboration of an extraordinarily advanced Consumer Protection regime which included the Consumer Rights Act (CRA)⁹⁷ and the Consumer Protection Act (Amendment) Regulation.⁹⁸ The CRA not only brought enormous changes to consumer law on a national basis

91. The Directive replaced the Distance Selling Directive and the Directive on Contracts negotiated away from business premises, Directive 97/7/EC of European Parliament and of the Council on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. L 144/19, and modified both the Consumer Sales Directive, Council Directive 85/557/EEC to Protect the Consumer in Respect to Contracts Negotiated Away From Business Premises, 1985 O.J. L. 372/31, and the Unfair Contract Terms Directive.

92. Directive 2011/83/EU of the European Parliament and of the Council on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2011 O.J. L. 304/64 Art. 2

93. Parliament and Council Directive on Consumer Rights, *supra* note 91, art. 5, 6

94. SCHULZE & ZOLL, *EUROPÄISCHES VERTRAGSRECHT* 148 (Baden-Baden: Nomos 2015).

95. *Id.* at 186; RIESENHUBER, *EU-VERTRAGSRECHT* 87 (Tübingen: Mohr Siebeck 2013); critically: Horst Eidenmüller, *Why Withdrawal Rights?*, 7 *ERCL* 1, 15 (2011), <https://pdfs.semanticscholar.org/26ef/b94e6b6c56c850827d1fca497522179fe526.pdf>.

96. The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 Statutory Instrument 2013 No. 3134, http://www.legislation.gov.uk/uksi/2013/3134/pdfs/uksi_20133134_en.pdf.

97. Consumer Rights Act 2015, <http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted>.

98. Consumer Protection Act (Amendment) Regulations 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300129/bis-14-693-consumer-protection-amendment-regulations-2014.pdf.

but also summarized different aspects of consumer law in one piece of legislation. This consolidation of consumer law in the UK turned out to be one of the most sophisticated and forward-looking legislative acts within the European Union.

Among its other aspects, the legislation creates a new type of classification for digital content contracts and thus ensures a high level of consumer protection.⁹⁹ The provisions highlight the enormous relevance of these contracts in the field of consumer law, especially in comparison to other Member States. Some of these countries, e.g. Germany and France, do not have any manner of special provisions when it comes to contracts relating to digital content.¹⁰⁰ Other Member States, such as the Netherlands, do provide a legal framework but refer to an already existing regime of remedies.¹⁰¹ By contrast, the CRA creates a special regime of remedies for consumers that can be raised against retailers in case of non-conformity with the contract.¹⁰²

Given the importance of the topic, the EU also presented two new draft directives as part of the Digital Single Market Strategy,¹⁰³ dealing with consumer contracts for the supply of digital content (Digital Content Directive) and certain aspects of online and other distance sale of goods (Online Goods Directive).¹⁰⁴ It is certainly true that both the EU and the UK approaches concur in some aspects; however, they also show some differences.¹⁰⁵

99. Consumer Rights Act Explanatory Notes, Background, No. 5, <http://www.legislation.gov.uk/ukpga/2015/15/notes/division/2/1>.

100. *European Parliament*, Contracts for Supply of Digital Content to Consumers, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581980/EPRS_BRI\(2016\)581980_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581980/EPRS_BRI(2016)581980_EN.pdf), at 4.

101. *European Parliament*, Contracts for Supply of Digital Content to Consumers, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581980/EPRS_BRI\(2016\)581980_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581980/EPRS_BRI(2016)581980_EN.pdf), at 3.

102. Consumer Rights Act 2015, c. 3, s. 42.

103. *European Commission*, A Digital Single Market for Europe, 08.11.2016, https://ec.europa.eu/priorities/publications/digital-single-market-two-years_en (Feb. 7, 2017).

104. See proposal for a Digital Content Directive: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015PC0634&from=EN>; see proposal for an Online Goods Directive: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015PC0635&from=EN>; the Digital Content Directive and Online Goods Directive are the result of a process of consolidation undertaken after the Proposal on the Common European Sales Law (CESL) could not pass the legislation process (see in the Explanatory Memorandum of both proposals, p. 7: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015PC0634&from=EN>).

105. Mánko & Tereszkievicz, *Digitale Inhalte nach britischem Consumer Rights Act 2015 unter dem Eindruck des Brexit*, in BREXIT UND DIE JURISTISCHEN FOLGEN 279 et. seq. (Kramme, Baldus & Schmidt-Kessel, eds., Baden-Baden: Nomos 2017).

The differences can already be seen when it comes to the definition of digital content. The CRA defines the term digital content in Sec. 2 Subsection 9 as ‘data which are produced and supplied in digital form’, but it excludes digital services pursuant to Sec. 33 Subsection 4. The definition of digital content and hence the scope of the Digital Content Directive is broader compared to the CRA, as it does not exclude digital services. This leads to a higher level of consumer protection in the directive as, under Sec. 49 Subsection 1 CRA, the remedies for a contract of services depend on a breach of reasonable care and skill.

Moreover, the burden of proof in the CRA and the Digital Content Directive differ: Whereas the rules in the CRA correspond with the Consumer Sales Directive,¹⁰⁶ the burden of proof in the Digital Content Directive leads to a lower standard of consumer protection on the European level.¹⁰⁷

Another difference between the CRA and the proposal for a Digital Content Directive concerns the right to reject the goods. Whereas the proposal for the directive does not allow the consumer to reject the goods directly, instead specifying a prior right to repair or replacement, the CRA offers the option to immediately reject within a short time period – i.e. 30 days – pursuant to Sec. 20.

Despite these differences, both the CRA and the European proposal show the importance of consumer law and adapt it to the modern developments of digitalization. The legal remedies and systems chosen by the UK are not at all unsuitable approaches, giving the consumer indeed a wide field of options. Some of the terms even

106. *See* Council Directive 1999/44, art. 4, 1999 O.J. (L 171) 12 (EC) The Consumer Sales Directive, which deals with contracts in regards to consumer goods between a consumer as a buyer and a seller as a business, provides for the rights of consumers where the goods are not in conformity with the contract.

107. Art. 5 Subsection 3 of the Consumer Sales Directive shifts the burden of proof, stating that non-conformity of the goods is presumed to have existed at the time of delivery, but only where the non-conformity becomes apparent within a time period of six months after the delivery of the goods. *See* Council Directive 1999/44/EC, art. 5 § 3, 1999 O.J. (L 171) 12 (EC). Sec. 42 Subsection 9 CRA states that digital content that does not conform to the contract within a period of six months is presumed to have been supplied as not conforming to the contract. *See* Consumer Rights Act 2015, c. 15, § 42(9) (U.K.). In contrast, Art. 9 of the Digital Content Directive shifts the burden of proof to the supplier but does not contain any presumption at all. *See* Commission Proposal for a Directive of the European Parliament and of the Council on Certain Aspects Concerning Contracts for the Supply of Digital Content, at art. 9, COM (2015) 634 final (Sep. 21, 2015).

provide a higher consumer protection level as compared to the two draft directives.

2. Privacy Law

As technological progress rapidly develops and new innovations flood the existing market every day, data protection has become a critically important political issue. Due to the fact that people are encouraged to pay with their data instead of money,¹⁰⁸ data protection needs to be regulated in a globalized context. The groundbreaking decisions of the CJEU regarding Facebook¹⁰⁹ and Google Spain¹¹⁰ also impact the relations between the EU and the United States of America (US), and after a Brexit they will also effect relations with the UK as a national player. For the first time, the Court established in the Google Spain decision the so-called ‘right to be forgotten’.¹¹¹ This crucial step towards more consumer protection in the field of data protection law was followed by massive legal discussions and led to further initiatives regarding the development of a uniform European privacy law. The recently established rights were further strengthened because the CJEU repealed in its Facebook decision the ‘safe harbor agreement’ between the European Commission and the US. Since the CJEU found the gap between the respective protection standards of the EU and the US to be substantive, the agreement is now in the process of re-negotiation.¹¹² Not only did the standard of privacy law change within less than one year, one of Europe’s most important trading partners, the US, was also deeply affected. The involved companies had to change their storage policy, and, up to now, Facebook has been trying to cope with the responsibility of enabling users to delete (and by this we mean permanently delete) data that they do not want to remain in the internet.

In order to minimize the enormous impact of these decisions for the European Member States, the new General Data Protection

108. See Kerber, *Digital Markets, Data and Privacy: Competition Law, Consumer Law and Data Protection*, 65 GRUR INT. 639 (2016).

109. See *Schrems v. Data Protection Commissioner*, Case C-362/14, 2015, available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62014CJ0362>.

110. See *Google Spain SL v. Agencia Espanola de proteccion de Datos (AEPD)*, Case C-131/12, 2014, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131>.

111. *Id.* See also Charter of the Fundamental Rights of the European Union, 364/1, arts. 7-8, 2000 O.J. C 2000.

112. Skouris, *Leitlinien der Rechtsprechung des EuGH zum Datenschutz*, 35 NVWZ 1359, 1363 (2016).

Regulation will come into force on 25 May 2018. Given the short time-period, it seems likely that the regulation's scope of application will also include the UK, at least for the moment. Theoretically, a different data protection regime after Brexit is possible. Notwithstanding that, it seems to be more reasonable to keep the same standard in order to improve and ensure the enforcement of a single level of data protection. Businesses are therefore encouraged to adopt the necessary changes to ensure conformity with current legal provisions.¹¹³

As today's world cannot be imagined without millions of data processing programs sending data from one point in the world to another each second, parallel data protection on the global level seems crucial in the future. Although developments are practically in their infancy, a uniform code at least for a geographical Europe would be considered an important step. The UK's participation therefore offers an important option, especially for facilitating the smooth functioning of business-to-consumer (b2c) as well as business-to-business (b2b) transactions within the EU. In the long run, unified codices of such a nature might also be a worldwide option. Since international businesses have to adjust their policies regarding EU standards, they might as well change those policies in and for the US and elsewhere, providing a uniform standard of data protection.

Nevertheless, the legal issues in this field of law change very quickly. After Brexit the UK will be able to decide on a national level and hence react considerably faster to new challenges than the EU with its complex legislative process. The chance to become a role model by implementing innovative and preventive provisions is strong, and this dynamic could most certainly encourage the EU to follow the UK's chosen path or at least consider it.

3. Enforcement

The enforcement of rights is of enormous importance, as without functioning enforcement, consumer protection law provisions remain merely law on the books. Unfortunately, the enforcement of European consumer laws is rather weak as – in part due to the principle of procedural autonomy¹¹⁴ – hardly any harmonized enforcement rules

113. Geminn & Schaller, *Brexit im Datenschutz?*, ZD-AKTUELL 05320 (2016).

114. See *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, Case 33/76, 1979 E.C.R. 1989.

exist.¹¹⁵ It is only relatively recently that the Alternative Dispute Resolution Directive (ADR Directive) and the Online Dispute Resolution Regulation (ODR Regulation) were introduced. Most noteworthy is the fact that there exist neither class actions¹¹⁶ on a European level nor a European Consumer Agency that is comparable to the Federal Trade Commission.¹¹⁷

The CRA, however, not only brought significant changes to the rights of consumers in consumer contracts in the UK but also implemented changes in the enforcement of rights. By introducing class actions into the law of the UK, a new procedural mechanism for hearing competition law infringements before the Competition Appeal Tribunal (CAT) has been implemented. The class action suit provided for in the CRA is based on an opt-out mechanism¹¹⁸ similar to the class-action mechanism in the US and aims to enhance the enforcement of rights.

In the UK the enforcement of rights in the field of consumer protection has been changed by the implementation of the Competition and Markets Authority (CMA) in 1 April 2014, which since that date has the power to investigate matters and bring a claim to court.¹¹⁹ The authority has been created in order to make enforcement more efficient and effective and to streamline its structure. The CMA is responsible not only for consumer protection but also for promoting competition for the benefit of consumers. It thereby takes a consumer-orientated approach as it investigates consumer issues and links the protection of competition directly to consumers' interests. Discussions on developing a more consumer-linked approach in the enforcement of consumer and competition law have been ongoing also in other EU

115. Regulation 861/2007/EC of July 11, 2007, Establishing a European Small Claims Procedure, 2007 O.J. (L 199) 1 (EC) has been introduced by the EU, but has no wide practical influence because many consumers are unaware of it and the entailed small claims procedure; see also ECC-Net European Small Claims Procedure Report, (Sep. 2012), available at: http://ec.europa.eu/consumers/ecc/docs/small_claims_210992012_en.pdf.

116. Different types of class actions have been introduced in the law of certain European Member States. France, Italy, Bulgaria, Denmark, Finland, Sweden, Spain, Poland, Romania and Belgium created class actions, for an overview cf. EBERS, RECHTE, RECHTSBEHELFE UND SANKTIONEN IM UNIONSPRIVATRECHT 774 (Tübingen: Mohr Siebeck 2016).

117. For further references, see Chris Jay Hoofnagle, *Federal Trade Commission Privacy Law and Policy* (Cambridge: Cambridge Univ. Press 2016).

118. See Consumer Rights Act 2015, c. 15, § 81, sch. 8 (UK).

119. CMA, CONSUMER PROTECTION: ENFORCEMENT GUIDANCE 2, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/546521/cma58-consumer-protection-enforcement-guidance.pdf.

Member States, e.g. concerning the enforcement procedures of the *Bundeskartellamt* (Federal Cartel Office) in Germany.¹²⁰ While small changes have already been introduced in Germany – enlarging the Federal Cartel Offices competence to investigate businesses’ repeated infringements of consumer law provisions¹²¹ – the introduction of a full-fledged consumer and competition law authority comparable to the CMA is still missing. The CMA can thereby be seen as an important and effective body of consumer rights’ enforcement; the rights that it advances and its clear structure of enforcement can be seen as significantly progressive.

The above-mentioned ADR Directive has been transposed into national law by the Consumer Rights Act and implements an alternative dispute resolution procedure. This means of enforcements aims to enhance the level of consumer protection and promote dispute resolution outside of courts.¹²² Consumers thereby have access to redress in a simpler and more efficient way. Businesses are obliged to make consumers aware of relevant alternative dispute resolution providers.¹²³ It remains to be seen if this transposed directive will continue to be part of the national law after Brexit.

The ODR Regulation additionally implements an online dispute resolution instrument on a European level in order to promote trade within the single market and simplify the enforcement of consumer rights concerning distance contracts within the internal market context. Accordingly, the ODR Regulation has not been implemented into national law, instead being directly applicable. It cannot be foreseen if this regulation will still be a part of the national law after Brexit.

120. Opinion of the Federal Cartel Office (Bundeskartellamt) to the Draft Amendment to the German Competition Act (July 25, 2016), p. 2 & 28, available at: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Stellungnahmen/Stellungnahme-Regierungsentwurf_GWB9.pdf?__blob=publicationFile&v=2.

121. *Cf.* Amendment to § 32e GWB, German Competition Act, available at: <http://dip21.bundestag.de/dip21/btd/18/114/1811446.pdf> (24.3.2017). The law was accepted by the German Bundestag on March 9, 2017 and scheduled for discussion on March 31, 2017 in the second chamber, the German Bundesrat.

122. *See* Directive 2013/11 of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 2009 O.J. L 165/63.

123. *See id.*

IV. 'A MARKET SOLUTION'

Notwithstanding the importance of analyzing all potential statutory consequences and mechanisms, the final outcome of Brexit will primarily influence the law on the books. However, a more economic view towards the problems of Brexit might help in order to streamline new approaches and amplify our perspectives. From an economic point of view, changes regarding consumer law are a key factor that will influence further trading relations.

The main task of the UK's government will be to find a practical and acceptable solution to all the legal problems. However, legal reality and legal theory do not always coincide. Apart from the UK's governmental decision, economic aspects will shape the reality for UK businesses and companies. Therefore, the key question that has to be addressed will be: Can UK businesses economically afford an alteration and – particularly – a lowering of consumer protection standards?

Any lowering of the current consumer law standards will encourage continental EU consumers to buy their products somewhere within the EU instead of the UK, while at the same time also prompting UK consumers to buy from businesses located in the EU.¹²⁴ Additionally, possible trade customs or prohibitive taxes are an actual danger that will certainly influence the price of goods and shipping. The risks of losing customers and a noticeable decline in sales should be sounded out carefully by the UK's businesses. One is drawn to the conclusion that UK's industry might retain a high interest in matching the EU consumer protection level in order not to lose customers in the EU market. If UK businesses want to offer goods and services to EU consumers, they are legally required to comply with the EU standards. As Art. 6 para. 1 Rome I Regulation suggests the applicable law in a conflict of laws case depends on the consumers' habitual residence as well as whether the undertaking 'pursues' (Art. 6 para. lit. b *leg. cit.*) business in this country. Assuming a customer residing in the EU, the EU consumer protection standard would apply.¹²⁵ Consequently, a

124. The question of competing legal regimes and to what extent consumers are aware of different legal consequences was, however, broadly debated in context of the Common European Sales Law. See e.g. Dannemann, *The CESL as Optional Sales Law: Interactions with English and German Law*, in *THE COMMON EUROPEAN SALES LAW IN CONTEXT* 708, 722 (Vogenauer & Dannemann eds., Oxford: Oxford University Press 2013).

125. Choice of clause clauses would not prevail, if the standard of the chosen law deviates from the EU standard (Art. 6 para. 2 Rome I Regulation); although it is highly disputed

Brexit a would have no negative effects on consumers purchasing from UK businesses within the EU.

The other way around, EU companies that are used to a possibly higher EU standard might be more competitive in the UK, since they could – voluntarily – offer for consumers more favorable conditions than UK businesses do.¹²⁶ Given the scenario that the UK legislature decides to lower its consumer protections standards in comparison to the EU provisions, businesses could close that gap by contractual provisions. Guarantees and other options could be included in either contract terms or corporate social responsibility agreements so as to ensure EU consumers' rights also within the UK. That might also be feasible given that UK businesses which offer their services in the EU and enter into contract with EU consumers will in any event – even if UK law purportedly governs the contract under a choice-of-law clause – be subject to EU law where the law of the domicile of the EU consumer provides for a higher level of protection, this being an element of EU law pursuant to Art. 6 para. 2 Rome I Regulation.¹²⁷ However, it has to be questioned how successful such a strategy will be if only part of the businesses in the UK opt to apply the higher standards of the EU.¹²⁸

Presently the question of a divergence between EU and UK consumer protection standards do not have much of importance as a certain conformity of British law has been shown to be likely and there have not yet been any severe pronouncements on the future of consumer law in the UK. But since EU law will continue to grow and develop, further standards and legislative programs (e.g. in privacy

what 'pursuing' means – especially in context of distance and online sales – it is at least common that 'pursuing' means wilful behaviour to sell goods in a certain country, cf. *Callies*, Art. 6 Rome I Regulation, in: *Rome Regulations – Commentary*, 154 seqq. (Callies ed., Alphen aan den Rijn: Kluwer Law International, 2d ed. 2015)

126. Obviously, this is only one possibility: For EU or UK business another possible way would be, to operate with two sets of standard terms (one for goods offered in UK and one in the EU). However, if we assume rational undertakings this depends on how valuable the sold good is and how big the actual legal difference is, whether they would choose this option.

127. *Callies*, *Art. 6 Rome I Regulation*, in *ROME REGULATIONS – COMMENTARY* 154 et seq. (Callies ed., Alphen aan den Rijn: Kluwer Law International 2d ed. 2015).

128. The assumption that consumers behave as rational as often suggested (and thus would pursue their rights in court) has been questioned by research concerning the consumer behaviour. For the UK, see in a very condensed manner Twigg-Flessner, *Ability of Consumers to Enforce Their Rights – A UK-Perspective*, in *CONSUMER LAW AND CONSUMER BEHAVIOUR* 211 (Heiderhoff & Schulze eds., Baden-Baden: Nomos 2016), but this is question is different from the fact that granting additional warranty rights or guaranties to consumers is a competitive feature of good.

law) will be introduced. And after Brexit those provisions will not apply in the United Kingdom. Even if the benchmark of an average consumer is taken as a starting point, different standards of protection will not remain unnoticed. Businesses will (with good reason) fear a considerable loss of customers and a decline in sales. The UK would be well advised to follow the example of Switzerland¹²⁹ and keep up with the changes made in EU (consumer) contract law on a voluntary basis.¹³⁰

If, however, the UK legislature decides to lower its consumer protections standards in comparison to the EU provisions, businesses could close that gap by contractual provisions. Guarantees and other options could be included in either contract terms or corporate social responsibility agreements so as to ensure EU consumers' rights also within the UK. That might also be feasible given that UK businesses which offer their services in the EU and enter into contract with EU consumers will in any event – even if UK law purportedly governs the contract under a choice-of-law clause – be subject to EU law where the law of the domicile of the EU consumer provides for a higher level of protection, this being an element of EU law pursuant to Art. 6 para. 2 Rome I Regulation.¹³¹ However, it has to be questioned how successful such a strategy will be if only part of the businesses in the UK opt to apply the higher standards of the EU.

Apart from the legal problems that might be solved by contractual agreements, enforcement seems one of the most important legal issues. What will happen if a dispute arises between a UK business and an EU consumer and the UK has bound itself contractually to the higher standards known in the EU? Can the voluntary provisions then be interpreted in the light of the jurisprudence by the CJEU? Since Prime Minister May declared the UK's intention not to be bound by any decision of the CJEU after Brexit, the respective judgments of the CJEU will not apply directly within the UK borders.¹³² However, if UK businesses decide to be bound by EU provisions voluntarily, the Prime Minister's stated intention might not be advisable:

129. Epiney, *Die Beziehungen Schweiz-EU als Modell für die Gestaltung des Verhältnisses Großbritanniens zur EU*, in BREXIT, - DIE JURISTISCHEN FOLGEN 77, 83 (Kramme, Baldus & Schmidt-Kessel, eds., Baden-Baden: Nomos 2017).

130. This has, for different areas of law, previously been described as the 'Brussels Effect' by Bradford, *The Brussels Effect*, 107 NW. L. REV. 1 (comparing the situation created by the EU to the well-known California effect).

131. Callies, *supra* note 127, at 154.

132. *Cf.* May, *supra*, note 7.

While CJEU decisions will clearly no longer be binding on UK courts, the guidelines and constructions of the CJEU should at least be considered by UK courts when interpreting contractual provisions (or legal provisions which are rooted in EU law and not changed after Brexit) since one can correctly state that many EU consumer law directives and regulations came alive only through their interpretation by the CJEU.¹³³ The problem can be compared to the question whether CJEU decisions are binding on national courts where the national legislature decided to transpose a directive so as to also encompass B2B relations.¹³⁴ Yet in areas in which British legal academics and courts have struggled with the CJEU's arguments, it is often common law concepts that receive greater emphasis, as can be seen concerning the concept of good faith. The legal lines there are indeed quite vague.

V. CONCLUSIONS AND OUTLOOK

It can be shown that consumer law in the UK after Brexit will likely fall into one of three groupings, one area which will remain rather constant (e.g. product liability law and air passenger rights), one area where a divergence from the European standard is likely (e.g. unfair contract terms and unfair commercial practices law) and one area where post-Brexit changes might even function as a role model for the further development of consumer law in the EU (e.g. enforcement and privacy law). The differentiation between the first two groups may be based on the fact that any kind of deprivation or loss of concrete consumer rights and remedies will be more difficult to establish than a change of vague legal institutions like the notion of the average consumer.

By contrast, the exit of the UK might also work as a trigger to rejuvenate projects that were previously abandoned – in part due to the harsh criticism voiced by the UK – like the CESL.

133. See *Gebr. Weber GmbH v. Wittmer*, Joined Cases C-65/09 & C-87/09, [2011] E.C.R. I-5295; *Messner v. Krüger*, C-489/07, [2009] E.C.R. I-7315; *Quelle AG v. Bundesverband der Verbraucherzentralen und Verbraucherverbände*, C-404/06, [2008] E.C.R. I-2713.

134. Regarding the methodological issue of interpreting 'excessively implemented directives' see further Habersack & Mayer, *Die überschießende Umsetzung von Richtlinien*, in *EUROPÄISCHE METHODENLEHRE* 297, 310 (Riesenhuber ed., Cambridge: Cambridge University Press 3d ed.).

However, even in the areas where changes can be expected on a legislative level, the market might thrive towards a perpetuation of the status quo in order to remain competitive on the European market.

There is no doubt that an EU without the UK will lead to a tragic loss for the remaining Member States in many ways.¹³⁵ Different approaches and guidelines initiated by the UK have shaped the EU and its legislation over the years. Most certainly, the EU would not have looked the same without the UK being part of it for over 45 years. The countless contributions of British businesses, judges and lawyers cannot be appreciated enough. Nevertheless, some of the guidelines and legislation within the EU law would have looked different without the UK's constant insistence. It would not be wholly inaccurate to view the UK as a perpetual 'loner' whose wishes and many special agreements have caused an uncountable number of protracted and encumbering negotiations.

But also the UK has, for its part, been influenced and shaped by EU politics and legal provisions. The economic, cultural and legal achievements have been implemented and have found their way into the British society.

As shown above, it is exceedingly likely that the general approaches regarding law enforcement and liberal market regulations after Brexit will develop in different directions. Detrimental consequences have to be expected on both sides, but not everything has to be negative. In fact, a Brexit might even lead to the UK assuming a role model position. CMA as well as the Consumer Protection Act and the Consumer Rights Act do give hope in this respect.

Whatever the final Brexit will look like, it still means the end of an era. It can be metaphorically described as a 'divorce after a marriage'¹³⁶ of over 45 years. As is common knowledge, family issues are a sensitive topic, involving many emotions that should be put aside when negotiating what is best for the future of the family members. Although separations are never easy, hope and faith should form a part of all such negotiations. Considering all of the legal problems, the process of Brexit is likely to take more than the two years allotted for

135. For a further analysis of costs and benefits, see Oliver, *European and international views of Brexit*, 23 J. OF EUR. PUB. POL'Y 1321 (2016).

136. Skouris, *Brexit - Rechtliche Vorgaben für den Austritt aus der EU*, 27 EUZW 806, 811 (2016).

negotiation.¹³⁷ But it can be hoped that, in the end, both sides will overcome their pride, learning from each other's approaches and adjusting the respective legislation in order to achieve a better consumer welfare.

137. Falter & Rüdell, *Brexit, Anwendbare Rechtsquellen und Auswirkungen auf Verträge*, 8 GWR 475, 476 (2016).