Legal Tech und (EU) Verbraucherrecht

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- Introduction

- The Current Legal Framework – Overview

- Regulatory Challenges

  - Legal Services Regulation and Legal Tech

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  - EU Data Protection Law and Legal Tech

- The Future Legal Framework – Discussion

Introduction

Use of Legal Tech (LT) in Consumer Markets

- **LT Products/Services providing**
    - infrastructure, marketplaces
    - Legal information
    - Legal (tailored) advice
    - Document/Contract Automation (drafting, reviewing)
    - Dispute Resolution Services
    - Algorithmic (automated) decision making

- **Forms of Communication**
    - Websites
    - Chatbots, virtual assistants
    - Apps

Use of Legal Tech (LT) in Consumer Markets

- **LT: Classification by Technology**

  - **Hand-coded Knowledge**

    - Esp. expert systems designed as **rule-based** conditional logic operations

  - **Data-learnt Knowledge**

    - Predictions based on statistical **correlations** found in data

    - Ability to **learn from data**

Advantages for Consumers

- Increasing Awareness of Legal Problems

- Wider Choice

- Increasing Price Transparency

- Better Quality?

- Better Access To Justice

- **Overall Advantages**

  ➢ Open-up latent markets

  ➢ More Competition

  ➢ Stronger Rule of Law

Risks for Consumers

- **Access/Choice Problems**

  ➢ Exclusion of „analogue" consumers

  ➢ Exclusion of uneconomical claims?

  ➢ Reduction of consumers' autonomy

- **Loss of Transparency**

  ➢ Level of Protection is unclear, because the consumer does not know whether LT is a regulated service!

  ➢ Loss of personal contact

  ➢ Black box algorithmic systems

Risks for Consumers

- **Quality of LT Services**

  ➢ Who makes sure that law is accurrately translated into code?

  ➢ How to Assess the Accuracy of Legal Advice?

- **Fairness of LT Services**

  ➢ New power asymmetries between consumers and legal service providers

  ➢ Exploitation of consumers' vulnerabilities?

  ➢ Accountability of legal service providers?

Risks for Consumers

- **Redress**

  - Mandatory Insurance Policies for LT products?

  - Cross-border enforcement?

  - Redress at Bar Association?

- **Representation**

  - Hidden privatisation of decisions about public values?

  - Involvement of consumer groups in the development, deployment, evaluation of LT services?

The Current Legal Framework – Overview
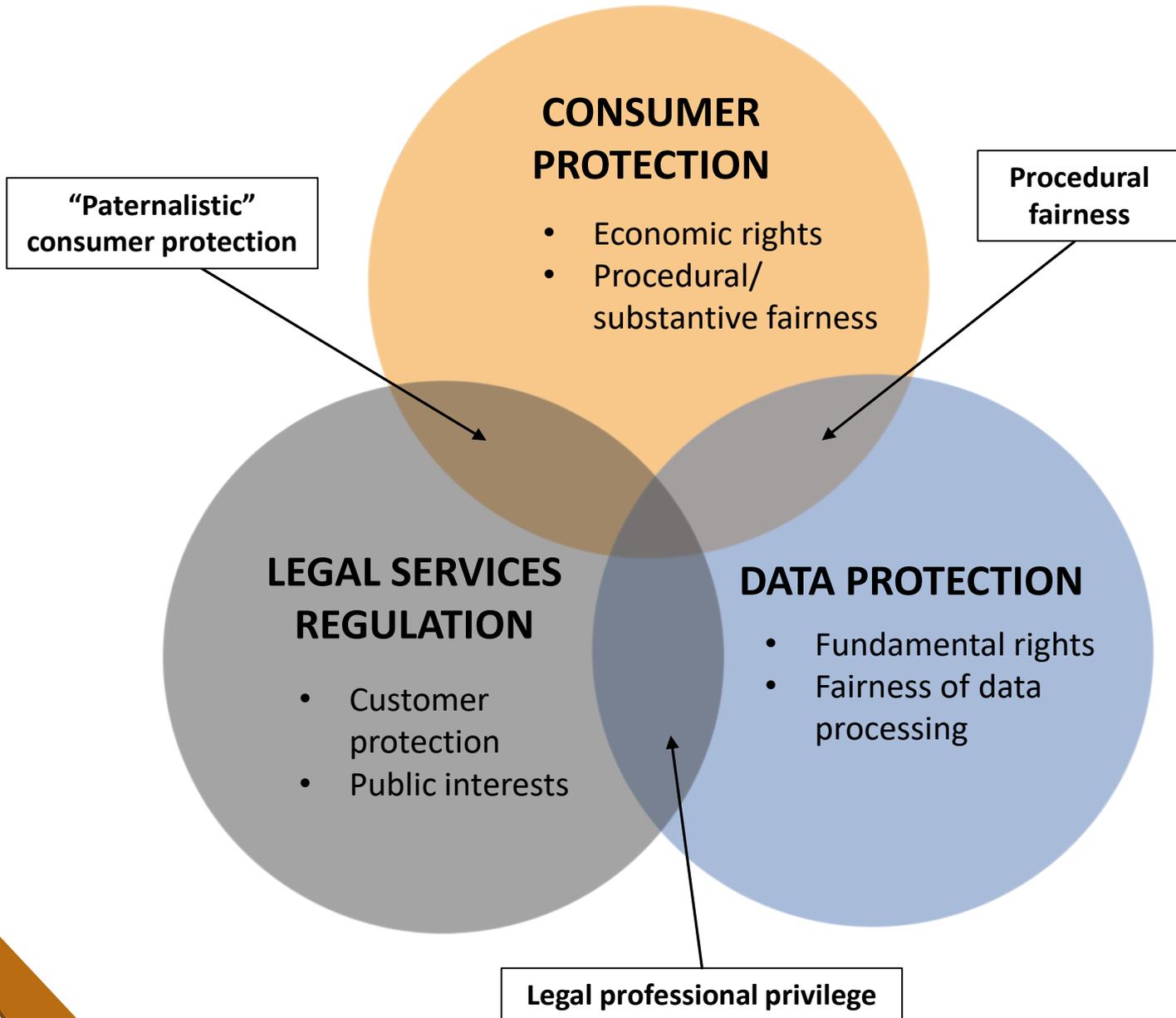
Legal Services Regulation and Legal Tech

Legal Services Regulation

- Most LT companies offer their services not as law firms but outside the professional rules.

- Reasons:

  - Ownership Restrictions

  - Restrictions to co-operate with non-lawyers

  - Fee sharing restrictions

  - Restrictions of commercial/advertising activities

Legal Services Regulation

- **Worldwide, notable differences regarding:**

  - Type of activites which is reserved to lawyers only

  - Permission for unregulated providers to operate in the legal services sector?

  - Ability of non-lawyers to own/manage law firms

- **In the EU, no harmonization according to:**

  - Lawyers' Services Directive 77/249

  - Lawyers' Establishment Directive 98/5

  - Professional Qualifications Directive 2005/36

  - Services Directive 2006/123

"LEGAL ADVICE" AS RESERVED ACTIVITY FOR LAWYERS

RED: LEGAL ADVICE IS A RESERVED ACTIVIY

GREEN: LEGAL ADVICE IS NOT Reserved
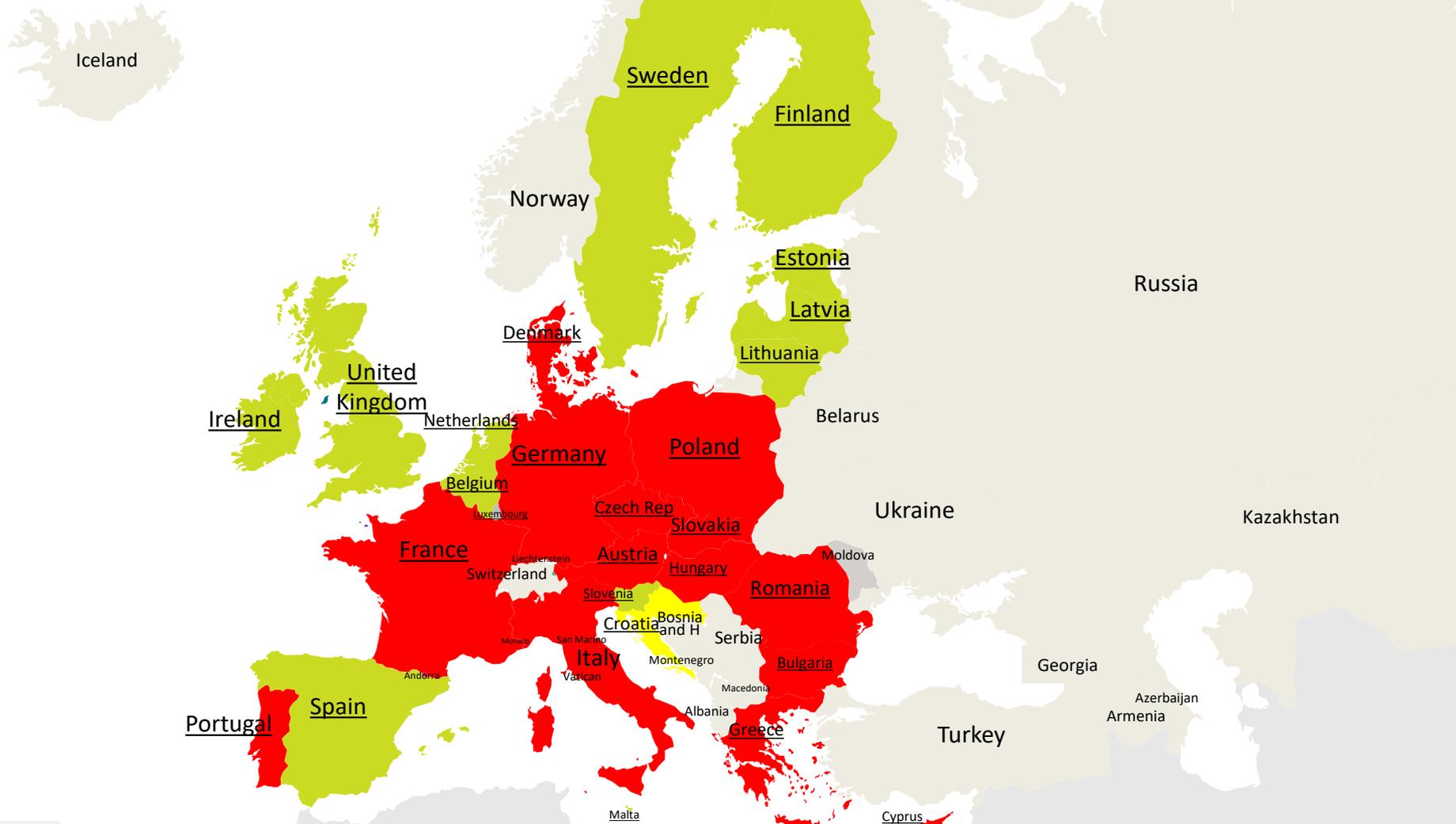
Data Source: Claessens et al., Evaluation of the Legal Framework for the Free Movement of Lawyers, Final Report, 2012, pp. 40-42; Map Template by Showeet.com

Legal Services Regulation

- Most EU jurisdictions make a distinction between

Unregulated	Legal Information	Legal Product	standardized
Regulated	Legal Advice	Legal Service	taylored

➢ **LT is blurring these boundaries!**

➢ **Challenges**

- Over-regulation of LT companies
- Under-regulation of LT companies

Legal Services Regulation

- If LT falls outside the (national) legal services regulation:

  - **Less Protection for Clients/Consumers**

    - No minimum standards of quality and ethics

    - No neutrality of LT provider

    - No (written) prohibition of „conflict of interest"

    - No legal professional privilege

    - No redress to the bar association

    - No mandatory insurance policy of LT provider

  - **Less Protection for third parties?**

  - **Risks for the public?**

EU Consumer Law and Legal Tech

EU Consumer Law and Legal Tech

- **Regulatory Framework**
  - Unfair Commercial Practices Directive (UCPD) 2005/29
  - Consumer Rights Directive (CRD) 2011/83
  - Services Directive 2006/123
  - Unfair Contract Terms Directive (UCTD) 93/13
  - Digital Content Directive (DCD) 2019/770
  - Injunctions Directive 2009/22

EU Consumer Law and Legal Tech

- **Applicability to LegalTech Services?**

CJEU, case C-537/13 (**Šiba)**

"As regards **contracts for legal services** (…) there is, as a general rule, some **inequality between 'client-consumers' and lawyers** owing in particular to the **asymmetry of information** between the parties. Lawyers display a high level of technical knowledge which consumers may not have and the latter therefore may find it difficult to judge the quality of the services provided to them (…).

Thus, a lawyer who, as in the case in the main proceedings, provides a legal service for a fee, in the course of his professional activities, to a natural person acting for private purposes **is a 'seller or supplier' within the meaning of Article 2(c) of Directive 93/13**."

EU Consumer Law and Legal Tech

- **Applicability to LegalTech Services?**

CJEU, case C-434/15 (Asociación Profesional Elite Taxi)

Art. 56 TFEU as well as Art. 2(2)(d) Services Dir. 2006/123 and Art. 1(2) Information Society Services Dir. 98/34 to which Art. 2(a) E-Commerce Dir. 2000/31 refers, "must be interpreted as meaning that **an intermediation service** (..) the purpose of which is to connect, by means of a smartphone application and for **remuneration**, nonprofessional drivers using their own vehicle with persons who wish to make urban journeys, **must be regarded as being inherently linked to a transport service** and, accordingly, must be classified as "a service in the field of transport". Consequently, such a service **must be excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31."**

EU Consumer Law and Legal Tech

- **Applicability to LegalTech Services?**

  - How about „free" services?

Art. 3(1) Digital Content Directive 2019/770:
This Directive shall also apply where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and **the consumer provides or undertakes to provide personal data** to the trader,
except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content or digital service in accordance with this Directive or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose.

EU Consumer Law and Legal Tech

- **Consumer Protection Instruments**

  - **Prohibition of Unfair Commercial Practices**

    - UCPD: Safeguards against unfair commercial practices

    - BUT: No established standards of „professional diligence" for LT

  - **Information Requirements**

    - Only standardized information, no „individual advice"

    - NO special safeguards for algorithmic decisions!

  - **Right of Withdrawal**

    - Only if LT is provided as distance contract

EU Consumer Law and Legal Tech

- **Consumer Protection Instruments**

  - **Quality of Service?**

    - Yes, if LT is regarded as „legal service" under the DCD 2019/770

    - But: NO established objective conformity standards for LT

  - **Fairness-Check of Contract Terms**

    - Yes, Unfair Contract Terms Dir. 93/13 is applicable.

    - But: No established standard for „fairness" of contract terms if LT is not subject to deontological rules

  - **No EU Claim For Damages!**

EU Consumer Law and Legal Tech

- **Further Gaps in EU Consumer Protection**

  - No special rules for chatbots

  - No special rules for „intelligent systems"

    - New information asymmetries due to (i) big data analytics and (ii) black box algorithms

- **General Problem**

  - EU Consumer Law is based on standardization, whereas intelligent systems lead to an individualization and personalization

EU Data Protection Law and Legal Tech

EU Data Protection Law and Legal Tech

- **Purpose of EU Data Protection:**

  - **Fairness of Data Processing** = Procedural Fairness

  - EU Data Protection is NOT designed to assess the accuracy of decsion-making process!

CJEU, joined cases C-141/12 and C-372/12 (*YS. and M. and S.*):

In contrast to the data relating to the applicant for a residence permit which is in the minute and which may constitute the factual basis of the legal analysis contained therein, such an analysis, as the Netherlands and French Governments have noted, **is not in itself liable to be the subject of a check of its accuracy** by that applicant and a rectification under Article 12(b) of Directive 95/46.

The Future Legal Framework – Discussion

The Future Legal Framework

- **Current Approaches of Regulators**
  - Wait and See Approach
  - Prohibition (for lawyers; non-lawyers)
  - Modifying the status-quo
  - Facilitating Legal Tech

Regional Court Cologne, Judgment of 8 Oct. 2019, Case Hanseatic Bar Association vs. Smartlaw.de:

„When drafting legally secure … contracts, it is usually necessary to clarify the relevant facts in cooperation with the client…. This can not be provided by a computer that asks different questions about the desired contract design in a question and answer system and then delivers a contract that has been compiled considering the answers"

The Future Legal Framework

- ## Alternative Approaches

A Regulatory Sandbox Model

Innovators

Identify innovative new offering, and submit 'experiment' along with which regulations should be relaxed & how they'll measure outcomes

If accepted, run the Experiment and gather data to evaluate

- consumer interest + outcomes

- technology's performance

- pricing and outreach models

Exit if there is no audience, or if risks outweigh benefits

Possibly continue with the Experiment as full offering if Authority extends Sandbox or permanently changes regulation

Applications	Sandbox Experiments	Evaluation

Regulatory Authority

Invites applications, and specify which regulations are open to relaxation and which are not

Gives steering guidance on possible experiments

Decides which Experiments can enter, & what the safeguard principles are

Gives 'no enforcement' guarantee to them

Audits quality and outcomes of the experiments, and removes experiments

Does final outcomes evaluation and report

Decides possible new regulatory strategies, or permanent regulation change

Possibly extends sandbox and experiments

Source: Jiménez/Hagan, A Regulatory Sandbox for the Industry of Law