

The UK votes to leave the EU

Initial legal observations

Further information

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The potential legal issues raised by the departure of the UK from the European Union (EU) are unprecedented. However, one thing is clear - until the exit, in terms of the content and stability of UK law, nothing will change. The UK remains bound by its EU Treaty obligations and directly applicable EU law will continue to apply; where EU law does not apply, the UK remains competent to legislate as it sees fit.

Three aspects of the UK's exit are worth particular comment from a legal perspective.

The legal framework under which the UK will withdraw from the EU

As a matter of EU law, Article 50 of the Lisbon Treaty provides the only mechanism for withdrawal. Under Article 50:

- ▶ It is up to the UK to notify the European Council of its decision to withdraw - the EU cannot start withdrawal proceedings itself.
- ▶ The European Council must negotiate an agreement with the UK "setting out arrangements for its withdrawal, taking account of the framework for its future relationship with the [EU]."
- ▶ The agreement must be approved by a qualified majority of the Council (excluding the UK) after receiving the consent of the European Parliament.
- ▶ If no agreement has been reached within two years of the UK's formal notification under Article 50, the UK will exit the EU without any framework for their future relations. That two-year period can only be extended by a unanimous decision of the European Council (acting without the UK) and separately agreed by the UK.

The legal framework that will govern the UK's relationship with the EU after exit

A number of existing models (e.g., accession to the European Economic Area, a form of free trade agreement or simply relying on rights under the World Trade Organization) have been suggested, but nothing is yet clear on this question, and there is no legal reason why it has to be any of these models. If there is an appetite for it (and the time), there is an opportunity to be creative in structuring the future UK-EU relationship.

The task of identifying the impact on UK law once EU law ceases to apply

In simple terms, without EU law applying, what are the gaps in UK law and how should they be filled? Evidently, the nature and content of the negotiated exit agreement with the EU will answer some of those questions.

What will not change - international commercial contracts

It is important to bear in mind what will not change as a result of a UK exit. For example:

- ▶ English commercial contract law is unaffected by EU law.
- ▶ English law (and judges) will continue to accept the parties' choice of law and jurisdiction in contractual matters - the English common law position is the same as that under EU law (the Rome I Regulation).
- ▶ There will be uncertainty around non-contractual obligations that will need to be addressed - the legacy position under English law would be different to that under EU law (the Rome II Regulation).
- ▶ An exit will have no impact on the court system and procedures, or the qualification and competence of English judges, so we would expect English courts to remain attractive to the international market.
- ▶ The UK will have to legislate in the area of reciprocal enforcement of judgments in the EU, which is based on EU law (the Brussels Regulation), and this will require agreement with other EU Member States to maintain the current position - much of this could be achieved by signing up to the Lugano Convention but, without the Brussels Convention, the risk of forum shopping does remain.

The exit negotiation

Much of the debate to date, and much of the emotion, has been focused unsurprisingly on the exit negotiations and the future relationship between the UK and the EU. The operation of Article 50 will be important here: even accepting that this is the first time it has been used, the fact that the approval of the European Parliament and a (qualified) majority of Member States is required suggests that a broad consensus will have to be reached across the EU before agreement is concluded.

Furthermore, the two-year deadline for agreement (and the fact that it can only be extended by unanimity) places time pressure on all parties once the formal Article 50 notice is given. In any scenario, two years is a very short period of time for what will be a complex negotiation and approval process.

To add to the uncertainty, the shifting political landscapes in the UK, the EU and the remaining 27 Member States will inevitably impact on what the final terms of a UK exit will look like. Much is likely to change between now and then, including the identity and makeup of the key negotiators and lawmakers themselves. Already, there are many different issues that will influence the final outcome, but key among them at this stage appear to be:

- ▶ The intentions of the new UK Prime Minister Theresa May, who has ruled out calling a general election at this stage.
- ▶ The role of politicians who campaigned for a vote to leave the UK, three of which Mrs. May has appointed to key roles in this context in her first cabinet - Boris Johnson as Foreign Secretary, David Davis as Secretary of State for Exiting the EU and Liam Fox as Secretary of State for International Trade.
- ▶ The approach and demands of the devolved legislatures of, and MPs from, Scotland, Wales and Northern Ireland.
- ▶ The outcome of national elections in the rest of the EU (such as those upcoming in the Netherlands, France and Germany) between now and exit (as any changes in the governments of these countries will lead to changes in the leaders who sit in the European Council).
- ▶ The disparate views within the UK of what an exit should look like and the disparate views of the remaining 27 EU Member States - despite the rhetoric, neither side yet has a clear or commonly agreed negotiating position.

UK law post-exit - what needs to happen?

Assessing the likely impact of the UK's exit from the EU depends on the extent to which current UK law is derived from EU law. For these purposes UK law is derived from EU law where it is based on:

- ▶ An EU Treaty provision or regulation (both of which apply in the UK without the need for any UK implementing legislation)
- Or
- ▶ An EU directive (or decision), in which case, there will be UK implementing legislation in the form of either primary or secondary legislation

In simple terms, the exit will involve repealing the European Communities Act 1972 (ECA72). ECA72 is the UK primary legislation that, broadly speaking, ratified the UK's accession to the EU, incorporated EU law into UK law, provided a legislative basis for the adoption of (in particular) EU directives, and established the principles of supremacy of EU law (in the areas where the EU is competent) and consistency of UK law with EU law.

On the repeal of ECA72, where UK law was based on EU Treaty obligations or regulations, any gaps resulting from their removal will have to be filled by new domestic UK legislation (to the extent that UK lawmakers wish to fill the gaps). Where UK law was based on EU directives (or decisions), the UK has options:

- ▶ Where directives have been implemented by way of primary UK legislation, laws will continue to be unaffected by an exit (so the question is, do lawmakers wish to alter or repeal such laws?).
- ▶ Where directives have been implemented by secondary legislation, the UK will have to legislate to retain those laws (but it could do that by grandfathering existing UK implementing legislation, leaving itself free to amend it at a future date).

The removal of EU law would also mean that:

- ▶ UK courts will no longer be bound to apply the law in a manner consistent with principles of EU law.
- ▶ The UK will be able to legislate in areas that were previously under the exclusive competence of the EU (e.g., agriculture and fisheries).

Replacing EU laws

Exiting the EU does not mean simply repealing all UK laws that are based on EU law. That would have the effect of leaving vast gaps in UK law. Consequently, steps have to be taken to identify areas where EU law prevails, or where UK law is derived from EU law, and then work out how to "convert" EU law into domestic UK law (assuming that is the will of Parliament).

This is an immense task, complicated by the fact that, in some areas, there may be further complexity where the devolved legislatures in Scotland, Wales and Northern Ireland have competence. A by-product of removing an EU law applicable to the whole of the UK may be to introduce divergent replacements across the UK.

In truth, with certain important exceptions, we do not expect wholesale changes to UK law as a result of the exit from the EU. Most EU laws are uncontroversial or work satisfactorily so, in most areas, we expect that UK laws based on EU regulations or directives are more likely to be continued, with some changes at the margins and then incrementally over time.

There are a number of reasons for this view:

- ▶ The UK Government will have to achieve some consensus in the UK Parliament (given the current slim majority of the Government, the demands of the opposition parties and the closeness of the Referendum vote) and will have to be conscious of EU demands in the exit negotiation.
- ▶ There will not be time for major changes.
- ▶ We expect that stability and "business as usual" will be important drivers.

All of the above suggest that maintaining the status quo as much as possible is more likely than major changes.

Replacing EU rights and benefits

The more critical (and contentious) question to ask is, where EU market access rights or benefits are lost as a result of exit, what will the UK do to replace them? This will be the main focus of the exit negotiations, and key among the issues are likely to be:

- ▶ The loss of EU Treaty free movement rights will have a disproportionate impact on certain sectors of the economy, unless they are replaced with equivalent rights under the exit agreement. An obvious example of this will be the EU “passporting” rights in the financial services sector.
- ▶ Some sectors benefit from pan-EU regulatory or product approval regimes (e.g., medicines and pharmacovigilance, safety in the nuclear sector under the Euratom Treaty, the European Common Aviation Area and the Internal Energy Market). In these areas, alternative arrangements will need to be made, and it would seem, in some areas at least, to be in the interests of all that they are done so collectively (e.g., could the UK remain a signatory to the Euratom Treaty even if it left the European Union?).

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