

The people have spoken, but until we know what form an exit will take, there is little that we can say about how the law will change. Whilst the present uncertainty is having an effect on practical, especially financial, matters such as project funding, the referendum has no effect on English law. EU Directives continue to have direct effect in the UK and the UK Courts continue to be bound by decisions of the European Court of Justice. That will remain the case, even after the UK gives notice that it proposes to withdraw from the European Union under Article 50 of the Treaty of Lisbon. It is only once the UK actually leaves the EU that our laws will change.

With so little information about our future relationship with the EU available, attempts at predicting how the law will change are perhaps premature, but some of our lawyers give their views on possible developments below. The reassurance that we can give our clients is that we will be monitoring actual developments carefully and issuing them with regular updates.

How might Brexit impact our legal landscape?

Subsequent to Brexit, EU treaties, directives, directly effective decisions and regulations, and rulings of the Court of Justice of the EU would cease to apply to the UK upon its withdrawal from the EU, unless their effect was specifically preserved by UK national law; this would be for consideration by our government and clearly for now we have limited indication as to the likely direction. It could be that the government continues with existing EU directives and implemented directives will apply until actually changed, but we do not have a steer on this to date.

As an observation many areas of law are modelled on European law and conversely many aspects of European law are derived from “best practice” as driven by the UK and international expectations so radical change could be viewed as being unlikely, particularly in areas such as procurement and state aid.

Human rights law

In very brief terms we need to appreciate that there is an interleaving of law including treaties, direct legislation and case law as well as actual institutional arrangements to such an extent that clear political direction following the EU referendum result is needed before we can even begin to assess the detail. The key factors supporting this view are:

- We of course have direct legislation not least of which being the Human Rights Act 1998 (HRA) and current legal obligations continue;
- The UK is a signatory to the European Convention on Human Rights (ECHR) providing for protection of a range of fundamental human rights many of which are incorporated in the HRA;
- A range of protections are enshrined in employment and anti-discrimination law with for example the law on non-discrimination incorporated through the Equality Act 2010;
- Our case law remains in place;
- The European Court of Human Rights (ECtHR) is not an EU institution. It's a body of the Council of Europe, enforcing various international agreements;
- The Council of Europe exists to promote democracy, the rule of law, human rights, economic development, and integration of certain regulatory functions in Europe. Again please note it is not an EU body. It has a Committee of Ministers (the foreign ministers of each of its 47 member states) and its own Parliamentary Assembly;
- The European Court of Justice is an EU institution. It does, however, make reference to and apply ECHR and ECtHR decisions in its work;

- Replacement treaties will be likely to include obligations to comply with human rights standards.

This backdrop, together with post referendum Brexit planning and putative consultations for a Bill of Rights to replace the HRA, presents a complicated picture.

Employment law

There is no doubt that employment law has developed significantly as a result of European Directives, Regulations, Treaty Articles and judgments of the European Court of Justice. Indeed, it is not an exaggeration to say that it is impossible to advise on these issues without a working knowledge of how UK employment law intertwines with European law.

Significant amounts of employment tribunal time has been spent over the years on cases with a European element for example, Equal Pay, Working Time, TUPE and a multitude of equal treatment (discrimination) rights but it is worth noting at the same time that the law relating to unfair dismissal has minimal European influences.

Although, it is not possible to predict with certainty the extent to which changes will be made there is no doubt that any government will have a lot more freedom to make changes as it won't be constrained by European law. In terms of specific predictions, we could easily envisage a cap on the amount of compensation for discrimination cases, TUPE reforms making it easier to harmonise terms and working time changes to cut down the administrative burden on employers. We would expect most forms of discrimination law to remain in place as these have become well regarded by the general public and it is noteworthy that even countries outside the Eurozone tend to have a wide number of discrimination rights. Obviously, there will also have to be some legislative input in relation to dealing with issues relating to freedom of movement of workers, particularly those workers who have been employed in the UK for a number of years. It will also be interesting to see the extent to which judges feel able to rely on European case law in situations where the UK has chosen to keep existing European law.

Ultimately, the extent to which there are changes will depend on the government's view of existing laws and whether it wishes to undertake fundamental reforms.

Planning and environmental law

Business as usual..... for now

What happens now? In truth no-one can say at this stage what the impact on legislation relating to Environment and Planning will be. There appears, however, a few choices. The UK jurisdictions could legislate that all EU law should continue to have effect unless revoked or amended. It could be that we decide to do a law-by-law assessment. It is too early to say.

What about the status of decisions of the European Court of Justice on the interpretation of EU environmental law? Do we just ignore it or will it still be binding and influential on decisions made in the UK? Again, too early to say but an approach will need to be adopted and fairly shortly as cases are going before our Courts on a daily basis. No doubt a steer from Central Government will be forthcoming. At present our view is that the decisions of the European Court of Justice will still bind and as practitioners we should still be aware of them.

Town and Country Planning is very much in the hands of the UK. However what will be interesting is to see the impact of Brexit on the process, consideration and requirement for Environmental Impact Assessments (EIA), Habitats Directive, Wild Birds Directive, Air Directive, Water Directive, Strategic Environmental Assessments etc. It would be up to the UK to retain as much of that as they want.

It is therefore 'business as usual....for now'. However, we expect to see more in the coming days and weeks and will keep you updated.

Contract law

Regarding our contractual arrangements, generally local government contracts will have a local choice of law clause and a local jurisdiction (England & Wales) but there are exceptions to this, and finance is a particular area where EU or international dealings may present issues.

In terms of detailed provisions within our existing contracts there is a review task to establish whether they contain any provisions based solely on EU based law without a basis on law within our own jurisdiction. The issue will be abated if the contract expires before any exit, subject to whether breach of a primary obligation has occurred and is within the contract's limitation period for any claim, and whether there is continuing obligation in relation to the contract. Such provisions may or may not have retrospective effect (the position is not clear as yet). However an obligation, for example to comply with a repealed EU law such as an anti-pollution provision in the transport sector, may lead to an argument that an agreement in contract law terms is "frustrated" or subject to the contract's force majeure provisions.

Our clients' location and general reluctance to accept such requests means that a Scottish choice of law in any of our contracts would be very unusual but clearly, and suddenly, details such as this will attract attention in these new circumstances.

Looking back at now seemingly quaint but at the time reflecting widely held concerns "Year 2000" clauses and also provisions contemplating the UK joining the Euro, in much the same way attention might now be given to clauses in new contracts:

- Either expressly including or excluding the UK leaving the EU from any *force majeure* provision;
- Giving the parties termination rights if the UK leaves the EU;
- Providing for/referring to an alternative mechanism which would apply in the event that the UK leaves the EU;
- Similarly providing for radical change within the UK.

Procurement law

Current legal obligations continue.

In any event we have a duty of good faith and equal treatment to tendering suppliers; claims can follow regardless of the Public Contracts Regulations 2015 for example.

Replacement treaties will be likely to include procurement obligations

State aid

Current legal obligations continue.

Similarly we would anticipate replacement trading arrangements, for example under the WTO, to preclude unfair subsidies.

One analysis predicts the possibility of a more certain and more strictly regulated regime with a local, focused regulator to deal with and local suppliers becoming more aware of their rights.

nplaw July 2016

For more advice please contact:

George Core at george.core@norfolk.gov.uk or on 01603 222238

Jane Linley at jane.linley@norfolk.gov.uk or on 01603 223811



Please follow us on Twitter: @NplawNorfolk

nplaw is LEXCEL accredited and authorised and regulated by the Solicitors Regulation Authority with registration number 65083.