HERBERT SMITH FREEHILLS

BREXIT: THE LEGAL QUESTIONS RAISED BY THE LEAVE VOTE

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Legal Briefings – By **Julie Vaughan**, **Nish Dissanayake**, **Nick Pantlin** and **Miriam Everett**

Now that the result is in, and the public have voted to leave the European Union, what does that mean for the law? This article was first published in Estates Gazette, 24 June 2016.

Julie Vaughan, Nish Dissanayake, Nick Pantlin and Miriam Everett consider the possible legal impact of Brexit.

Counting the votes and announcing the result is just the start. We do not yet know what Brexit will look like, as the UK's post-exit relationship with the European Union could take any number of negotiated forms. What we do know is that different areas across the real estate industry will be affected. Although it is difficult to describe the impact on a community of businesses so diverse that any change will affect each one in materially different ways, outcomes in certain key areas can be considered likely, irrespective of how the precise nature of Brexit takes shape over the weeks and months to come.

ENVIRONMENTAL LAW

At least 50% of UK environmental law derives from the EU. It has driven improvements in environmental standards, and the government consultation on the balance of competencies showed that some sectors welcome a degree of cross-EU regulation and its ability to establish a level playing field among competitors in the European market. It is also an enabler of the EU clean technology and environmental services industries. The level of integration between domestic and EU law demonstrates the difficulty and questionable benefit of seeking to unravel the whole.

Since environmental legislation is a devolved matter, any amendments to environmental law can only be made by or with consent of the relevant National Assemblies or Parliaments and to the extent permitted by the relevant devolution legislation. However, whichever part of the UK you are in it is unlikely that domestic regulation implementing EU environmental law will be removed where:

- the law implements international treaty obligations to which the UK remains bound as an individual party, or chooses to rejoin following Brexit;
- the EU law adopted a system that was either modelled on UK domestic law or significantly influenced by the UK;
- the UK joins the European Economic Area ("EEA") or;
- the law imposes a system which has wide public support due to its perceived benefits for environmental protection and removal would be seen as retrograde.

There are, however, some areas of law which the government in Westminster or the relevant devolved administration could be tempted to repeal. National air quality targets are a current bone of contention, the government having recently been ordered by the Supreme Court to comply *(R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28; [2015] PLSCS 132). However, alarming statistics and growing public awareness regarding the scale of potential health impacts from poor air quality would doubtless make it politically very difficult.

In some areas there is a clear need for regulation but the manner in which this has been tackled through EU legislation is notoriously over-complex. An example is REACH, the EU's flagship chemicals regime, the provisions of which are all-but-unfathomable to the uninitiated. Although arguably the drafting of some home-grown and overlapping UK regimes (such as the Carbon Reduction Commitment and Energy Savings Opportunities Schemes) can be equally as obtuse.

Any EU legislation that is to go would likely require substantial time to reverse out: it is doubtful things could simply be rolled back to 1972, ignoring interim technological and scientific progress. Due to the fact that environmental regulation has been devolved in the UK, each of the separate devolved administrations may reach a different outcome, catalysing much faster local divergence.

Regardless of the position in UK environmental laws following Brexit, UK exporters would still find themselves obliged to meet EU environmental and safety products standards in order to sell into the EU market and may therefore feel little has been gained. Finally, not all UK environmental regulations would be under review. Domestic-only regulations, some of the most stringent, would be unaffected. This includes strict liability for cleaning up contaminated land, requirements for some types of environmental permits as well as criminal liability for harm caused to the water environment and the potential for liability for harm caused by pollution under common law concepts such as nuisance and negligence. The binding decarbonisation targets set by the UK's Climate Change Act 2008 would also continue to drive government policy with targets no less ambitious than those mandated by the EU.

ASSET MANAGEMENT REGULATION

For two principal reasons it is not an easy thing to describe the impact of Brexit on asset managers in the UK. The term “asset manager” spans a diversity of business models, each of which may be affected in different ways. Some asset managers are UK-focused, for UK investors. The impact on these businesses may be less severe than the impact on those asset managers that operate in the UK but rely on capital flows from across the EU. Other asset managers will operate out of multiple bases, both in the UK and throughout the rest of the EU, so finding solutions to Brexit issues might be easier than for those asset managers whose infrastructure is wholly domestic. Some managers will have significant retail businesses and they will likely be more profoundly affected than those whose business is primarily institutional.

Currently, UK real estate asset managers are required to operate in compliance with the Alternative Investment Fund Managers Directive (AIFMD) and, where they manage alternative investment funds (AIFs) established in the UK or elsewhere in the EU, are able to market those AIFs to professional investors across the EU pursuant to a passport. The passport, for the most part, cuts through marketing barriers that would otherwise be erected by certain EU countries that are less open to allowing foreign funds to be marketed in their territory. For asset managers who sell or may wish to sell their AIFs into these more “closed” countries (including Italy, Germany, Spain, Austria, Denmark and Norway) an exit, if it meant that the passport would no longer be available, would mean that these sources of capital would either be cut off or become harder to access.

The loss of the AIFMD passport would not be so meaningful for asset managers that only market their AIFs (i) domestically to UK investors; (ii) outside the EU; or (iii), at least in the short term, within the EU but only to those countries which put up few barriers (such as Luxembourg, the Netherlands and Ireland). The impact may also be less acute for asset managers that have existing management hubs elsewhere in the EU. This is because the passport will continue to be available if management is migrated to one of the management hubs in the EU, then delegated back down to the UK base.

It should also be noted that the AIFMD passport appears likely to be extended in the near future to those AIFs managed by asset managers based in territories whose asset management regulation is broadly equivalent to that of the AIFMD, eg Guernsey, Jersey and Switzerland. The UK would also seem a prime candidate to be granted such third country passport access rights, although acquiring such passport rights comes with its own set of compliance burdens. Brexit, however, may not mean that the well documented difficulties managers continue to experience in relation to complying with the occasionally poorly thought out rules of the AIFMD will suddenly be lifted. The AIFMD is now enshrined in domestic law, rules and guidance and many managers have finally managed to bed compliance down into their everyday business practices. For it to be repealed so soon after its introduction is likely to be seen as disruptive and, post-Brexit, it may be that the UK continues to operate under a near-equivalent regime without substantial amendment, at least in the short to medium term.

CONSUMER REGULATIONS

Current consumer rights regulation in the UK is based on a combination of EU Directives and a stand-alone set of UK-specific rules, which also represent in significant parts UK implementation of EU Directives.

The provisions of the EU Consumer Rights Directive 2011 were implemented via the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 and the Payment Surcharges Regulations 2012. These regulations formed part of a wider, fundamental reform of UK consumer law, resulting in the new Consumer Rights Act 2015 ("CRA"), which aims to make consumers better informed and better protected when they're buying in the UK. The CRA came into force on 1 October 2015, representing a significant development in the regulation of consumer contracts under English law. It consolidates and brings consistency to rules that were previously spread across a wide range of different UK Acts and Regulations. It also implements the EU Unfair Terms in Consumer Contracts Directive 1993, consolidating and extending the previous protections under English law found in the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999.

The existence of primary legislation in the UK for the protection of consumer rights means that, following Brexit, this legislation would remain in effect until such time as it was amended or repealed in the future. However, any future amendment to consumer rights at the European level would not need to be reflected in the national legislation, meaning that, over time, consumer regulation in the UK could develop at a different pace to Europe. This could create regulatory barriers for consumer-facing organisations in the UK hoping to sell their products across Europe. In particular, this could create a challenge for online businesses selling across Europe, which would need to comply with different regulations depending on the location of the end consumer.

DATA PROTECTION

A new European General Data Protection Regulation (GDPR) was approved and published in the Official Journal on 4 May 2016 and entered into force on 25 May 2016, although there is a two year implementation period for the GDPR, meaning that it will not apply until 25 May 2018.

The timing of the UK's exit will therefore have significant consequences from a data protection legislative perspective. The two year notice period required for exit means that the GDPR would be in effect in the UK at the time of exit, having repealed the current Data Protection Act. This means that a UK exit from Europe post-May 2018 would leave the UK having to move quickly to adopt new data protection legislation.

This regulatory gap is viewed by some as an opportunity for data protection reform at a UK national level. A lot of the detail of the GDPR has been criticised in the past by both the UK Government and the Information Commissioner (the UK data protection regulator), as well as UK plc. Brexit could therefore leave the UK Government free to adopt a more business-friendly approach to data protection regulation going forward. However, certain key issues, including the need to ensure that the transfer of data between the EU and the UK is not restricted in the future mean that, in practice, it is unlikely that the UK will want or be able to stray far from the principles of data protection set out in the GDPR, without forcing businesses to move data hubs out of the UK into the EU.

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