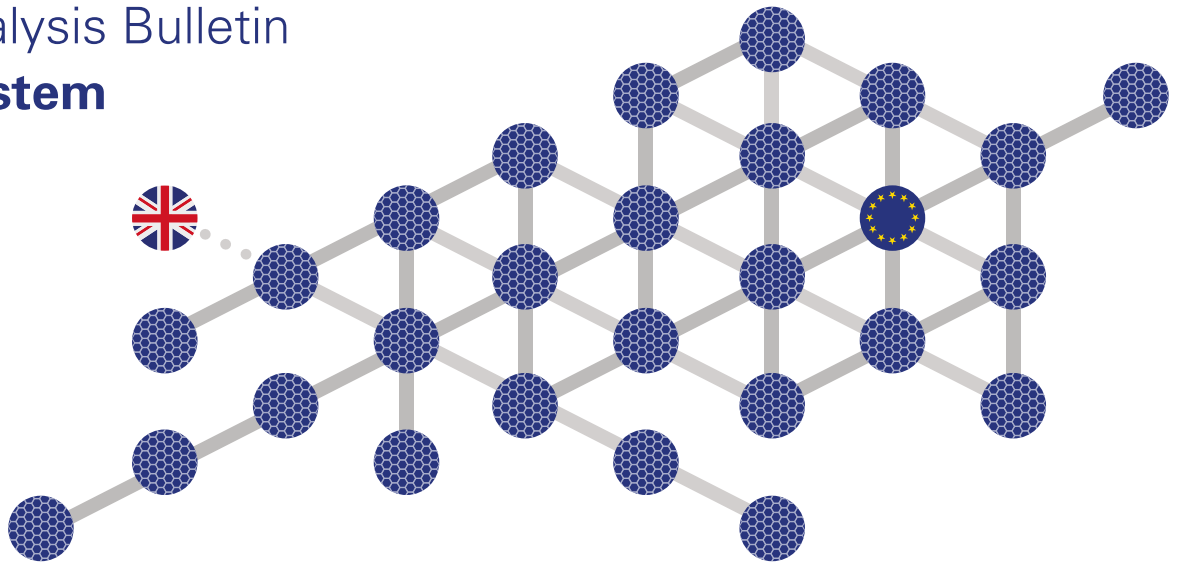


Brexit Analysis Bulletin

Court System



Whilst a Brexit will have no impact upon the UK court system, the mechanism by which European laws are interpreted by the UK courts will be dramatically altered and may lead to short-term uncertainty. At present, determination of European Union (EU) legal issues often involves an additional step in the UK court process. This is an additional step that adds complexity and delay – often considerable delay (measured in years rather than months).

Laws originating from the EU have become interwoven in the fabric of UK law in a number of ways: UK Acts of Parliament (primary legislation); regulations introduced in accordance with the European Communities Act 1972 (secondary legislation); or, in the absence of formal implementation by the UK, because certain EU laws are considered to be of “direct effect” and can thus be relied upon by EU citizens across all of the Member States.

The highest court in the UK is the Supreme Court which hears cases on appeal from Scotland (the Court of Session), from England/Wales (the Court of Appeal) and from Northern Ireland (the Court of Appeal). The referendum outcome will not impact upon that structure.

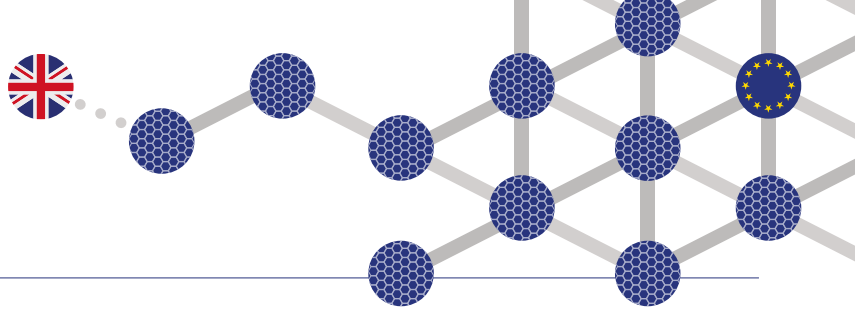
However, as an EU member state the UK courts require to interpret legislation derived from the EU in accordance with both the existing jurisprudence of the Court of Justice of the European Union (CJEU) and the body of UK case law that has built up around it. If UK courts consider themselves unable to resolve a legal point, or are faced with a novel point of European law, the UK courts can refer the legal issue to the CJEU for a determination. By so doing, EU law should therefore be interpreted in

a consistent and uniform manner across the member states.

CJEU judgements

Upon the UK’s formal departure from the EU, the CJEU will no longer have jurisdiction over new UK cases (the UK will lose this additional step in the court process), and CJEU judgements will no longer be binding on the UK courts. It is also possible that the number of references to the CJEU declines sharply during the period between the UK giving formal notice to the EU of the Brexit and the UK’s exit from the EU if UK judges take the view there is now very little to be gained from seeking the assistance of the CJEU. A further issue to be resolved by future UK governments will be whether to repeal in whole, or in part, the legislation that is in effect in the UK as a consequence of the EU.

But, what if domestic legislation originating from the EU is not repealed in the UK and continues to have effect? And what of previous UK court judgements in which the reasoning was influenced by CJEU jurisprudence (for example, our previous Brexit articles make reference to the influence of EU law in the employment sphere)?



The UK courts will be required to interpret pre-Brexit primary and secondary legislation without the assistance of the CJEU. The UK courts may therefore depart entirely from previous decisions of the CJEU, and thus no longer be consistent with the remaining EU legal systems. Alternatively, a Brexit may initially result in a more cautious retreat over time from particular EU principles and doctrines that the UK courts did/do not agree with. Or the UK courts will nevertheless opt to follow the decisions of the CJEU in order to prevent legal uncertainty. Much of this will depend on the UK's subsequent relationship with the EU and its regulations – whether as part of the European Economic Area (EEA), whether as a member of the European Free Trade Association (EFTA), or whether as part of some other union or bi-lateral agreement.

Brussels Regulation

The jurisdiction of EU member states in civil and commercial disputes is currently regulated by the Brussels Regulation, which sets out which courts of EU member states should have jurisdiction over many kinds of disputes and seeks to avoid parallel, potentially clashing, proceedings running in different member state courts. A further consequence of the Brexit vote is that a decision will need to be taken on how to replace these jurisdiction provisions. The UK may seek to enter into the 2007 Lugano Convention (to which non-EU countries, such as Norway and Switzerland, are currently party) and which contains provisions similar to those found in the Brussels Regulation. However, one key difference is that the Lugano Convention does not provide, where proceedings are commenced in a member state in breach of an exclusive jurisdiction clause, that the dispute is stayed to allow the chosen court to rule on jurisdiction.

The UK may therefore also seek to accede to the Hague Convention on Choice of Court Agreements (currently in force between the EU (excluding Denmark) and Mexico) which provides for the validity and effectiveness of jurisdiction agreements.

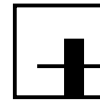
Interpretation of clauses

Without any international agreement with the EU, there will be an increased risk of parallel proceedings in English and EU courts and a level of uncertainty as to how member states would interpret exclusive jurisdiction clauses in favour of UK courts.

A further difficulty may arise at the conclusion of proceedings, as the automatic recognition and enforcement provisions of the Brussels Regulation would no longer apply. This could introduce additional layers of complexity for those trying to enforce judgements from courts in other EU countries in the UK and vice versa.

Concluding remarks

One thing that is certain is the period of uncertainty that is now to follow. Whilst UK cases will no longer be subject to the delay of awaiting a determination from Europe, it will be very difficult to predict whether the UK courts will follow or distinguish the existing European legal precedents. That is especially so for the lower courts that may be required to resolve new or difficult points of law. Of course, any subsequent conflicts in the decision-making of the lower courts in the UK will then require cases to be brought before the UK Supreme Court (which may take many years) in order to resolve such inconsistencies.



SHEPHERD AND WEDDERBURN'S BREXIT ADVISERS JOINING THE DOTS OF THE EU REFERENDUM

What next?

Shepherd and Wedderburn has been for many years offering balanced and impartial advice on how the different scenarios might play out in the event of constitutional change.

Now that the vote has been cast to leave the EU, members of our dedicated Brexit group continue to interrogate the regulatory and commercial issues and to advise clients on next steps and outcomes.

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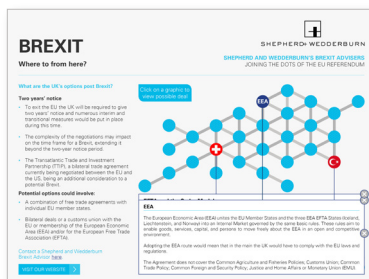


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