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The impact of Brexit on UK employment law rights and health and safety legislation

THOMPSONS SOLICITORS
TRADE UNION LAW GROUP BRIEFING

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Executive Summary

Over 40 years of EU law has been incorporated into a huge amount of UK law: from health and safety to how to name cheeses; from labelling aerosols to data protection. This paper deals purely with employment law rights and workplace health and safety rights and assesses their immediate future following Brexit.

It is our assessment that in the short-term, little is likely to change. Until the UK's membership of the EU formally ends, the UK is required to continue to honour all of its EU obligations, including employment rights. Until then at least, these rights will substantially remain in their current form.

There are compelling practical reasons not to rush into giving the Article 50 notice despite political pressure to do so. Not least given that the task of reviewing which laws to keep or change is a substantial one, which could take several years if it is to be completed responsibly and with proper Parliamentary oversight. There is also a constitutional question as to how such notice can be given, with High Court challenges already before the courts about how to resolve that. Triggering Article 50 would start an unstoppable two year countdown which would also lead to the repeal of many of these rights: that is directly at odds with the scrutiny and oversight task.

The legal effect of the European Communities Act 1972 (the ECA) is that when the membership eventually ends, much of the EU-derived employment legislation will automatically end too. Allowing that to happen without replacing the lost rights is both politically and practically problematic, and it is perhaps more likely that the ECA will be amended to keep these laws in place until time has been made to review them properly. The statement of the Brexit Minister set out on page 6 suggests that such a review may not be a priority.

None of this is to say that change is not going to happen. We identify several EU-derived rights which we feel are vulnerable in the medium term, and there is a little-discussed longer-term impact as our law-makers revert to a more insular approach, which we feel will be the greater legacy of Brexit on our employment rights.

We have not attempted to assess what effect either devolved law-making within the UK or the possibility of Scottish independence will have. These will undoubtedly be complicating factors but currently involve too many variables to elicit more than speculation at this stage.

Foreword

The outcome of the 23 June 2016 referendum will require the UK to untangle itself from the EU's 40-year influence on legislation and regulation across most sectors of British life. Parliament will need to decide what laws need replacing, keeping, amending, or discarding. This is a massive task that will fully engage Parliament, the civil service and any advisers, as well as stakeholders who have an interest.

It is this task which will define the way in which UK employment and health and safety law enters the post-Brexit world.

It is crucial that discussions on this process include the Labour Party and the unions, plus the devolved administrations. Workers' rights must be fully protected and the TUC's "five tests" (set out on page 13) must be met.

This will all need to be done against the background of an inexorable two year countdown when Article 50 is triggered. As the UK's membership expires, so will some (but not all) of the UK law which is derived from EU membership. Further complications will arise from the extent to which devolved governments will seek to act differently to Whitehall, and how various legal challenges will affect the position.

What is clear however, is that until the UK's membership of the EU does expire, the legal status quo must prevail to avoid breaching existing obligations. The new Prime Minister has told the High Court that Article 50 will not be triggered this year[1] so these changes will be unlikely to come in before 2019.

This briefing is not intended to be a handbook for the process. It does though attempt to assess what might happen to those employment law and health and safety rights with a European origin.

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[1] 'Theresa May does not intend to trigger article 50 this year, court told', The Guardian, 19 July 2016, http://tinyurl.com/hszsrhc

PART 1

RIGHTS IN THE WORKPLACE

What Rights Are We Talking About?

Employment Rights

David Davis MP, the Brexit Minister, is on record as saying that he intends to take a light touch with UK employment rights:[2]

"At the moment all businesses in the UK must comply with EU regulation, even if they export nothing to the EU. This impacts on our global competitiveness. Instead, we should look to match regulation for companies to their primary export markets.

'To be clear, I am not talking here about employment regulation. All the empirical studies show that it is not employment regulation that stultifies economic growth, but all the other market-related regulations, many of them wholly unnecessary. Britain has a relatively flexible workforce, and so long as the employment law environment stays reasonably stable it should not be a problem for business.

'There is also a political, or perhaps sentimental point. The great British industrial working classes voted overwhelmingly for Brexit. I am not at all attracted by the idea of rewarding them by cutting their rights. This is in any event unnecessary, and we can significantly improve our growth rate by stopping the flood of unnecessary market and product regulation."

Many of the UK's employment rights have no origin in Europe and Brexit per se will not directly affect them. These include key claims such as unfair dismissal, the national minimum wage and unlawful deduction from wages. Other claims such as equal pay had a domestic origin before being subsumed into the European regime.

The key rights which this section of the briefing covers are those deriving from the following:

The Acquired Rights Directive 2001/23/EC	Protects employees' rights in the event of a transfer of an undertaking, business or part of one. Includes the provision of information to, and consultation with, employees and their representatives. Also provides unfair dismissal protection. Implemented in the UK by Transfer of Undertakings (Protection of Employment) Regulations 2006 and the Employment Rights Act 1996
The Agency Workers Directive 2008/104/EC	Gives all agency workers equal treatment entitlements in relation to access to facilities and information on vacancies from day one and (after a 12 week qualifying period) creates rights to the same basic working and employment conditions in certain areas, including pay and annual leave, as directly recruited employees. Also gives unfair dismissal protection. Implemented in the UK by the Agency Workers Regulations 2010 and the Employment Rights Act 1996
The Collective Redundancies Directive 98/59/EC	Guarantees a minimum standard of treatment for employees in the event of collective redundancy. In particular, sets out collective consultation with representatives and the enforcement of protective awards. Implemented in the UK by the Trade Union and Labour Relations (Consolidation) Act 1992
The Employer Insolvency Directive 2008/94/EC	Provides employees dismissed from an insolvent employer a right to State-backed compensation payments for wages and redundancy. Operated in the UK via the Redundancy Payments Office and payments from the National Insurance Fund. Implemented in the UK by the Employment Rights Act 1996
The Employment Conditions Directive 91/533/EEC	Requires employers to provide employees with details of the key provisions which govern their employment relationship. Implemented in the UK as the requirement for Statement of Particulars of Employment. Implemented in the UK by the Employment Rights Act 1996
The Employment Framework Directive 89/391/EEC	Provides protection from discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. Also provides for paid time off for health and safety representatives. Implemented in the UK by the Equality Act 2010 and the Health and Safety (Consultation with Employees) Regulations 1996
The Equal Treatment Directive 76/207/EC	Requires Member States to ensure equal treatment in relation to employment and vocational training. Although this measure was adopted under a single market legal base, it was subject to expansive interpretation by the European Court of Justice, resulting in its application to pregnancy and maternity and gender reassignment. Implemented in the UK by the Equality Act 2010
The European Works Council Directive 2006/109/EC	Provides for the establishment of European Works Councils (EWC) or for a procedure to inform and consult employees on transnational issues affecting the workplace (i.e. those which concern all the operations of the business in Europe, or which concern undertakings and establishments in at least two different European Economic Area countries). Only larger multi-national employers fall within the scope of the EWC rules and there is no obligation to set up a EWC in the absence of a request from at least 100 employees in two or more countries. Implemented in the UK by the Transnational Information and Consultation of Employees Regulations 1999
The Fixed-Term Workers Directive 99/70/EC	Ensures that fixed-term workers may not be treated in a less favourable manner than permanent workers solely because they have a fixed-term contract, unless different treatment is justified on objective grounds. Also provides for the provision of a permanent contract after a set period of time. Implemented in the UK by the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002
The Information and Consultation Directive 2002/14/EC	Provides employees in organisations with 50 or more employees the right to be informed and consulted on a regular basis about issues in the organisation for which they work. This includes the provision of information on the organisation's economic situation, to be informed and consulted about developments in the workplace and in particular on anticipatory measures envisaged where there is a threat to employment. Includes right to paid time off and protection from detriment and unfair dismissal. Implemented in the UK by the Information and Consultation of Employees Regulations 2004 and the Employment Rights Act 1996

[2] 'Trade deals. Tax cuts. And taking time before triggering Article 50. A Brexit economic strategy for Britain', 14 July 2016, http://tinyurl.com/z8m58yl

The Parental Leave Directive
2010/18/EC

Entitles workers to at least four months' parental leave on the birth or adoption of a child until a given age, suggested as being up to the age of eight. Also provides unfair dismissal and detriment protection.

Implemented in the UK by Maternity and Parental Leave etc Regulations 1999 and the Employment Rights Act 1996

The Part-Time Workers Directive
97/81/EC

Requires that, in respect of employment conditions, part-time workers are not treated in a less favourable manner than comparable full-time workers solely because they work part-time. Also unfair dismissal protection.

Implemented in the UK by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and the Employment Rights Act 1996

The Posted Workers Directive
96/71/EC

A single market measure to ensure a level playing field when businesses or agencies post workers temporarily from one Member State to provide services in another. The Directive entitles posted workers to certain core employment rights available in the country they are posted to, including minimum rates of pay, maximum work periods and equal treatment provisions.

Implemented in the UK by the Posted Workers (Enforcement of Employment Rights) Regulations 2016 and the Posted Workers (Enforcement of Employment Rights) Regulations (Northern Ireland) 2016

The Pregnant Workers Directive
92/85/EEC

Sets the minimum levels of maternity leave and pay which Member States must provide (14 weeks' maternity leave with an "adequate allowance" paid at least at the rate of statutory sick pay), alongside health and safety at work protections. Also provides for the right to suitable alternative work or pay if suspended, a prohibition on detriment due to pregnancy and unfair dismissal protection.

Implemented in the UK by the Management of Health and Safety at Work Regulations 1999, the Employment Rights Act 1996 and the Equality Act 2010

The Race Directive
2000/43/EC

Implements the principle of equal treatment between persons irrespective of racial or ethnic origin. This Directive prohibits discrimination on the grounds of race in employment, training, social protection, including social security and healthcare, education, access to and supply of goods and services which are available to the public.

Implemented in the UK by the Equality Act 2010

The Recast Gender Directive
2006/54/EC

Implements the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. This recast Directive contains provisions to implement the principle of equal treatment in relation to employment, training, working conditions, including equal pay and occupational social security schemes.

Implemented in the UK by the Equality Act 2010

The Working Time Directive
2003/88/EC

Contains restrictions on night work, requirements for daily rest, weekly rest, rest breaks, and four weeks' paid annual leave. It also sets a 48 hour limit on the working week, which individuals can opt-out of. Also provides protection from detriment.

Implemented in the UK by the Working Time Regulations 1998 and the Employment Rights Act 1996

The Young Workers Directive
94/33/EC

Provides various protections for employees aged under 18 in areas such as night work.

Implemented in the UK by the Working Time Regulations 1998

Treaty on the Functioning of the European Union
2012/C 326/01

Article 8 imposes an obligation to eliminate inequalities, and to promote equality, between men and women. Article 10 imposes an obligation to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Article 157 imposes an obligation on the State to ensure measures which provide for equal pay for male and female workers for equal work or work of equal value.

Implemented in the UK by the Equality Act 2010

Appendix 1 on page 22 provides some context for the importance of these rights. The tables show the numbers of Employment Tribunal claims made in Great Britain to protect just some of these rights for the years 2008 – 2013.[3] Those years immediately pre-date the introduction of fees and are therefore perhaps a better indication of the level of need than more recent figures given that "…the regime of employment tribunal fees has had a significant adverse impact on access to justice for meritorious claims."[4]

They show that during these five years nearly a million people considered that their EU-derived rights had been breached, and went so far as to lodge a claim. Inevitably this will under-report the actual scale of breaches in the workplace.

Consistently, the highest volume of claims related to working time, equal pay and sex discrimination. It is perhaps no coincidence that the Working Time Regulations 1998 top many employers' wish-list for repeal.[5]

It is not just individual rights that will be affected. Most (but not all) trade union and collective rights, including most of those provided for in the Trade Union and Labour Relations (Consolidation) Act 1992, are UK rather than EU law rights. Some of these rights, such as the freedom to take industrial action and the right to recognition, derive from non-EU international law such as International Labour Organisation Convention Nos. 87 and 98 and Article 11 of the European Convention on Human Rights. These rights derived from UK and 'non-EU' international law are not directly affected by Brexit.

But that is not the end of the matter. Certainly before the Lisbon Treaty elevated the status of the EU Charter of Fundamental Rights to the same level as other EU Treaty provisions, the EU lacked competency in relation to trade union freedoms. That position changed, however, in a series of challenge to the Court of Justice by employers under free movement principles. They argued (successfully) in cases like Viking and Laval that any restriction on free movement principles (such as the freedoms to establish and provide services in other Member States) brought about by collective action had to be justified according to standards set in the Posted Workers Directive. These EU free movement principles, which have been used to undermine collective action, are the equivalent for companies of the free movement principles at the heart of the debate on immigration in the run up to the referendum. In the absence of agreement for their continuation in some form, these free movement principles will cease to apply once Brexit is accomplished.

[3] Taken from the publications of the Employment Tribunal Service. Only some claims are recorded separately in this way and so not all the EU-derived rights listed at page 6 are identified

[4] *Courts and Tribunal Fees*, House of Commons Justice Committee, Second Report of Session 2016–17, HC167, 20 June 2016, paragraph 69

[5] *Working Time Regulations should be scrapped, urges CIPD*, Personnel Today 24 May 2010, http://tinyurl.com/jy624ul. 'Following today's publication of CIPD/KPMG survey of 800 employers, which found that 28% believed the WTR was the legislation that was of most hinderance [sic] to their business, Mike Emmott, employee relations adviser at the CIPD, said: "We believe that the Working Time Regulations in particular have negligible value in limiting unhealthy workplace behaviour. We are, therefore, calling for its repeal in the context of the review currently being undertaken by the European Commission."'

Health and Safety Rights

The mechanism for translating European health and safety law into UK law is the same as just described for employment rights. The rights themselves are somewhat different of course.

It was the European Framework Directive on Safety and Health at Work,[6] adopted under Article 118 of the Treaty on the Functioning of the European Union[7], which led to the UK's introduction of the "6-pack" of health and safety regulations in 1992.[8]

Those regulations have gone on to provide the foundation for work-related personal injury claims, including the landmark cases of Stark v The Post Office[9], Allison v London Underground[10] and Dugmore v Swansea NHS Trust and anor[11] All these cases would have been lost by the workers involved had the regulations not operated to impose a stricter duty on the employer.

Most recently, in Kennedy v Cordia [2016], the Supreme Court noted that:[12]

> *"Article 153 [the successor of Article 118] requires the EU to support and complement the activities of the Member States in a number of fields, including "improvement in particular of the working environment to protect workers' health and safety", and permits the European Parliament and Council to adopt Directives for that purpose. It is clear from the case law of the Court of Justice that Article 153, and in particular the concepts of "working environment", "safety" and "health", are not to be interpreted restrictively…safety is to be levelled upwards… Where possible, risk is to be avoided rather than reduced; means of collective protection are to be preferred to means of individual protection (such as PPE); and merely giving instructions to the workers is to be the last resort."*

In practice, once a Directive is made, EU states have a deadline to introduce them through domestic law. If that does not happen in time, a person has the right to bring a claim against the state for its failure to provide a remedy for breach of the Directive; known as a Francovich claim.[13] That safety net will of course be lost once the UK has left the EU.

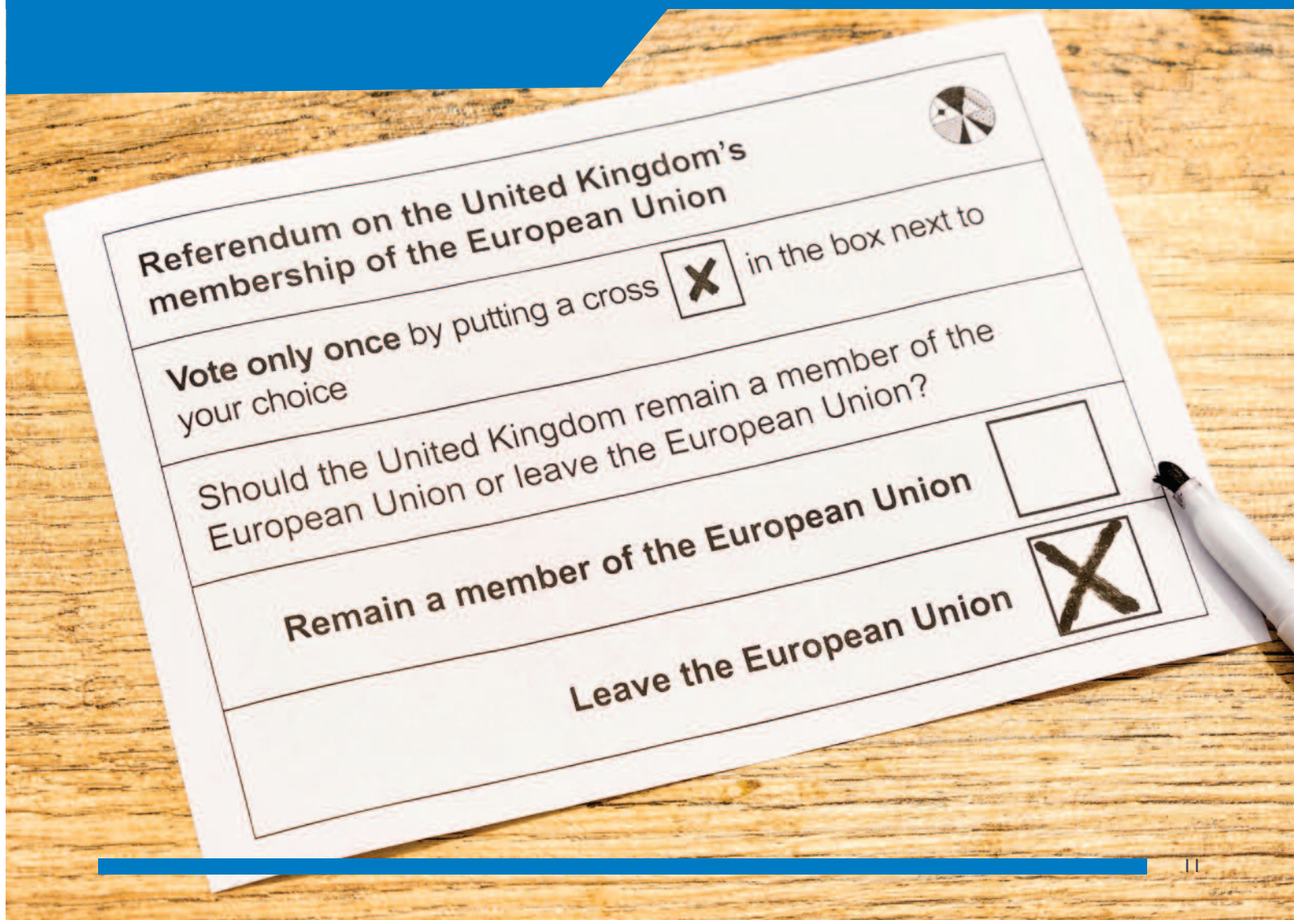
The 6-pack regulations were introduced into UK law through the Health and Safety at Work Act 1974 (HSWA). As this is primary legislation, they would not be immediately affected by Brexit and/or any repeal of the ECA. However, they would no longer have the underpinning of the Directive and would be vulnerable to future change by a "deregulating" government.

Other regulations, including The Control of Substances Hazardous to Health Regulations 2002 (COSHH), are made under both the ECA and the HSWA and would therefore have to be recast on any repeal of the ECA.

[6] Directive 89/391 EEC
[7] 2012/C 326/01
[8] These are detailed in Appendix 2 on page 23
[9] [2000] ICR 1013, Court of Appeal
[10] [2008] IRLR 440, Court of Appeal
[11] [2003] ICR 574, Court of Appeal
[12] [2016] ICR 325, Supreme Court at paragraphs 75 and 76 and 80
[13] Named for the case which established the principle - Francovich and ors v Italian Republic [1992] IRLR 84 ECJ

PART 2

EU RIGHTS AND UK LEGISLATION: STATUS AND IMPLICATIONS OF LEAVING THE EU



How Do These Rights Take Effect in the UK?

When the UK's EU membership ends some of the legal structure will remain until it is tackled domestically. UK law will not just magically return to a pre-EU state. What happens depends, partly, on how the law has taken effect in the first place.

- Some EU laws have 'direct effect'. This means that they apply in the UK without any need for domestic legislation and can be enforced between non-State participants. This applies to various Articles in the Treaty on the Functioning of the European Union (TFEU).[14] It can also apply to Directives where the content of the Directive is sufficiently clear and precise, unconditional and does not give Member States substantial discretion as to implementation.

- For everything else (e.g. Directives which are not capable of having direct effect) domestic legislation is required to apply it in the UK. This is known as 'vertical effect'. Implementation can either be by primary legislation (i.e. Acts of Parliament such as the Health and Safety at Work Act 1974), or secondary legislation (i.e. regulations such as Transfer of Undertakings (Protection of Employment) Regulations 2006).

These distinctions are set out in a statute called the European Communities Act 1972 (the ECA). This is the key Parliamentary authority for the application of EU law in the UK both directly and indirectly. The domestic Regulations have their authority from this Act, (although a few are made under more than one 'parent' Act).

Article 50 automatically ends Treaty obligations and enforceable rights when membership ends[15]. The part of the ECA which also does that then becomes unnecessary.

There is a real issue as to whether the ECA will be repealed though because large amounts of UK law depend on it for their existence. In our view it is not likely to be repealed in the short to medium term, but is more likely to be amended.[16] Any outright repeal would cause legal and commercial confusion, and is to be avoided for a managed exit.

Primary legislation is free-standing law and would survive any repeal of the ECA. However, where the validity of secondary legislation relies on the ECA, when the ECA goes, so it will too. As the table on pages 6-9 shows, most of the employment rights identified there come via secondary legislation, i.e. domestic regulations.

Therefore, unless something is done to avoid it, directly enforceable rights and those implemented only by regulations will disappear overnight when EU membership ends. But what if the UK wants to keep some? Or if Parliament hasn't got time to even make that assessment?

What happens will depend on how the government approaches the mammoth task ahead of it.

[14] See page 9
[15] (or when the terms of a negotiated withdrawal take effect) Article 50(3), Treaty for European Union 2007
[16] An alternative approach is a quasi-rebranding exercise whereby the ECA is repealed to placate the pro-Brexiteers, and a new statute is passed which essentially replicates it in the manner identified here. Either way however, we think it is likely that legislation will be passed to buy the process breathing-space

The Mammoth Task's Impact on Timetable

Under Article 50 once notice of intention to leave the EU is given to the European Council the UK has two years to get its affairs in order before membership automatically ends. If a withdrawal agreement with the EU can be reached sooner, then it ends then. There is nothing in Article 50 about when notice must be given.

This two year deadline is a very real issue for Brexit. Brexit supporters see Article 50 notice as the key move away from the EU, however as a matter of practicality it imposes all sorts of problems. Not least is that all the signs are that the process of managing Brexit responsibly could be lengthy.

No member of the EU has left before and there is no clear process or precedent. From a constitutional point of view, our own approach is very unclear too. There is significant doubt over whether Article 50 notice can be given by the Prime Minister as a prerogative power, or whether it requires the authority of Parliament via a vote or even statute. David Cameron specifically left it to his successor to sort out[17] but appeared to suggest that his view was that the Prime Minister had all the necessary authority[18]. This issue is subject to an English High Court challenge to be heard in October 2016 and may be followed by similar challenges in devolved jurisdictions. Theresa May has meanwhile indicated that no Article 50 notice will be given until at least 2017[19] and is reportedly planning to delay any Commons debate until after notice is given.[20]

Formal negotiations would not begin until the Article 50 notice had been given, but the government will want to try and negotiate ahead of that. How that works out depends on the EU; but the presidents of the European Council, Commission and Parliament, and Mark Rutte, the Prime Minister of the Netherlands which holds the EU's rotating presidency, have all called for delay to be avoided.[21] European leaders looking to their own positions will not allow the UK to profit from Brexit.

The TUC has set out five requirements for this period of informal negotiations before Article 50 is triggered:[22]

1. The government should have a clear action plan in place to protect jobs, industries and public services currently at risk from Brexit, and guarantee the continuation of all workers' rights currently derived from the EU.
2. The government should lead a national debate on realistic options for the best possible arrangements with the rest of the EU post-Brexit and beyond the EU, so as to build a national consensus on the mandate for the negotiating team.
3. A cross-party negotiating team including the devolved administrations, TUC, CBI and civil society should be established.
4. Existing EU27[23] citizens living and working in the UK should be guaranteed the right to remain, and approaches made to secure reciprocal arrangements for British citizens living and working in the rest of the EU.
5. An all-Ireland agreement on economic and border issues should be secured.

[17] HC Hansard, 27 June 2016, col 40
[18] See his resignation speech delivered on 24 June 2016 "A negotiation with the European Union will need to begin under a new prime minister and I think it's right that this new prime minister takes the decision about when to trigger Article 50 and start the formal and legal process of leaving the EU." (emphasis added)
[19] Supra note 1
[20] *Theresa May 'acting like Tudor monarch' by denying MPs a Brexit vote*, The Guardian 28 August 2016, http://tinyurl.com/hp38oka
[21] *'EU leaders call for UK to leave as soon as possible'*, The Daily Telegraph, 24 June 2016 http://tinyurl.com/hee63yc
[22] *TUC publishes 5 tests the Prime Minister must meet before triggering Article 50*, 26 July 2016, http://tinyurl.com/jf69jb4
[23] The 27 EU Member States are the current 28 states less the UK, i.e. Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden

As these are practical, sensible and enjoy cross-faction support it seems likely that they will gain traction in some form or another. Indeed, the Prime Minister appears to have taken some steps in relation to the fourth point, stating publicly that EU citizens' rights in UK would be protected as long as the rights of Britons were guaranteed.[24]

When negotiations proceed it is likely that Parliament will want a high degree of scrutiny. The House of Lords European Union Committee has already reported that:[25]

"Should the UK decide to withdraw from the EU, the UK Parliament should have enhanced oversight of the negotiations on the withdrawal and the new relationship, beyond existing ratification procedures."

Realistically, extensive and meaningful oversight would be a massive undertaking.

If a withdrawal agreement was reached before Article 50's two year deadline, then Parliament would have to ratify both it, and any other international treaties which arose from the negotiations. This gives another opportunity for pro-Remain MPs to flex their collective muscle.

If the ECA were to be modified or repealed that would require Parliament's involvement and 70% of MPs campaigned for a Remain vote. Fears of a constitutional crisis created by disgruntled MPs who feel side-lined might well mean that the Article 50 issue goes to the House. There is also precedent for the exercise of a prerogative power being debated in this way following the August 2013 Commons vote on Syria, as well as an undertaking by the Leader of the House of Lords that she saw it as "an important part of the process that Parliament has a serious opportunity in this House to debate and express its views."[26]

It therefore seems that triggering the two year deadline is a political, legal and constitutional helter-skelter which should be ridden only with caution. So long as that caution manifests as delay then UK law is likely to remain substantially unchanged.

There will though be a point of no-return beyond which looms the possibility of a black hole where laws and rights used to be. This is the next area of consideration.

[24] *Theresa May: EU citizens' rights depend on fate of Britons abroad*, The Guardian 27 July 2016, http://tinyurl.com/gtdpm46
[25] House of Lords European Union Committee, The Process of Withdrawing from the European Union, 4 May 2016, HL Paper 138 of session 2015–16, p 19
[26] During the House of Lords debate on the Prime Minister's parliamentary statement about the referendum outcome, Lord Wallace of Tankerness, QC (Leader of the Liberal Democrats), Lord Lester of Herne Hill and Lord Elystan-Morgan (Crossbench) all asked what Parliament's role would be in any decision to trigger Article 50. Baroness Stowell said that it was "too early" for her to say, but that she saw it as "an important part of the process that Parliament has a serious opportunity in this House to debate and express its views, and there is a role for our European Union Committee and its sub-committees to play in this process." HL Hansard, 27 June 2016, col 1387

Repealing and Reviewing Domestic Legislation

As we have noted earlier, when the UK's EU membership ends, so too will some of its laws. A way to address this is to review all affected laws to assess whether they should be retained to any extent, or replaced. This careful, piece-by-piece approach would be massively time-consuming even if limited to employment or health and safety law, but we need to remember that it goes well beyond that. The problem is summed up well in the following passage:[27]

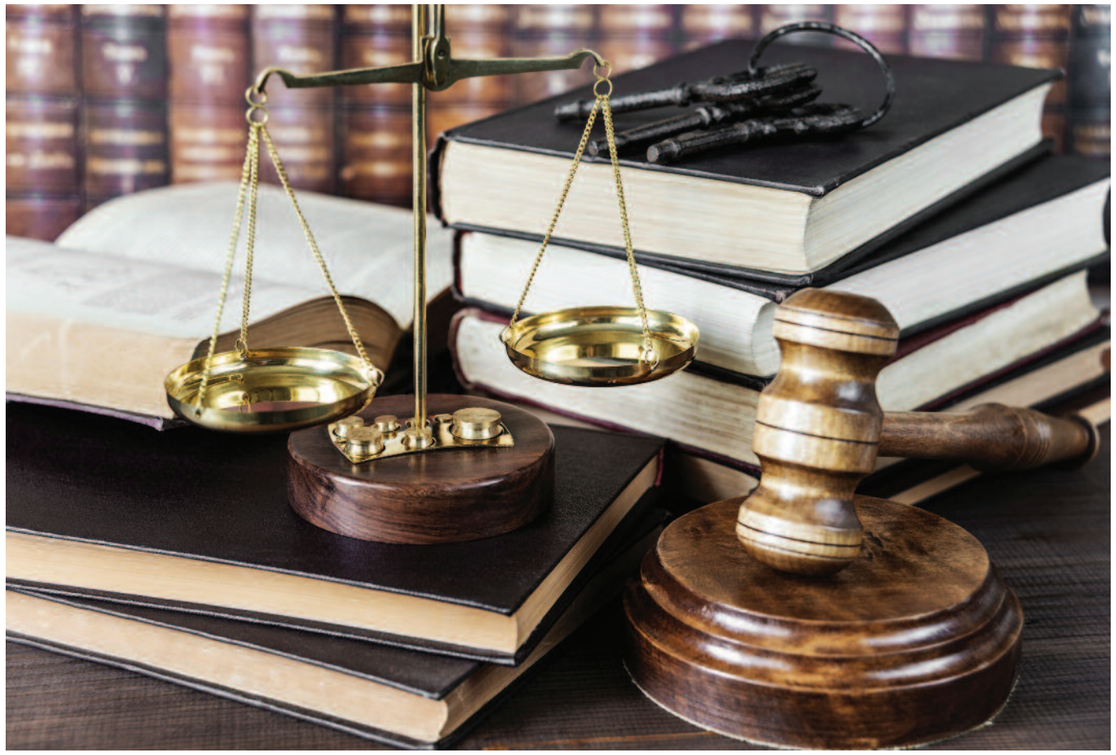
"A number of observers have commented on the size and complexity of this task, and the amount of parliamentary, ministerial and civil service time likely to be required. The House of Lords European Union Committee suggested that the "review of the entire corpus of EU law as it applies nationally and in the devolved nations" would "take years to complete". The Constitution Unit has expressed the view that "the size of the task […] could overwhelm Parliament's capacity to exercise effective legislative control". In a separate blog post, Alan Renwick of the Constitution Unit estimated that the "task of reviewing 40 years of EU and domestic legislation could take five or ten years". Sir Paul Jenkins, former Treasury Solicitor and Head of the Government Legal Service between 2006 and 2014, described the process of "unravelling 40 years of an entrenched constitutional position" as the "largest legal, legislative and bureaucratic project in British history except for a world war."

It is worth remembering that until new trading treaties are agreed, and the terms of Brexit are established with the EU, it will be very unclear what changes are actually required, or even acceptable.

An alternative to a lengthy delay in the review process is simply to let the laws lapse, but this would be unacceptable for a significant proportion of them. It is unlikely that the repeal of many laws in this manner would be politically or socially acceptable.

A further alternative is to leave such decisions to civil servants, and have a Parliamentary approval process. Such a lack of scrutiny is also unlikely be acceptable and would lead to the incredible irony of a massive democratic exercise having led to a massively undemocratic one.

[27] *Leaving the EU - Parliament's Role in the Process*, House of Lords Library Note 2016/034, 4 July 2016, page 13



A more practical half-way house, and by far the more likely, is to enact holding legislation which retains all the laws that would otherwise lapse. They could then be reviewed in a more orderly way, in the coming years. The obvious way of doing this is by amending the ECA along with some transitional provisions allowing the winnowing-out process to continue via further delegated legislation. The Attorney-General has hinted this might well be the preferred approach.[28]

Depending upon the government's priorities (and David Davis explained those on page 6) employment legislation in particular might be largely unaffected for years to come. The government however remains committed to a deregulation agenda, and has a track record of prioritising complaints of red-tape over evidence[29]. The next section considers what changes might occur and the potential consequences of them.

[28] Responding to a question on health and safety regulations the Attorney-General replied "…there are many of those regulations that we will wish to retain, but, of course, the exercise of looking at exactly which parts of the canon of European law we wish to transfer into UK law, which we wish to adapt and which we may not wish to continue with at all is a very lengthy one that we will need to continue with. But I agree with him that it will not, in all likelihood, be the case that all of those rules and regulations will be dispensed with altogether, and both businesses and those who are employed by them benefit from some of those measures." HC Hansard, 21 July 2016, col 952 (http://tinyurl.com/z6ahbg5)

[29] See for instance the repeal of Wider Recommendations in the discrimination context as being a 'burden on business' when only around 6 had been ever made (s.2 Deregulation Act 2015)

PART 3

POSSIBLE CONSEQUENCES

So What Might We Expect in Employment Law?

Inevitably this is crystal-ball gazing. Our assessment is based on an appreciation of the practical challenges of Brexit, previous policy documents from Euro-sceptics, consultation documents from the Conservatives in recent years which floated ideas, statements from key politicians, and also campaigns and pressure brought to bear by employer lobbies.

There are some key employment law-related changes which have been hinted at and some will be easier to implement than others. We would expect to see the following changes in some form or another:

1. An imposition of a cap on discrimination damages is almost guaranteed.
2. Abolition of
   a. age discrimination provisions
   b. agency worker protection
   c. payments made by the RPO in cases of insolvency
   d. posted workers' rights.
3. Weakening of
   a. collective consultation rights in cases of insolvency or business transfer. Possibly also under the ICE Regulations but as these are less trade union focussed they may not be substantially altered.
   b. fixed-term workers protections
   c. part-time worker protections
   d. TUPE, especially making it easier for any post-transfer harmonisation of terms and the removal of an individual's right to claim for detriment or dismissal
   e. working time regulations protections, particularly those on limiting hours (especially for junior doctors) and the calculation of holiday pay.
4. Re-introduction of the need for a comparator in pregnancy discrimination cases.

Some changes would be too unpopular to be seriously approached. For those it is very unlikely that there would significant changes: for example the longer established discrimination strands of sex, race, and disability would likely to be substantially safe, although those which are more recent are potentially more at risk (e.g. certain LGBT rights and religion or belief protections); paid holiday; and some family-friendly rights.

Theresa May's appointment of George Freeman MP as chair of the Policy Board may also hint at some other, broader, changes. He has previously advocated 'regionalising' minimum wages and public sector pay, and exempting new firms for their first three years from all employment legislation.[30]

The government's recent modus operandi has been to make it harder to access and enforce individual rights rather than abolish them. They have also severely restricted the amount of compensation available. It is possible that this is an approach they will adopt. The likely pace of change will also present its own set of challenges to those wishing to scrutinise it.

[30] *The Innovation Economy: Industrial Policy for the 21st Century* (2013), George Freeman MP and Kwasi Kwarteng MP

Changes Already Afoot in Health and Safety Law

We have already seen the desired direction of travel of this government in the introduction under the Coalition of the Enterprise and Regulatory Reform Act 2013 (ERRA) and its notorious s.69 which removed civil liability on the part of employers for breach of health and safety regulations.

In the House of Lords debate on the clause which became s.69 ERRA, Viscount Younger, the relevant minister, said that:[31]

> *"We acknowledge that this reform will involve changes in the way that health and safety-related claims for compensation are brought and run before the courts. However, to be clear and to avoid any misunderstanding that may have arisen, this measure does not undermine core health and safety standards. The Government are committed to maintaining and building on the UK's strong health and safety record. The codified framework of requirements, responsibilities and duties placed on employers to protect their employees from harm are unchanged, and will remain relevant as evidence of the standards expected of employers in future civil claims for negligence."*

Despite that, it is clear in practice that there is a swathe of employers' liability claims which are now significantly more difficult to win because s.69 means that workers now have to prove that their employers were at fault, for instance in providing defective equipment, and that they should have foreseen a risk of injury.

It is worth noting that, although not yet tested in the courts, it is arguable that where the defendant employer is an emanation of the State, an injured worker can currently rely on the higher standard imposed by the Directive. If so, it is likely that protection will be directly impacted by Brexit.

In the Autumn Statement of 2015[32] the government indicated its intention to make a two-pronged attack on the ability to bring personal injury claims by (a) raising the limit on small claims and hence the amount at which legal costs are recoverable from £1,000 to £5,000 and (b) removing the right to bring a claim for damages for "minor soft tissue injuries" worth below £5,000.

These moves will extend the changes introduced in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to remove recoverable success fees and insurance premia and operate to tilt the playing field in personal injury litigation yet further in the favour of the government's financial backers in the insurance industry.

One consequence, not of Brexit itself but of the focus on campaigning for the referendum and the political confusion the Leave vote has caused, has been a delay in implementation of these further attacks.

[31] HC Hansard, 22 Apr 2013, Column 1324 (http://tinyurl.com/zfyswnm)
[32] HM Treasury *Spending Review and Autumn Statement 2015*, Cm 9162 (November 2015) at paragraph 3.103. Although justified as a measure to combat 'unnecessary whiplash claims' it will affect all claims, including those relating to workplace injuries

The Future for Health and Safety

Do these legal changes, in a context of chronic underfunding of the Health & Safety Executive, mean that the whole modern philosophy of risk assessment and management is itself at risk of extinction?

Perhaps not; after all, successful employers recognise that, that philosophy is beneficial to them as well as their workers. No doubt, however, we can expect some degradation of protection; removing the need for formal risk assessment in smaller businesses categorised as lower risk and removing the right to free eye tests for display screen users have already been mooted.

New regulations from the EU will no longer necessarily apply to the UK. It is interesting to note here that in recent years the volume of regulations coming from the EU has lessened as the idea of a Social Europe has retreated, under pressure from the UK and similar free market governments. One unintended outcome of Brexit might even be that the UK, through its membership of the European Economic Area, is subject to increased regulation from an EU which reverts to a more social democratic philosophy.

Finally, it is worth noting the likely loss of other Directives which provide for EU harmonisation which often prove relevant to health and safety and personal injury issues, even though they do not apply exclusively to the field of work.

For instance, on motor insurance, the Codified Directive (2009/103/EC) allows a UK worker, injured by a French driver in Spain, ease of proceedings against the relevant motor insurers in the UK. Brexit may result in the loss of this right. Similarly, the Consumer Protection Act 1987, which was introduced through the Product Liability Directive 85/374/EEC, allows claims against suppliers and importers of defective products. Again, this is now part of domestic law and will not be lost automatically through Brexit but the rights it establishes could now be considered afresh by Parliament and, perhaps, lost.

The Wrong Question?

As much as these changes are perhaps predictable, asking what rights may be targeted is possibly the wrong question as it misses the bigger impact which Brexit is likely to have on employment law and health and safety protection. This will be its key legacy.

The EU structure sets out social standards of minimum entitlement which workers have the right to expect from the State. The State is legally bound to introduce measures implementing those entitlements or face sanction. That implementation must provide an effective remedy to the individual affected, and if it does not then they may sue the State for that failure. When interpreting UK legislation the courts must do so in a way which furthers the social standards and if they do not do so adequately, then the Court of Justice of the European Union allows an individual to challenge that. Where they do so it is open to the UK Government to make legislative changes to change the domestic law, but never in a way which provides less than they are bound to in EU law. If they do then the law may be struck down in the courts as being incompatible with the EU obligations.

In short, the EU provides checks and balances to government excess.

The consequence of the Leave vote to 'take our country back' is that these restraints will be lost. If the government doesn't want a particular right to exist then it can repeal it. If it doesn't like a particular court ruling then it can legislate it away. The UK courts are historically very conservative in their rulings and give significant weight to the common law and the contents of contracts – neither of which tend to be of any real use to employees due to the disparity in bargaining power. They are also duty-bound to interpret and apply Parliament's will, even where it is unfair or unjust.

So far as Thompsons is concerned, the medium-term erosion of the UK's employment and health and safety rights may be just the tip of the Brexit iceberg.

Appendix 1

Employment tribunal claims lodged between 2008 and 2013

	Age Discrimination	Disability discrimination	Equal pay	Part Time Workers Regulations	Race discrimination	Redundancy – failure to inform and consult	Religion or belief discrimination	Sex discrimination	Sexual Orientation discrimination	Suffer a detriment / unfair dismissal - pregnancy	Transfer of an undertaking - failure to inform and consult	Working Time Directive	Written statement of terms and conditions	TOTAL
2008/09	3,800	6,600	45,700	660	5,000	11,400	830	18,600	600	1,800	1,300	24,000	3,900	134,990
2009/10	5,184	7,547	37,385	530	5,712	7,487	1,000	18,204	706	1,949	1,768	95,198	4,743	206,438
2010/11	6,821	7,241	34,584	1,575	4,992	7,436	878	18,258	638	1,866	1,883	114,104	4,016	220,304
2011/12	3,715	7,676	28,801	774	4,843	7,984	939	10,783	613	1,861	2,594	94,697	3,630	183,571
2012/13	2,818	7,492	23,638	823	4,818	11,075	979	18,814	639	1,589	1,591	99,627	4,199	190,850
TOTAL	22,338	36,556	170,108	4,362	25,365	45,382	4,626	84,659	3,196	9,065	9,136	427,626	20,488	936,153
RANK	7	5	2	12	6	4	11	3	13	10	9	1	8	

Table 1 - EU derived claims lodged at Employment Tribunals (pre-fees levels)

	Age Discrimination	Disability discrimination	Equal pay	Part Time Workers Regulations	Race discrimination	Redundancy – failure to inform and consult	Religion or belief discrimination	Sex discrimination	Sexual Orientation discrimination	Suffer a detriment / unfair dismissal - pregnancy	Transfer of an undertaking - failure to inform and consult	Working Time Directive	Written statement of terms and conditions
2009/10	1.3%	1.9%	9.5%	0.1%	1.5%	1.9%	0.3%	4.6%	0.2%	0.5%	0.5%	24.2%	1.2%
2010/11	1.8%	1.9%	9.0%	0.4%	1.3%	1.9%	0.2%	4.8%	0.2%	0.5%	0.5%	29.8%	1.1%
2011/12	1.2%	2.4%	8.9%	0.2%	1.5%	2.5%	0.3%	3.4%	0.2%	0.6%	0.8%	29.4%	1.1%
2012/13	0.8%	2.3%	7.1%	0.2%	1.4%	3.3%	0.3%	5.7%	0.2%	0.5%	0.5%	29.9%	1.3%

Table 2 - EU derived claims lodged at Employment Tribunals (pre-fees levels) as percentage of all claims lodged that year

Appendix 2

The 6 pack regulations

The Display Screen Equipment Directive
90/270/EEC

The Health and Safety (Display Screen Equipment) Regulations 1992

These regulations require employers to carry out an analysis and assessment of the work station which must meet certain basic requirements that enable them to be appropriately adjusted and used without unacceptable risks to health and safety. Appropriate information, instruction and training should be provided to users so that they can use the equipment provided effectively and information on eye examinations and free eye examinations for persons identified as users must be provided on request. The employer is responsible for paying for tests and for basic spectacles if they are required for DSE work.

The Employment Framework Directive
89/391/EEC

The Management of Health & Safety at Work Regulations 1992

These regulations place a duty on employers to assess and manage risks to their employees and others arising from work activities. Employers must also make arrangements to ensure the health and safety of the workplace, including making arrangements for emergencies, adequate information and training for employees, and for health surveillance where appropriate. Employees must work safely in accordance with their training and instructions given to them. Employees must also notify the employer or the person responsible for health and safety of any serious or immediate danger to health and safety or any shortcoming in health and safety arrangements.

The Manual Handling of Heavy Loads Directive
90/269/EEC

The Manual Handling Operations Regulations 1992

These regulations are concerned with the manual handling of loads, defined as 'the transporting, including the lifting, putting down, pushing, pulling, carrying, of a load'. An employer should avoid the need for his or her employees to undertake manual handling involving risk of injury. If that is not reasonably practicable, then the employer must assess the risk of the operation and reduce that risk to the lowest reasonably practicable level. Relevant training and information must be provided.

The Use of Personal Protective Equipment Directive
89/656/EEC (now 96/58/EC)

The Personal Protective Equipment at Work Regulations 1992

These regulations require employers, where risks to an employee cannot be controlled by other means, to provide suitable Personal Protective Equipment (PPE) , such equipment having first been appropriately risk assessed.

The Use of Work Equipment Directive
89/654/EEC

The Provision and Use of Work Equipment Regulations 1998

These regulations seek to address, control and prevent the risk of injury and death to workers by requiring employers to provide equipment which is suitable for its purpose and maintained in a safe state of repair.

The Workplace Requirements Directive
89/654/EEC

The Workplace (Health, Safety, Welfare) Regulations 1992

These regulations are concerned with the working environment. They place a duty on employers to make sure that the workplace is safe and suitable for the tasks being carried out there, and that it does not present risks to employees and others. They cover all aspects of the working environment, with specific regard to: maintenance of the workplace, equipment, devices and systems; ventilation; temperature in indoor workplaces; lighting; cleanliness and waste materials; room dimensions and space; work stations and seating; condition of floors and traffic routes; falls or falling objects; windows and transparent or translucent doors, gates and walls; windows, skylights and ventilators; ability to clean windows, etc. safely; organisation, etc. of traffic routes; doors and gates; escalators and moving walkways; sanitary conveniences; washing facilities; drinking water; accommodation for clothing; facilities for changing clothing; and facilities for rest and to eat meals.

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