

Departing from EU case law - our opinion

Our response to the consultation on extending powers to depart from retained EU case law to additional lower courts and tribunals.

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From 31 December 2020, the amended European Union (Withdrawal) Act 2018 vests the power to depart from retained EU case law in the Supreme Court and the High Court of Justiciary (where there is no leave of appeal to the UK Supreme Court). The UK government is considering extending this power to depart from retained EU case law to additional lower courts and tribunals, namely the Court of Appeal in England and Wales and the High Court of Justice in England and Wales and their equivalents.

Browne Jacobson LLP welcomed the opportunity to engage with the government on these proposals and submitted a response to the consultation before the consultation closed on 13 August 2020.

As a firm, we do not support extending the power to depart from retained EU case law to other courts and tribunals beyond the UK Supreme Court and the High Court of the Justiciary. Our view is that extending the power to depart to lower courts would be likely to cause great legal uncertainty, and potentially divergence between the UK legal jurisdictions encouraging parties to engage in "forum shopping" by bringing litigation in the jurisdiction that they believe will lead to the most favourable outcome. Uncertainty would weaken the UK's reputation as a strong legal centre because it would present a difficulty in advising about the prospects of success of cases.

Any extension of the power to depart would also be likely to cause a dramatic increase in re-litigation of previously closed issues, which would in turn increase costs for litigants, particularly in areas of law such as intellectual property (as there are many controversial CJEU decisions which have shaped this practice) and environment and planning (given the prevailing view of developers that European law stands in the way of commercial development). We also consider that the proposals to extend the power to depart to lower courts and tribunals could jeopardise fairness as reliance could no longer be placed on known positions.

In our response, we also outlined the potential impact of the proposals on individuals with protected characteristics under the Equality Act 2010 ("Equality Act"). This will not be such a concern where an individual's cause of action does not relate to their status as a protected person. However, where an individual with a protected characteristic is seeking to assert their rights under the Equality Act, there may be a risk that they would suffer an adverse impact as the Equality Act implements four EU directives. Given that the Equality Act also consolidated a number of pieces of domestic legislation, such as the Race Relations Act 1965, it is unlikely that a significant departure will be made from retained EU case law in any event and so although there is a risk of individuals with a protected characteristic suffering an adverse impact as a result of these proposals, the risk is small.

Our stance is that if the law is to be changed, it should primarily be changed through the legislature. To leave the decisions on when to depart from European case law entirely to the judiciary is arguably a dereliction of the government's duty to legislate. In our view, retaining the right to depart from EU case law to the Supreme Court and the High Court of Justiciary constitutes a satisfactory compromise between legal certainty and UK sovereignty following the end of the transition period. It would also allow any such departure to take place in a controlled and consistent manner.

We await the publication of the outcome of this consultation as the government continues to analyse responses.

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