Accountability for public decisions – the future of judicial review after Brexit

In the future, we may look back on this moment as being pivotal for judicial review (the core legal means of challenging public authorities' exercise of power). There is a 'perfect storm' of change: Brexit has happened; due to the pandemic the state has been granting itself sweeping powers which would have been unthinkable before; regulators are continuing to take a much more aggressive and interventionist approach; and the Queen's Speech in May foreshadowed a yet-to-be-seen Judicial Review Bill that may well narrow the ambit of any potential remedies available for judicial review claims.

As regards Brexit, after years of speculation on how the UK would exit the EU, the long-awaited "exit day" of 31 December 2020 passed a few months ago with relatively little fanfare. However, what did come to pass was a wholly new legal order, rejecting the adoption of EU law into the UK system and replacing it with a complex hybrid.

The implications of this new legal order across all sectors will continue to unfold for some time to come. Businesses should keep an eye on changes in law that affect them and move quickly if they want to challenge those changes. Below, we consider the role of judicial review in scrutinising this post-Brexit legal framework (and in particular the broad powers afforded to Government Ministers), as well as the potential public law challenges that may arise out of that new framework.

Changes to the law post-Brexit

The post-Brexit relationship between the UK and the EU will be governed by the Withdrawal Agreement 2019 (the "Withdrawal Agreement") and the Trade and Cooperation Agreement (the "TCA") both entered into between the UK and the EU. As a general rule, under the Withdrawal Agreement, the UK 'retains' EU law as it stood on exit day but from 1 January 2021, the UK can amend existing law or make new law.

The following pieces of legislation, among other things, give Ministers very broad powers to make secondary legislation to give effect to the terms of the Withdrawal Agreement and the TCA in domestic law:

1. the European Union (Withdrawal) Act 2018 (the "EUWA 2018");
2. the European Union (Withdrawal Agreement) Act 2020 (the "WAA 2020"); and
3. the European Union (Future Relationship) Act 2020 (the "EUFRA").

Given the UK Government's ability to amend existing law and make new law, and the broad powers granted to Ministers, companies should keep a close eye on the use of these powers post-Brexit, and may wish to consider appropriate challenges in order to test and set the boundaries of UK and EU law and the exercise of the Government's powers (as far as it's relevant to their sectors). We anticipate that it will take some time for the full shape of the new legal order to be established by the UK courts, including how the various Brexit instruments should be interpreted, implemented and enforced. We consider below a couple of fertile areas of potential public law challenge in the wake of Brexit.

First area of challenge: broad powers to make secondary legislation

The powers under the EUWA 2018 and WAA 2020 to make secondary legislation were intended to allow Ministers to ensure EU law is effectively converted into domestic law – not to make policy or other changes. There are some limits on the exercise of those already broad powers. However, if Ministers have made policy or other changes, which then affect businesses' interests, then businesses may be able to challenge the Minister's use of the power. Indeed, since 2018 and in great haste Ministers have created over 1,000 statutory instruments under these provisions – none of which has been scrutinised by Parliament in the way that primary legislation would have been. There is a real risk that Ministers have amended or created legislation by exercising discretion beyond that which was granted to them under the EUWA 2018 and the WAA 2020, or that errors have been made in the general haste ahead of exit day.

If businesses want to challenge this raft of secondary legislation, they may be out of time to do so, but judicial review still looks set to be a crucial means of challenging future secondary legislation made using a Minister's power under the EUWA 2018 or WAA 2020. Companies could make such challenges to the exercise of powers that adversely affects their businesses on the following bases:

— the Government acted outside its powers under EUWA 2018 or WAA 2020;
— statutory or procedural fairness rules were breached;
— the law was changed inappropriately, for example, to displace retained EU law or principles or otherwise changing the underlying policy;
— secondary legislation is inconsistent with the terms of the Withdrawal Agreement and the TCA, and / or the primary legislation that gives those agreements effect in UK law; or
— it is inconsistent with the terms of other secondary legislation.

Second area of challenge: the TCA

The TCA is a mishmash of overarching, relationship-based principles and more detailed, prescriptive measures (such as specific frameworks for particular sectors).

In terms of the TCA's domestic implementation, the most important provision (and what may become one of the most important statutory provisions in UK law generally) is section 29(1) of EUFRA which states as follows:

"Existing domestic law has effect … with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement … so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement."

That would appear to be a sweeping provision, potentially in itself making wholesale amendments to domestic law if required to give effect to the TCA.

In addition, EUFRA at section 31 contains extremely broad powers for Ministers - or other relevant national authorities – to do whatever they 'consider appropriate' to implement the TCA or to deal with matters 'arising out of or related to' the TCA.

Section 29 may be said to make the TCA directly effective in domestic law. Companies could therefore consider whether there is scope to challenge any breaches of the Government's obligations under the TCA. In particular, we may see judicial review challenges increase in relation to:

— breaches of hard-edged obligations created by the TCA affecting particular sectors or industries, such as the Energy or Digital Trade provisions;
— breaches of the Transparency or Good Regulatory Practice and Regulatory Cooperation provisions of the TCA, where Government has failed comply with these obligations. For example, the TCA has created the concept of major regulatory decisions and requires the Government to consult and publish impact assessments in relation to regulatory decisions falling into this category. The TCA also requires the maintenance of independent review and appeal procedures for administrative decisions that are not classified as major regulatory decisions; and
— the interplay between the EUFRA and the WAA 2020, domestic law and retained EU principles.

Given the provisional nature of the TCA there may, of course, be ongoing changes, updates and additions to it. Companies will need to keep a watchful eye on those changes to see if there may be further scope for judicial review should additional 'hard-edged' obligations be created, expanded or changed.

What next?

Through the TCA, decision makers and some regulators will have new obligations and duties with which to comply. As the TCA evolves, businesses will want to make sure that the relevant public bodies are adhering to the relevant obligations. Ironically, these new and broadened opportunities to challenge public law decisions come against a backdrop of the proposed Judicial Review Bill which may well make judicial review more difficult or less attractive as an option to claimants.

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