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IT Law in the United Kingdom after Brexit

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A B S T R A C T

It is difficult to find a more appropriate introduction than the words of this song in the attempt to assess what IT Law could look like in the UK at the time (whenever that may be[1]) when its exit from the EU might be concluded. Speculation is normally more in the realm of futurists than in that of a lawyer whose profession traditionally values qualities such as stability and predictability. These are not normal times and it may be helpful to consider some of the issues and topics that will require to be addressed in the near future. It is not the purpose of the article to repeat the arguments for and against UK membership of the EU. It seeks, rather, to highlight some of the issues that will inevitably arise following what has been described as the largest demerger in history – with what has been described as the world's 5th largest economy[2] seeking to disengage itself from the world's largest trading block. It is difficult to imagine that there has ever been such a legislative challenge. The information sector is an increasingly important part of the national economy and consideration of some of the issues affecting it makes for an interesting case study.

This article will focus on four legal topics; data protection, e-commerce, intellectual property and telecommunications. This is by no means an exhaustive list of the issues, even in the IT sector, that need to be addressed, but may serve to highlight some of the key points that will be required for consideration by legislators and to indicate also the scale of the task facing them. In some cases, the quest to seek answers will lie within the control of the UK legislature and government but other issues may be more difficult to resolve independently.

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There are more questions than answers

Pictures in my mind that will not show

There are more questions than answers

And the more I find out the less I know

(Johnny Nash)

1. Regulations and directives

Prior to commenting on specific topics, it is appropriate to consider the different types of European legislation that exist and the impact that these have on domestic law. There is a range of legal instruments but key are the concepts of Regulations and Directives. There are other categories of legislation such as Decisions and also a small mountain of European

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[1] The recent and highly controversial case of *R v. Secretary of State* [2016] EWHC 2768 (Admin) illustrates well some of the complex issues that may arise in the field. Although primarily concerned with the question whether the move (under the often quoted Article 50) to leave the EU requires Parliamentary approval, the case c

[2] It has been suggested that the UK's economy has slipped to 6th place following the referendum.

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Recommendations. These will not be considered in this article. Neither will the equally large collection of European standards promulgated by agencies such as CEN[3], CENELEC[4] and ETSI[5]. Whilst it may not be true that standards cover every aspect of life from conception to death, this is not too far from the truth[6], and standard making has constituted a major and increasing factor in the establishment of the Single Market, giving producers the assurance that if goods comply with a relevant standard they will be considered to satisfy legal requirements as to quality and/or safety in all Member States. Although the UK has its own well respected standard making body in the form of the British Standards Institute (BSI)[7] continuing engagement with European standard making bodies and compliance with standards will be an important component if continued access to the Single Market is a desired goal.

Turning to more traditional forms of legislation, a Regulation normally becomes part of domestic law in all of the Member States from the time that it is adopted although, as is also very often the case with items of UK legislation, the actual date of entry into force may be delayed. As will be discussed in more detail below, the 2016 Data Protection Regulation[8] is something of a hybrid measure. As is the norm with a Regulation it has provisions that will be directly applicable but also contains others that will require national implementing measures – such as the competencies to be afforded to national supervisory agencies. The other major form of EU legislation that is relevant in the present concept is that of Directives. In general, and again there are exceptions, Directives establish principles that require to be implemented by national laws, generally within a prescribed time scale. The current EU Data Protection Directive of 1995[9] provides a good example of this, being implemented in the UK by the Data Protection Act of 1998.

Where European Directives have been implemented in national law, it seems clear that the latter will continue to have effect post Brexit. One complicating issue is that in the case of legal proceedings the courts in the UK have sometimes tended to go straight to the text of the Directive and effectively ignore the national implementing measure. A reason frequently given for this is that UK statutes are unnecessarily complicated. That may send something of a warning signal for the future, and copyright law which is discussed below may constitute a prime example. It is perhaps noteworthy, however, that the new Data Protection Regulation extends to 88 pages in PDF format whilst the 1995 Directive was almost exactly a quarter of the length. Expanding the size and complexity of legislation is clearly not an exclusively British phenomenon.

A further potential problem may be illustrated by the recent case of *Cartier and Others v. British Sky Broadcasting and Others*.[10]

For a number of years the English courts have issued orders requiring ISPs to apply technical measures in order to block access by their customers to web sites containing copyright infringing material.[11] These cases have been brought under the authority of section 97A of the Copyright, Designs and Patents Act 1988, a provision that was introduced in the course of implementing the requirements of the European Directive on Copyright in the Information Society.[12] The Directive requires in Article 8 that:

> 3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

and in implementing it section 97A provides in part that:

> (1)The High Court (in Scotland, the Court of Session) shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright.

The present case was somewhat different. It was again concerned with a request from right owners that ISPs be required to block access to web sites, but on this occasion the allegation was that the sites in question were offering counterfeit goods for sale in infringement of the claimants' trade mark rights. It marks the first occasion on which such a claim has been made in the UK. The key question that had to be determined was what would be the legal basis for such a ruling. There is no equivalent in the UK's trade mark legislation to section 97A. The 2004 Directive[13] on the enforcement of intellectual property rights does however provide in Article 11 that Member States:

> shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.

A key issue is whether such injunctions can be permanent or merely temporary in their nature? No steps were taken by the then UK Government to implement the third sentence of Article 11 within a trademark context on the basis that existing law was sufficient to ensure compliance. This approach was criticised by Mr Justice Arnold who commented in the High

[3] https://www.cen.eu/about/Pages/default.aspx
[4] https://www.cenelec.eu/
[5] http://www.etsi.org/
[6] See https://www.cen.eu/news/brief-news/Pages/NEWS-2016-011.aspx
[7] http://www.bsigroup.com/
[8] Regulation (EU) 2016/679. OJ 2016 L119/1.
[9] Directive 95/46.
[10] Reported at first instance at [2014] EWHC 3354 (Ch) and before the Court of Appeal at [2016] EWCA Civ 658.
[11] See, for example *Twentieth Century Fox Film Corp v British Telecommunications plc* [2011] EWHC 1981 (Ch).
[12] Directive 2001/29/EC of 22 May 2001
[13] Directive 2004/48/EC of 29 April 2004.

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