EU law: what's retained?

Charles Brasted & Andrew Eaton provide a practical toolkit for advising on retained EU law in a post-Brexit UK

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IN BRIEF

▶ The European Union (Withdrawal) Act 2018 created 'retained EU law' to fill the gap left by EU law unless or until the UK Parliament legislates to replace it.

New Year's Eve 2020 was a bit different from other years, and for more reasons than one. It will certainly be a date that any English lawyer advising on the UK's post-Brexit legal system will not easily forget.

At 11pm GMT, EU law ceased to apply to and in the UK.

Brexit will be of enormous legal and practical importance for the people and businesses of the UK in the years ahead. However, some may not appreciate the extent to which it has already fundamentally reshaped the UK legal system: while many rules remain familiar, for the time being at least, their legal status and how they are interpreted, enforced and adjudicated upon is fundamentally different. The constitutional framework of those rules is new. Brexit has created new bodies of law—and will catalyse legal change even without legislative intervention.

The European Union (Withdrawal) Act 2018 (EU(W)A 2018) created a new species of UK law to fill the gap left by EU law: 'retained EU law'. Retained EU law is based on the equivalent EU '*acquis communautaire*' it replaces, but the context in which it applies and the principles governing its interpretation, application and interaction with other types of UK law are wholly untested. Even as the law of the EU itself continues to develop, EU(W)A 2018 preserves a 'freeze-frame' version of EU law as it existed in the UK at 11pm on 31 December 2020, unless or until the UK Parliament legislates to replace it and/or the upper courts of the UK decide to depart from pre-Brexit case law.

This article seeks to provide a practical 'starter kit' of questions to ask when advising on the implications of retained EU law for the UK's legal and regulatory environment.

What was the position in EU law immediately before 11pm on 31 December 2020?

EU(W)A 2018, ss 2, 3 and 4 provide that retained EU law exists only so far as there was an equivalent EU law or EU-derived domestic law in force in the UK immediately before this date. As such, the position as at 11pm on 31 December 2020 will now be of central importance when advising clients in the future on their legal position under retained EU law.

Identifying the relevant EU treaty provisions, EU legislative acts and decisions in force as at this date will potentially become increasingly difficult over time. Online resources such as *legislation.gov.uk* (which has created the EU Exit Web Archive (*bit.ly/2NwVTyg*)) and commercial legal research services have sought to compile the relevant EU instruments in force as at 31 December 2020. However, one should be wary not to rely on these tools uncritically.

Has the relevant EU law been transposed as retained EU law?

Once you have identified the relevant EU law in force on 31 December 2020, you must engage with the mechanics of EU(W)A 2018, which acts as a 'sorting machine' into which all EU law was placed at 11pm on 31 December 2020 before its 'reintegration' into the UK legal system as retained EU law. The key types of EU law, and whether or not they are transposed as retained EU law by EU(W)A 2018, are as follows.

EU-derived domestic legislation

Yes (EU(W)A 2018, s 2): all primary and secondary domestic legislation enacted before 31 December 2020 to implement EU law continues to be legally valid as retained EU law.

EU regulations, EU decisions, EU tertiary legislation & provisions of the European Economic Area Agreement

Yes (EU(W)A 2018, s 3): so long as it was in force and applicable in the UK on 31 December 2020, the English language versions of these EU law instruments now form part of UK law as retained EU law (other language versions may still be used as an aid to interpretation (EU(W)A 2018, s 3(4)(b)).

The question of what happens to EU legislation that is partly in force as at 31 December 2020 is a difficult one that requires a close reading of EU(W)A 2018 and the timing of the relevant provisions of EU legislation in question. In some cases, the UK government has enacted statutory instruments under EU(W)A 2018 to 'normalise' the position so that the relevant EU legislation is not partly transposed as retained EU law in a manner that creates legal uncertainty.

Directly effective provisions of the EU treaties & directly effective rights under EU directives

Yes (EU(W)A 2018, s 4): any rights, powers, liabilities, obligations, restrictions, remedies and procedures set out in EU law that were recognised and enforceable in the UK on 31 December 2020 continue to be recognised and enforceable after that date as retained EU law, unless they:

- are otherwise retained by EU(W)A 2018, s 3, or
- arise under an EU directive and are 'not of a kind recognised' by the Court of Justice of the European Union (CJEU) or a domestic court in a case decided before 31 December 2020.

This saving provision potentially incorporates a wide range of directly effective rights set out in the EU treaties and EU directives that would otherwise not be retained under EU(W)A 2018, ss 2 and 3. However, at present, there is no comprehensive list of the rights to which EU(W)A 2018, s 4 applies. The UK government has, in some instances, passed secondary legislation to ensure that certain directly effective rights that would otherwise be caught by EU(W)A 2018, s 4 cease to be recognised and available in UK law after 31 December 2020 (see, for example, the Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019, SI 2019/1401).

There is also some uncertainty as to how the courts will interpret the phrase 'of a kind' in the context of EU directives.

Charter of Fundamental Rights of the EU

No (EU(W)A 2018, s 5): EU(W)A 2018, s 5(4) provides that the Charter of Fundamental Rights is not retained in UK law after 31 December 2020. However, EU(W)A 2018, s 5(5) states that this does not affect the retention in domestic law of any rights or principles that exist irrespective of the charter. Given that the charter is a codification of such rights and therefore does not itself contain any additional rights, it is currently unclear how the courts will interpret these provisions.

EU directives

No: EU directives are not a type of EU law that is retained under EU(W)A 2018. However, it remains to be seen what relevance EU directives will have for the purposes of interpreting and applying other forms of retained EU law, such as EU-derived domestic legislation enacted to implement an EU directive and directly enforceable rights retained via EU(W)A 2018, s 4 that are embedded in an otherwise non-enforceable EU directive.

Note: the case law of the CJEU, also a type of retained EU law, is considered below.

Has the retained EU law been amended or repealed?

So, you have established that the relevant provision of EU law has been retained, but now you need to consider whether it has been amended or repealed by subsequent legislation.

Almost all retained EU law has to some extent already been amended by statutory instruments enacted by the government using its power under EU(W)A 2018, s 8 to correct deficiencies arising from the UK's withdrawal from the EU. Some 1,000+ statutory instruments have been enacted to tweak provisions of retained EU law so that they function appropriately in their new context. Lawyers seeking to understand how retained EU law differs from the equivalent EU law it replaced will therefore need to consider the implications of any amendments for the interpretation and practical application of the relevant retained EU law provisions.

Over time, further amendments to retained EU law will be made by subsequent legislation. EU(W)A 2018, s 7 sets out detailed rules regarding how retained EU law can be amended or repealed, depending on the status of the specific legislation in question.

- **EU-derived domestic legislation:** Primary and secondary domestic legislation enacted to implement EU law, now itself retained EU law within the scope of EU(W)A 2018, have the same domestic legal status as previously.
- **Direct EU legislation**: For the purposes of amendment and repeal by future legislation and the Human Rights Act 1998 (but not for other purposes):
  - EU regulations (but not EU tertiary legislation) and any provision of the European Economic Area (EEA) Agreement , defined as **retained direct *principal* EU legislation**, are treated *as if* they are primary legislation; and
  - Other types of direct EU legislation are **retained direct *minor* EU legislation** and are treated *as if* they are secondary legislation.
- **Rights etc retained by EU(W)A 2018, s 4**: Any rights etc retained in UK law via EU(W)A 2018, s 4 are to be treated similarly to retained direct *principal* EU legislation.

Is there CJEU case law relevant to the interpretation of the retained EU law?

The impact of CJEU case law on the interpretation of retained EU law in the UK depends on whether the case was decided—you guessed it—before or after 31 December 2020.

For CJEU cases decided *before* 31 December 2020, these cases are now 'retained EU case law'. This means that the principles and decisions laid down by the CJEU in these cases continue to be binding on the UK courts so far as they are relevant to 'any question as to the validity, meaning or effect of any retained EU law'. However, there are important caveats to this.

- First, CJEU judgments are binding 'so far as [the retained EU law in question] is unmodified' on or after 31 December 2020 (EU(W)A 2018, s 6(3)). This does not prevent retained EU law that has been modified from being interpreted in accordance with CJEU case law 'if doing so is consistent with the intention of the modification' (EU(W)A 2018, s 6(6)). However, unless the modification itself makes it clear whether and to what extent relevant CJEU case law continues to apply, this will be left to a judge to decide (and thus could create scope for legal argument).
- Second, in any event, the Court of Appeal and Supreme Court (and equivalent courts, for example, in Scotland) have the power to depart from retained EU case law. These courts must apply the test used by the Supreme Court when deciding whether to depart from its own judgments—namely, whether it is 'right to do so'. How this test will operate in this new and different context is not yet clear. Until a settled practice is established, the potential for divergence where 'right to do so' will increase legal uncertainty and could result in considerable litigation to test the boundaries.

For CJEU cases decided *after* 31 December 2020, the UK courts are no longer bound to follow such cases. Instead, they may 'have regard' to anything done after that date so far as it is relevant to any matter before the court. It will be for the courts to determine when and to what extent they do so, which in practice means there is likely to be some debate in the courts unless or until a settled view is reached by the judiciary on this question.

How is conflict between the retained EU law & other domestic law to be resolved?

Where a conflict between retained EU law and other domestic law is identified, how is it to be resolved? Again, the answer turns on whether the relevant domestic law was enacted before or after 31 December 2020:

- all domestic legislation enacted *before* 31 December 2020 must either be interpreted compatibly with retained EU law (in accordance with the *Marleasing* principle (from *Marleasing SA v La Comercial Internacional de Alimentacion SA* (1990) C-106/89) or disapplied; whereas
- domestic legislation enacted *after* 31 December 2020 is capable of repealing retained EU law in accordance with EU(W)A 2018, s 7 (see the third question above).

This has the effect of partially recreating the pre-Brexit position while the UK was a member of the EU, whereby retained EU law continues to be 'supreme' over other domestic laws enacted before 31 December 2020, but ensures that this is no longer the case in respect of new domestic laws enacted after 31 December 2020.

But what if pre-31 December 2020 domestic law is subsequently amended? Does that make the amended provision an enactment made after 31 December 2020 (and therefore not subject to the principle of the supremacy of EU law), or is the amended provision still treated as having been enacted before 31 December 2020? The answer provided by EU(W)A 2018 is inconclusive: the principle of supremacy of EU law *may* apply in respect of an amendment made after 31 December 2020 to an enactment made before 31 December 2020 'if the application of the principle is consistent with the intention of the modification' (EU(W)A 2018, s 5(3)). This

means that, unless the amendment itself makes its intention clear, the courts would need to determine how such amendments affect the hierarchy of retained EU law and the amended provision, thereby creating much scope for legal uncertainty in the meantime (for example, it is yet to be determined whether the court will consider any provisions of retained EU law to constitute constitutional statutes and thus liable only to express (as opposed to implied) repeal (as per *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin)).

How can retained EU law be challenged?

You have established what the law is. If you don't like it, or a decision made under it, can you challenge it?

In short, emphatically yes, at least in the short term. In fact, the uncertainty introduced by EU(W)A 2018 means that there has never been a better time for businesses to revisit their approach to regulation, to challenge their and their regulator's working assumptions and, ultimately, to shape their legal and regulatory environment. In the short term, if you seek to bring a legal claim concerning matters that took place before 31 December 2020, it will be important to consider the transitional provisions set out in EU(W)A 2018, Sch 8, which apply until the end of 2023.

Potential aspects of the new regime that are likely to give rise to opportunities for legal challenges include:

- **Amendments to retained EU law made by the statutory instruments enacted by the government under EU(W)A 2018, s 8**: These powers were intended only to correct deficiencies in the law, but might in practice have gone further by making substantive policy changes. Are the specific amendments to retained EU law beyond the scope of the power? If the answer is potentially yes—these statutory instruments are potentially liable to challenge in the courts.
- **Decisions made under the new retained EU law regimes**: As UK public bodies exercise powers previously held in Brussels and/or for the first time since EU law ceased to apply, individuals and businesses subject to such decisions should be ready to scrutinise the lawfulness of the exercise of these powers.
- **The continued applicability of CJEU case law**: Whether it is because retained EU law has been modified or because there is an argument that, in any event, it is 'right' for the courts to depart from established CJEU jurisprudence, there may now be scope for arguing that previously binding CJEU case law is no longer binding in the UK.
- **Measures that are incompatible with retained EU law**: Much like while the UK was in the EU, any government action or pre-Brexit legislation that is incompatible with retained EU law is liable to be quashed or disapplied. The usual judicial review remedies also continue to be available in respect of such actions.

The new legal reality in the UK ushered in over the New Year is fraught with complexity and uncertainty. The true mechanics of EU(W)A 2018 will become apparent over time, as aspects of the Act are considered by the courts. In the meantime, businesses need to equip themselves to navigate this uncertainty, guarding against the risks but also capitalising on the potential opportunities that such uncertainty inevitably brings. **NLJ**

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