HERBERT SMITH FREEHILLS

The UK's new legal order post-Brexit: A new class of UK law

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Since the UK joined the EU in 1973, much UK law has derived from European law. A UK exit from the EU, whether in a no-deal Brexit on 31 October 2019 or at the end of a transitional period lasting until at least end 2020, brings the prospect of revisiting 46 years of interconnection of UK law with EU law and institutions. Affected law ranges from the regulation of financial services firms to vast swathes of EU health and safety, environmental, product liability, consumer protection and employment law applicable in the UK.

The UK could not manage without law in these fields and therefore the UK will put EU law applicable in the UK on its statute book as classes of 'retained EU law' to apply after Brexit. UK lawmakers are in the process of reviewing the laws that will become retained EU law and taking decisions as whether to:

- keep them in the form in which they are retained,
- reform them to work effectively as the law of the UK, or
- repeal them.

Much work has been focused on preparing for the risk of a no-deal Brexit at the end of October 2019. While the proposed changes may foreshadow the position at the end of any transitional period, if a Withdrawal Agreement is approved by all parties, a period of transition may lead to agreement on a number of issues, which either changes or renders unnecessary the changes that would come into force in a no-deal Brexit.

UK and EU: the key constitutional changes

The key constitutional changes once the UK ceases to be in the EU or in transition (in the absence of agreement to the contrary) will be:

- there will be no obligation for the UK to apply or adopt new EU legislation (assuming the Irish backstop remains unacceptable to the UK);
- there will be no, or a limited, obligation to follow CJEU decisions;
- there may be no or limited financial contributions between the EU and the UK; and

The section is part of our Brexit Legal Guide.

Will there be a transitional period?

Although a detailed draft Withdrawal Agreement was settled between the EU member states and the UK Government when Theresa May was the UK Prime Minister, that agreement has been rejected three times by the UK House of Commons. The current UK Prime Minister, Boris Johnson, has declared that the agreement will not be approved without removal of the "Irish backstop", a provision to ensure an open border between Northern and Southern Border, even after the end of transition, by keeping the UK in the EU customs union and either Northern Ireland or the UK as a whole in several aspects of the EU single market.

Negotiations continue to seek to break this impasse, which largely relates to the provisions designed

- there will be no or limited standing for the UK and UK resident businesses or individuals to be heard before the CJEU with regard to actions within the UK, although UK businesses will continue to be subject to EU laws when operating in the EU and to have standing before the European Commission and CJEU in processes and disputes arising from those activities and subject to EU law.

The following changes will apply from end October 2019 even if there is a transitional period:

- there will be no voting representation for the UK at the EU (Parliament, Council or Commission); and
- there will be no say for the UK in EU legislation.

Many rights enjoyed by UK businesses and citizens in the EU are likely to be lost, including free movement, recognition of qualifications and protection from 'soft' trade barriers, save in so far as they are saved by the terms of the Withdrawal Agreement, by new trade agreements with the EU or by the CJEU deciding that they are protected by the doctrine of 'acquired rights'.

The draft Withdrawal Agreement makes it clear that there are likely to be different solutions for those already exercising these rights and for those who have not done so. UK citizens who wish to work or live in an EU member state, as well as EU citizens wishing to live or work in the UK, after, at latest, the end of transition will not have the protection given to those already exercising those rights: see accompanying section: Migration.

Replacing EU law in the UK – the Withdrawal Act

Overview

The principal purpose of the European Union (Withdrawal) Act 2018 (the "**Withdrawal Act**") is to repeal the European Communities Act 1972 (the "**ECA 1972**"), which gives effect and priority to EU law in the UK – thereby formally reasserting the sovereignty and independence of UK domestic law from the EU.

The ECA 1972 not only gives directly effective EU law, such as EU Regulations, legislative effect in the UK, but also provides for UK law to be adapted to ensure compliance with EU Directives that harmonise, or provide for, minimum legal standards throughout the EU, as well as for the authority of the CJEU in relation to EU law. Huge amounts of UK legislation have been passed as secondary legislation under the ECA 1972 to give effect to EU Directives and to facilitate the smooth operation of directly effective EU law.

In isolation, the legal consequence of this repeal would be that all EU legislation currently applying in the UK by virtue of the ECA would cease to have effect, as well as all subsidiary legislation made under the ECA 1972 but the Withdrawal Act preserves a very high proportion of this corpus of law as 'retained EU law'.

Retained EU Law

Retained EU law will fall into two broad categories:

- Directly effective EU law. That is law that currently applies directly in the UK as a member state of the EU. Most of this takes the form of EU Regulations but some EU and EEA Treaty provisions are also directly effective, as well as some provisions found in other EU instruments such as Decisions of the EU Council of Ministers or the EU Commission. Most Regulations are passed through a co-operative process managed by the EU Commission and requiring the approval of both the EU Parliament and the Council of Ministers, though some Regulations are passed by the EU Commission using delegated powers. The UK Government estimates that there are currently around 12,000 EU Regulations in force in the UK.
- UK law which owes its existence or present form to the requirements of EU law. These requirements are usually expressed in EU Directives which are passed by the European institutions in the same way as Regulations. In very few cases an EU Treaty provision or a decision of an EU institution addressed to member states may be the basis of this form of EU law.

In the UK most of this second category of law has been created by statutory instruments under the ECA 1972, s2(2), but there are also pieces of primary legislation and statutory instruments under other acts which perform this function. In some cases, where EU law has adopted concepts already present in UK law, this category of law may include legislation that predates the relevant EU Directive: significant legislation in the financial services sector has this characteristic, including parts of the Banking Act 2009.

The House of Commons Library estimates there are just under 8000 UK statutory instruments implementing EU law.

The scheme of the Withdrawal Act is that all directly effective provisions of EU law will become part of the law applicable in the UK, as a new class of law (retained direct EU

to keep the Ireland/Northern Ireland border free of customs and regulatory checkpoints.

The terms of the Withdrawal Agreement must be approved by both the EU and the UK.

There is only a short time before October 31 2019, in which to break this impasse and negotiate some alternative to the Irish backstop, but the likelihood of any compromise remains extremely uncertain and the EU are clear in their reluctance to contemplate any change to the text of the Withdrawal Agreement. Even if agreement is reached the Withdrawal Agreement and the accompanying non-binding political declaration, which is more open to change, will have to be approved by both EU and UK Parliaments before we can be certain that it will come into force. See accompanying section: The Withdrawal Agreement Q&A

What law would apply during transition?

If the proposed transitional period from 31 October 2019 to end 2020 (with possible extension up to end 2022) comes into operation, the UK will be obliged to continue to apply EU law in the UK until the end of transition. The EU (Withdrawal Agreement) Bill will implement the Withdrawal Agreement into UK law and will amend the EU (Withdrawal) Act so that the effect of the ECA 1972 is selectively saved for the duration of the transitional period to ensure EU law continues to operate.

No-Deal legislation

Passage of the Withdrawal Act into law is being followed by the introduction of an extensive body of secondary legislation adjusting retained EU law to make it suitable for use by the UK as a country which is not a member state of the EU: this might involve, for example, substituting an EU agency with a UK one, for example, a new UK Medicines Authority in place of the EU Medicines Agency. The current

legislation), while all UK legislation which implements EU legal requirements or ensures compatibility of UK and EU law will be preserved, whether created by statutory instruments under the ECA 1972, by statutory instruments under other UK legislation, by rules made by UK regulators (eg large parts of the FCA and PRA Handbooks applicable to financial institutions and financial transactions) or by UK primary legislation.

Status of Retained EU law

UK statutes and statutory instruments which are retained EU law will have the same status as any other UK enactment: statutes being primary legislation and statutory instruments secondary legislation. The rules of interpretation are those for other UK laws.

They will be subject at all times to the same rules for amendment as any other UK primary or secondary legislation (or if made under devolved powers, the rules of the relevant legislature in Scotland, Wales or Northern Ireland). All that will change is that these laws will no longer be open to challenge for failure to comply with EU law (subject to some limited transitional provisions).

Retained direct EU law has been divided into two categories: "retained direct principal EU legislation" and "retained direct minor EU legislation". The latter category is effectively the same as "tertiary EU law" with the addition of some provisions in Annexes to the EEA agreement. Tertiary EU legislation consists of measures taken by the EU Commission (and certain other EU bodies) as delegated or implementing acts. It is in the nature of secondary legislation, and, although not precisely analogous it can be amended by most of the UK legislative processes which can be used to amend UK secondary legislation, whether primary or secondary legislation.

All other direct retained EU legislation is direct retained EU principal legislation. While this is not all legislation passed with the involvement of the EU Parliament, it is treated somewhat similarly to UK primary legislation. It can be amended by primary legislation, by "Henry VIII" powers which allow secondary legislation to be used to modify primary legislation, secondary legislation powers specifically created by post-Withdrawal Act enactments and by secondary legislation where the changes are "only supplementary, incidental or consequential" (see s 7 and schedule 8 of the Withdrawal Act).

Adapting retained EU law

In addition to the general powers of amendment based on the status of retained EU law, there are Brexit specific powers to amend retained EU law. Making retained EU law suitable for use in the UK after it ceases to be an EU member state is quite a challenge. The Withdrawal Act provides for the UK Government to make necessary adaptations through delegated powers by allowing ministers to make the necessary amendments by secondary legislation for a limited period. These powers include so-called 'Henry VIII' powers, under which ministers are able to amend primary legislation through secondary legislation.

A number of procedures exist under which Parliament is able to play a role in the making of statutory instruments, with different levels of scrutiny according to the significance of the subject matter. Under the scheme of the Withdrawal Act:

- The negative procedure (which does not require debate) is intended to be used to deal with the mechanistic issues of converting EU law to workable UK law; and
- The affirmative procedure (which does require debate and approval by both Houses) is seen as more appropriate for the more substantive changes, including changes to primary legislation. Most no-deal legislation has needed to use this process which has slowed its progress through Parliament.

"Defects" in retained EU law

Most Brexit-related amendments will be made to resolve 'defects', a category that does not just include provisions that are clearly unworkable or will serve no purpose once the UK ceases to be bound by EU law, but also provisions that depend on reciprocal treatment of UK legislation or regulatory acts in the EU. In addition, measures may be taken where EU references are no longer appropriate in the view of the relevant Minister. These provisions for amendment expire two years after exit day. Sometimes this approach creates gaps in the overall legal regime arising from the removal of special treatment for the actions of the EU or EU member states.

It would be a backward step for the UK to rush to remove recognition from EU law and regulation, where it may well be possible to obtain continued mutual recognition. If there is a transitional period, negotiations during that time should make it easier to identify where reciprocity will continue, where it remains a real prospect for future agreement and where it will be definitively lost. This means that if there is a transitional period, no-deal legislation may need to be changed again to reflect what has been agreed with the EU by the end of transition.

If there is a Withdrawal Agreement, legislation may be made to implement that agreement, but this power has to be exercised before exit

estimate is that the necessary corrections to retained EU law will require between 800 and 1,000 statutory instruments, but this may be an underestimate. The statutory instruments being brought forward in the first wave are focused on preparing for a no-deal Brexit and may never come into force if there is a transitional period.

While this legislation may then provide a road map for what may happen at the end of transition, what UK law in any particular area should contain is likely to depend on what has been agreed with the EU in the negotiations during transition on the future relationship and may be quite different: for example if mutual recognition of bank resolution, reconstruction and insolvencies were agreed, then the no-deal legislation, which removes the recognition of such proceedings in EEA States, would not be appropriate.

What will happen to EU Directives?

EU Directives are not retained EU law, except to the very limited extent they may contain a directly effective provision which has not been transposed into UK law although it should have been transposed before exit-day.

EU Directives have been regarded as an important aid to construction of UK laws which transpose Directive requirements, not least because EU law is purposive in its approach, while UK law, with its narrow approach to statutory interpretation, may unless read with the relevant Directive, be interpreted inconsistently with the Directive.

It is unclear how fully that will be the case going forward: according to the scheme of the Withdrawal Act the ordinary UK principles of statutory interpretation will apply in their domestic form. However Withdrawal Act s 5(2) provides "the principle of supremacy of EU law continues to apply on or after exit day so far as relevant to the

day. The extreme brinksmanship of the present situation, makes it difficult to judge whether, even if there is a Withdrawal Agreement accepted by both Parliaments, the adjustments to reflect it could all be made in time, save by postponing exit date until the end of transition in so far as that date is referred to legislation intended to operate after the UK has ceased to be bound by EU law, since the UK would continue to be bound to apply EU law during transition.

Finally, there are fairly wide-ranging powers to make regulations in consequence of the Withdrawal Act in the 10 years after exit day. These may be useful for addressing gaps created by the removal of provisions of retained EU law, where existing law dealing with third countries, or third country institutions does not produce a coherent regime, given the size and importance of EU relationships in a particular area or of EU institutions in the UK.

However, the EU Charter of Fundamental Rights will cease to form any part of UK law on exit day as a result of the Withdrawal Act itself.

Does the Withdrawal Act resolve uncertainty?

The interpretation of retained EU law will be a matter of law, and, although considerably improved, there are still a series of not entirely clear provisions that are intended to limit the influence of EU law on its interpretation and on other aspects of UK legal practice, in so far as that EU law was not both applicable and clear as at the date the UK leaves the EU.

The weight to be given to EU Directives as an aid to interpreting retained EU law which was adopted to implement them remains obscure and draft legislation to date has not been entirely successful in removing references to Directives from UK law, as sometimes these contain the only definition of a relevant concept. In some cases even references to non-binding EU Commission Guidelines have been retained in the absence of other sources.

The extent to which the EU's purposive approach to interpretation and use of recitals, headings and 'travaux préparatoires' as an aid to interpretation will be preserved in relation to retained EU law is also unclear. Where an EU Regulation becomes retained EU law it will continue to contain recitals which under EU rules of interpretation are vital to its interpretation. The Withdrawal Act provides that interpretation of retained EU law is a matter of law not evidence (Schedule 5, paragraph 3), a statutory reference which would normally be interpreted as a reference to UK law or that of one of the UK jurisdictions in so far as that law provides an approach to statutory interpretation. Provisions in the Act itself at s 6, however, provide for the limited application of EU case law pre-dating exit day and of retained general principles of EU law.

There are ministerial powers to make regulations, which may lead to clarification if serious problems arise.

To the extent that the purposive approach is abandoned, EU and UK law would diverge more rapidly than anticipated and litigation would be increased as a result of the greater uncertainty in interpretation.

The UK courts will not generally be bound to follow post-exit decisions of the CJEU or of EU regulators, although the lower courts will be expected to follow pre-Brexit decisions.

Appellate courts and the Supreme Court are required to take the same approach to departing from pre-exit EU case law as they would in departing from their own case law. All courts are free to, but not bound to, take later CJEU case law into account. Section 6 makes an attempt to clarify the circumstances in which EU law will retain supremacy post-exit, which follows the same pre/post exit day approach as for recognising the decisions of the CJEU or EU regulators.

The Withdrawal Act specifically provides that general principles of EU law developed after exit will not apply in the UK, although the earlier intention that the UK courts should be prevented from using any general principles of EU law in the interpretation of retained direct EU law has been abandoned.

In addition, after exit day there will be no cause of action in the UK based on a failure to comply with a general principle of EU law and courts may not disapply any enactment or rule of law for failure to comply with a general principle of EU law or quash or declare unlawful any conduct on this basis. There is a limited exception for proceedings started within 3 years of exit day and relating to administrative action or UK legislation (other than Acts of Parliament or the common law) where the challenge is based on something that occurred before exit day. This provision appears to be based on the misapprehension that general principles of EU law only apply in the sphere of public law and the extent to which rules in the sphere of private law may be affected remains to be established.

It is evident that the Withdrawal Act and in particular its complexities of provisions found in Schedules 1 and 8 are likely to be a source of legal uncertainty which can only be resolved by the UK courts. The House of Commons

interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day." Under s 5(3) this rule may extend to some modifications to earlier legislation made after exit day, but not to any new UK law made after that day. This may allow continue allow arguments that UK legislation which implements EU Directives should still be interpreted consistently with the underlying Directive, and any pre-exit day law which is inconsistent with the relevant Directive may be quashed. However, the intended scope of these provisions is unclear and it will be for the UK courts to decide what weight, if any, to give to EU Directives once the UK has left the EU and any transitional period has expired.

Library has published a briefing paper, The Status of "retained EU law", which discusses a number of the issues summarised in this section of the Legal Guide in more detail.

In addition, the right to damages for breach of an EU obligation under the rule in Francovich has been conclusively abolished and the EU Charter of Fundamental Rights is not part of retained EU law (save where in substance reflected in any retained EU law. The European Convention on Human Rights, predates the EU Treaties and is not part of EU law. The UK remains bound by this Convention, which overlaps in many respects with the EU Charter. This may lead to re-litigation of some issues already resolved on the basis of the EU Charter.

Timing

The very considerable time that the Withdrawal Act took in the Parliamentary processes curtailed the timetable for passage of the large number of pieces of secondary legislation needed to be in effect in the event of an abrupt departure from the EU at end October 2019 without any transitional period. The parliamentary impasse on the Withdrawal Agreement has added to this problem and also delayed some essential primary legislation needed for an orderly no deal Brexit.

This would not matter much if there were a transitional period, but there can be no certainty that this will come into being and, indeed, at the time of writing, a high risk of the UK leaving the EU on 31 October 2019 without any withdrawal agreement to smooth the process and allow for a gradual adjustment, with the prospect of a new trading relationship with the EU at the end of transition. The terms of the Withdrawal Act are likely to be tested repeatedly in the event of a no-deal Brexit.

Scotland, Northern Ireland and Wales, and Brexit

Interaction with the devolution settlements

The UK has devolved extensive legislative powers in home affairs to Parliaments or Assemblies in three distinct areas of the United Kingdom, Scotland, Northern Ireland and Wales, while the home affairs of England, where most of the UK population live, are managed by the UK Parliament and the Government of the UK as a whole. The residents of Scotland, Northern Ireland and Wales all elect members of the UK Parliament as well as of their own Parliament or Assembly. The UK Government manages foreign affairs and all other matters that have not been devolved, for the UK as a whole.

As the devolution settlements for Scotland, Northern Ireland and Wales were all premised on UK membership of the EU, the devolved administrations and legislatures are competent to make laws implementing common frameworks of EU policy that apply to devolved matters.

As a policy matter the UK Government wishes to exercise the legislative powers which are currently exercised by the EU in these devolved areas, which include agriculture and environmental policy, so that there can be a common scheme of legislation for the UK (as there currently is, created by EU laws). This will be particularly important in negotiating new free trade deals on behalf of the UK as a whole, as agricultural products are often a bone of contention in negotiating these agreements.

The Withdrawal Act deals with the position of devolved administrations at considerable length, both on this point, and on how they can amend retained EU law in areas where they are the competent legislative authority.

The devolved administrations have objected to what they view to a greater or lesser extent as a 'power grab' by Westminster, but have not been able to prevent the law being passed.

Scotland

The Scottish Government (the people of Scotland having voted in 2015 by a clear majority to remain in the UK and in 2016 by a substantial majority to remain in the EU) has said that it will do everything possible to keep Scotland in the EU (or, at least, in the Single Market). The Scottish First Minister, Nicola Sturgeon, continues to look for opportunities to hold a further referendum on whether Scotland should remain in the UK, but this seems unlikely to become a live issue before March 2019. It seems likely that an application for Scotland to join the EU or the EEA as an independent country would be part of the independence plans of her party, the Scottish Nationalist Party (SNP).

Scotland has been in dispute with the UK Government on the extent of its devolved powers after exit and law passed by the Scottish Assembly seeking to assert control over areas reserved to the UK Parliament by the Withdrawal Act has been referred to the Supreme Court, which has decided that sections of that legislation which would have the effect of making UK law conditional on the consent of Scottish Ministers or which would modify the UK Parliament's legislation are ultra vires : see The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland (Scotland) [2018] UKSC 64. See our blog post here for comment on the ruling.

"It remains to be seen which general principles of EU law survive, because the UK courts effectively decide they are also principles of UK public law."

ANDREW LIDBETTER

"The UK Courts can expect to be busy with cases that resolve issues related to retained EU law, especially the directly effective provisions of EU law that are transposed as retained direct EU law, which is a completely new class of UK law."

DOROTHY LIVINGSTON

Northern Ireland

In respect of Northern Ireland (which also voted in the majority to remain in the EU) there are difficult legal and practical issues arising from the UK's long-standing relationship with the Republic of Ireland, which have put in jeopardy the prospect of a transitional period on leaving the EU. The key issue is the so-called "Northern Ireland backstop", which, as currently drafted, would keep the UK in the EU customs union and require the UK Government to ensure that Northern Ireland (but not necessarily the rest of the UK) adhered to a range of EU single market measures after the end of transition, if a new EU/UK free trade agreement which avoided checks at the Northern Ireland/ Republic of Ireland border was not in place.

The Northern Ireland Assembly has been suspended because of differences between the DUP and Sinn Fein, the political parties essential to a power-sharing devolved government.

The result is that the UK Government can make the rules similar to those it has established for Scotland and Wales with regard to allocation of powers as between the UK Parliament and the Northern Ireland Assembly, and it may formally resume direct rule in Northern Ireland later in 2019, in any event.

Wales

The majority of voters in Wales, like the English, voted to leave the EU and the position of Wales in relation to Brexit is relatively uncomplicated. The UK Government and the Welsh Assembly have reached agreement on the allocation of powers that will be 'returned' from the EU (eg in the field of environmental and agricultural policy) as between the UK Government and the Welsh Assembly.

Other UK Brexit legislation

It is also necessary for the UK to adopt a number of new laws in areas where entirely new domestic regulatory regimes will need to be created and the following bills were listed in the latest Queen's Speech, several of which have now become law. As at 14th December 2018:

- An Immigration Bill which legislates for the end of the free movement under EU law and governs the status of EU nationals and their family members under UK law: see accompanying section: Migration. The Bill has now lapsed as the Government chose not to carry it over to the next session of Parliament at the commencement of prorogation on 9th September 2019. The Immigration and Social Security Co-ordination (EU Withdrawal) Bill deals only with immediate aspects and has now lapsed as the Government chose not to carry it over to the next session of Parliament at the commencement of prorogation on 9th September 2019.
- A Trade Bill which puts in place the necessary framework for an independent trade policy for the UK outside the EU. The Bill has now lapsed as the Government chose not to carry it over to the next session of Parliament at the commencement of prorogation on 9th September 2019.
- A Customs Bill which creates a standalone UK customs regime. This is now the Taxation (Cross-border Trade) Act 2018
- A Fisheries Bill which allows the UK to take on responsibility for access to fisheries and management of its territorial waters once it is outside the EU Common Fisheries Policy. The Bill has now lapsed as the Government chose not to carry it over to the next session of Parliament at the commencement of prorogation on 9th September 2019.
- An Agriculture Bill which creates a system to replace the UK's membership of the EU Common Agriculture Policy. The Bill has now lapsed as the Government chose not to carry it over to the next session of Parliament at the commencement of prorogation on 9th September 2019.
- An International Sanctions Bill with the necessary powers for the UK to implement non-UN sanctions which is currently done at EU level. This now the Sanctions and Money Laundering Act 2018.
- A Nuclear Safeguards Bill with new powers for the Office for Nuclear Regulation which will be necessary as a result of the UK leaving the Euratom Treaty. This is now the Nuclear Safeguards Act 2018.

The draft Withdrawal Agreement between the EU and the UK contains provisions which would bind the UK to provide UK rights for holders of EU intellectual property rights (eg EU Trademark) which will cease to apply in the UK when it leaves the EU. This will require, at least, amendment to the UK's existing law in these areas. This is partly being addressed by a statutory instrument, not yet law, the Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations: see accompanying section: Intellectual Property.

Two other Act specifically dealing with aspects of Brexit are the Haulage Permits and Trailer Registration Act 2018 and the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019.

September stop-press:

On September 9th the current session of Parliament closed with the prorogation of Parliament until mid October. The Government allowed all its Brexit related primary legislation that had not yet been passed to be lost. This means that when new Bills are introduced on the same subject matter they will reflect the policy of the government of the day and not that of the government led by Theresa May. Although the Government has stated this legislation is not needed to leave the EU, this move only serves to increase uncertainty for affected sectors particularly agriculture and fisheries. Some aspects of the regime for Financial Services (relating to EU legislation due to be implemented after 31 October 2019) and of the immigration regime also remain uncertain, as well as aspects of trade policy.

Most statutory instruments under existing legislation are not lost when Parliament is prorogued but time for necessary affirmative resolutions does not run, nor the time for Parliamentary challenge of negative procedure statutory instruments. As many no-deal statutory instruments still before Parliament require an affirmative resolution, there will be something of a log-jam for this legislation to be approved in the second half of October.

The Treasury introduced a Bill to deal with references to EU Financial Services Regulation during the two year period after withdrawal: the Financial Services (Implementation of Legislation) Bill. The Bill has now lapsed as the Government chose not to carry it over to the next session of Parliament at the commencement of prorogation on 9th September 2019.

How will the EU view retained EU law?

The UK cannot, by retaining EU law, actually achieve that the EU and its continuing member states will treat the UK as if it were still a member state, or otherwise make provision for the UK's own regulation (even if part of retained EU law) to be given the same status as that of EU member states in terms of recognition. It is fair to say that the retention in the UK of EU Regulations (and laws implementing EU Directives in similar terms to those of EU member states) through retained EU law will make it more likely that such recognition can be obtained, either in a future EU/UK trade agreement or a series of individual arrangements with the EU and its member states, but this will depend on the EU and its continuing member states.

The loss of recognition of the UK and its regulation within the continuing EU leads to some of the potentially most serious effects of Brexit. The following are among the most significant:

- Subject to the proposed arrangement for the Withdrawal Agreement to protect the rights of individual citizens actually exercising these rights at the date of Brexit and to the possible recognition of wider 'acquired rights', many important rights enjoyed by UK businesses and citizens in the EU will be lost either at end October 2019 or (in the absence of further agreement) at the end of transition, including:
  - free movement,
  - recognition of qualifications,
  - 'passport' rights for financial businesses authorised in the UK to trade throughout the EU, and
  - protection from 'soft' trade barriers (such as the need for phytosanitary approvals for agricultural imports or type approvals for vehicles and machinery).
- The UK will have no automatic right to the benefit of the many trade agreements that the EU has negotiated with third countries. It is in the process of seeking the individual agreement of each of these countries to continue EU treatment or negotiate a new arrangement: see accompanying section: Trade: The new relationships.
- After a no-deal Brexit, in the absence of a new agreement with the EU, airlines which are no longer majority owned and effectively controlled by EU nationals will lose their rights to operate in EU airspace during the course of 2020. See the accompanying section: Aviation.

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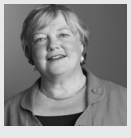

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