



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

MARCH 2020

Since the UK joined the EU in 1973, much UK law has derived from European law or become directly effective EU law. Under the terms of the Withdrawal Agreement between the UK and the EU, this will continue to be the case until the end of the transition period (called "the implementation period" in UK legislation) which started at the beginning of February 2020 and is expected to end on 31 December 2020. Now that the UK has left the EU, we know that EU law will cease to apply in the UK at the end of the transition period. The UK recognised the need to revisit the 47 years of interconnection of UK law with EU law and institutions which will have occurred by the time the UK ceases to be bound by EU law. 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 section is part of our  
Brexit Legal Guide.**

## **Deal/transition period**

Now it has been approved by the UK and EU Parliaments, the [Withdrawal Agreement](#) applies to arrangements for the UK's withdrawal from the EU with effect from 11 pm GMT on 31 January 2020 - when the UK ceased to be an EU Member State.

The UK is now in a transition period following its exit from EU until the end of 2020. UK legislation calls this the "implementation period".

During transition, EU law continues to apply in and to the UK and the UK continues to trade with the EU as part of the Single Market.

The non-binding [Political Declaration](#) on the future relationship between the UK and the EU accompanies the Withdrawal Agreement - there will now be an intense period of

The UK could not manage without law in these fields and therefore the [European Union \(Withdrawal\) Act 2018](#) (the "**Withdrawal Act**") provides for EU law applicable in the UK to be retained as UK law in the form of classes of "retained EU law" to apply after Brexit. UK lawmakers have already made good progress 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.

There is already a substantial body of statutory instruments passed to reform EU law and make it suitable for application in the UK after the end of transition. Much of this work was

focused on preparing for the risk of a no-deal Brexit, which remained a possibility up to the point of the decisive Conservative victory in the General Election held on 12 December 2019. The election result ensured that the UK would approve the Withdrawal Agreement and leave into transition at 11.00pm GMT on 31 January 2020. However, the Political Declaration, which accompanies the Withdrawal Agreement and sets out plans for the new relationship between the EU and the UK to apply after the end of transition, is not legally binding. The UK Government's determination not to extend transition beyond the end of 2020 leaves a very tight timetable to get new arrangements in place and there is therefore a continued risk that, at the end of transition, there will be in many respects the same outcome at that point as if the UK had left the EU without any deal at all. Certain elements such as citizens' rights and the position in relation to Northern Ireland are fixed by the Withdrawal Agreement, but beyond this there may be, at least for a period, only limited trade arrangements with the EU, leaving many businesses, especially those in services sectors, in much the same position as if there had been a no-deal Brexit. See side-bar for description of possible outcomes at end 2020.

The law that was prepared in contemplation of a no-deal Brexit foreshadows the position at the end of the transition period. The [European Union \(Withdrawal Agreement\) Act 2020](#) (the "**Withdrawal Agreement Act**") amended the Withdrawal Act and the statutory instruments made under it to defer some of its effects and, as a result, this body of law is now due to come into force on "**IP completion day**", which is the last day of the transition period. It will be adopted on a case by case basis to reflect the outcome of negotiations on the future relationship and/or the provisions of the Withdrawal Agreement but in many cases will remain as currently enacted. In addition to this, there will be further legislation adapting EU law and EU derived UK law to the post-transition period, including to deal with EU law which has come into force in the UK recently or will do so in the run-up to IP completion day. In addition, there will be UK primary legislation creating new regimes in fields such as agriculture and immigration to replace EU law completely.

### UK and EU: the key constitutional changes

The key constitutional changes, once the transition period ends (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 (except,

with effect in Northern Ireland, for certain measure relating to goods which will be in free circulation between Northern Ireland and the EU);

- 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, depending on the extent to which the UK participates in EU programmes, such as that for scientific research;
- 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. There is an important exception for a period of eight years after the end of transition allowing references from the UK in cases related to citizens' rights in the UK;
- the UK constitution itself is affected: areas of law which were previously an EU competence, such as the Common Agricultural Policy, will be "repatriated" to the UK. The remaining UK powers in several of these fields, including agriculture, had been devolved to the Scottish, Welsh and Northern Ireland Assemblies. The Withdrawal Act provides for many of these repatriated powers to be retained by the Westminster Parliament and, in effect, resettles the relationship in these areas between the Westminster Parliament and the national Assemblies in Scotland, Wales and Northern Ireland; and
- the Withdrawal Agreement Act section 38 contains a statutory recognition of the sovereignty of Parliament. This includes specific references to the directly effective (or deemed directly effective) aspects of the Withdrawal Agreement, the EEA EFTA separation agreement and the Swiss citizens' rights agreement and would seem to be intended to confirm that the UK can resile from these agreements in the same way as any other international agreement, if Parliament so decides. It may, however, possibly have implications outside the context of these arrangements, given that the concept of Parliamentary sovereignty is not codified and this may be the first statutory reference to the concept, which is a pillar of the UK constitution. The concept was discussed in the Supreme Court decisions in the Miller cases (*R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5 and *R (Miller) v The Prime Minister*;

negotiations seeking to finalise the future relationship between the UK and the EU so that it can come into force in legally binding form at the beginning of 2021.

See accompanying section: [Withdrawal Agreement Q&A](#).

### At the end of transition – will there be elements of no-deal?

At the end of the transition period, if the new trading relationship is not in place, there could be similar to no-deal situation in which the UK and EU revert to trading with each other on basic WTO terms. It is more likely that this will be modified by the introduction of agreed elements of the future relationship or some other temporary set of rules, even though the UK Government has ruled out extending the transition period.

The short negotiating timetable means that, while important provisions relating to tariffs and quotas on goods may be ready for implementation in early 2021, service industries are likely to experience what is effectively a no-deal Brexit in any event and be left to trade on the terms of the WTO GATS agreement, while goods may escape the application of WTO tariffs in trade with the EU under the terms of a new future relationship.

In any event, the UK will cease to benefit from the free trade agreements the EU has negotiated with third countries, except to the extent that any third country has agreed with the UK to "roll-over" the current trade terms as between the UK and that country, as a number have done already. The UK will set its own WTO tariff rates.

The UK and the EU have now set out their respective [negotiating positions](#). However, there will be no clarity on what will happen until towards the end of 2020 and the adage "plan for the worst, hope for the best" continues to apply and no-deal guidance therefore remains appropriate.

*Cherry and others v Advocate General for Scotland [2019] UKSC 41*), which were important constitutional decisions occasioned by the Brexit process.

In addition to the points noted above, the Withdrawal Agreement also provides that:

- there will be some additional requirements within the UK in relation to goods traded between Great Britain and Northern Ireland, including payment of EU duties on goods liable to be exported to the Republic of Ireland, to some extent creating an internal customs frontier and placing one UK jurisdiction under continued obligations to apply EU law, although the Northern Ireland Assembly has some rights of approval in relation to this; and
- EU citizens resident in the UK at the end of transition will have the rights stated in the Withdrawal Agreement and confirmed by the Withdrawal Agreement Act.

The following changes already apply as a result of the UK leaving the EU, even during the transition period:

- there is 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.

The UK, may sometimes be consulted by the EU on matters which affect it so long as EU law applies in the UK, but there is no requirement to take the UK's interests into account.

At the end of transition, 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 new trade agreements with the EU or by the CJEU deciding that they are protected by the doctrine of "acquired rights". The full picture will not be evident until the end of transition, when it becomes clear whether there will be a new agreed relationship with the EU that comes into force immediately and what that new agreement will cover.

The 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. After the end of transition, 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, will not have the protection given to those already exercising those rights. It is, however, relatively clear from the Withdrawal Agreement the extent to which free-movement is lost, even for UK citizens already living and working in

the EU: see accompanying section: [Migration](#).

## Replacing EU law in the UK – the Withdrawal Act

### Overview

The principal purpose of the Withdrawal Act (full title: the European Union (Withdrawal) Act 2018) 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 gave directly effective EU law, such as EU Regulations, legislative effect in the UK, but also provide 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.

Although the ECA 1972 has been repealed with effect from 31 January 2020, the Withdrawal Agreement Act inserted provisions in the Withdrawal Act which in effect preserve the situation as if the ECA 1972 had remained in force. These provisions will cease to apply at the end of transition.

For the long term, the Withdrawal Act preserves a very high proportion of the corpus of EU law and EU derived UK law currently in force in the UK as "**retained EU law**". Retained EU law will come into force at the end of the transition period on the day described in UK legislation as "**IP completion day**".

However, the EU Charter of Fundamental Rights will cease to form any part of UK law at the end of transition as a result of the Withdrawal Act itself.

### Retained EU law

Retained EU law will fall into four broad categories:

- Direct retained 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

The body of EU law in force at the end of 2020 will be imported into UK law (with necessary amendments) for the start of 2021 under the [European Union \(Withdrawal\) Act 2018](#) and UK legislation made to implement EU law will be retained, with suitable amendments – this will be called "retained EU law": see the main body of this section for further detail. Some of these amending laws are already in place (but subject to further changes, according to what is agreed for the future relationship).

However, the approval of the Withdrawal Agreement means that:

- the rights of UK citizens living and working in an EU Member State and of EU citizens living and working in the UK will be settled,
- there will be a basis for avoiding a border between Northern Ireland and the Republic of Ireland, involving some degree of checks and controls on goods crossing the Irish Sea between Great Britain and Northern Ireland,
- many other transitional issues, such as the treatment of pending cases before the CJEU, will be dealt with in an agreed way at the end of transition.

### Will any EU law apply in the UK after the end of transition?

The Withdrawal Agreement deals with the treatment of cases already decided or in progress before the EU Courts or administrators before the end of transition. The EU will retain rights in relation to the continuing process and (where relevant) enforcement of those cases in the UK and decisions will be binding on the UK parties. There are limited life rights for matters relating to citizens' rights to be referred to the CJEU by UK courts. The Northern Ireland Protocol will ensure the continuation of some aspects of EU law in Northern Ireland, in some circumstance in ways that could be binding

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 around 12,000 EU Regulations in force in the UK.

- EU derived domestic legislation: 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 EU Regulations. In a few cases, an EU Regulation, an EU Treaty provision or a decision of an EU institution addressed to Member States may be the basis of this form of domestic law.
- CJEU case law and domestic case law relating to EU law - this is also retained and there are specific rules as to when this should be followed, although these may be over-ridden by secondary legislation.
- General principles of EU law that are recognised in a case decided before the end of transition.

In the UK, most EU derived domestic legislation has been created by statutory instruments under the ECA 1972 section 2(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 8,000 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 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 that apply to 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 legislation**" 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.

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 section 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 the end of transition is quite a challenge, but the extended period in 2018-19, when the UK was at risk of a no-deal Brexit in a matter of months, means that considerable work has been done to get the basis of this legislation in place. The Withdrawal Act section 8 provides for the UK Government to make necessary adaptations through delegated powers by allowing ministers for a limited period

throughout the UK. Under the dispute resolution process for the Withdrawal Agreement itself, relevant matters of EU law will be decided by the CJEU. In addition, the EU negotiating directives suggest that the EU may press for the direct application of areas of EU law, such as State aid on a permanent basis, although the UK Government have made clear that this is unacceptable to them. This would not rule out co-operative processes - eg to enable the EU to collect evidence or enforce fines in EU cases involving breaches of EU competition law, in the context of reciprocal arrangements.

Of course, EU law remains part of the law of all the continuing EU Member States and could be applied, like any other foreign law, in the context of determination by a UK court of a dispute where the applicable law is that of an EU Member State.

### 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 agreement of the EU and its continuing Member States.

to make the necessary amendments by secondary legislation. These powers include the 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 amending legislation 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 “deficiencies”, 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 the end of the transition period. 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 will 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, but the compressed timetable for negotiating the future relationship between the UK and the EU means that the opportunity to obtain mutual recognition may be lost. If there are any mutual recognition arrangements, then the relevant statutory instrument will require further amendment to reinstate recognition arrangements.

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. In addition, both the Withdrawal Act and the Withdrawal Agreement Act extend the use of statutory instruments to amend primary legislation via secondary legislation to a number of other contexts, in some cases without limitation in time. An example of these powers (in this case, time-limited) is discussed below under the heading “The precedent value of CJEU decisions”.

### Does the Withdrawal Act resolve uncertainty?

The interpretation of EU law in the UK after the end of transition will be a matter of law for the UK courts and there are a series of not entirely clear provisions in the Withdrawal Act that are intended to limit the influence of the CJEU’s interpretation of EU law in the UK, at least in so far as that EU law was not both applicable and clear as at the date the UK left the EU. As explained below, the Withdrawal Agreement Act has added to uncertainty by amendment of these provisions, including by introducing new ministerial powers.

### Directives and retained domestic EU law

The weight to be given to EU Directives as an aid to interpreting retained domestic EU law that were adopted to implement them remains obscure. Legislation passed in preparation for EU law ceasing to apply in the UK has, to date, 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 Withdrawal Agreement Act introduces a new provision into the Withdrawal Act Schedule 8, paragraph 7, (in a part largely concerned with the powers of devolved assemblies). This indicates that any power to make, confirm or approve subordinate legislation that is subject to an implied restriction that it is exercisable only in a way that is compatible with EU law is to be read without any similar implied restriction in relation (after exit day) to retained EU law, unless this is required by the Withdrawal Agreement (which continues to require the supremacy of EU law during transition and for some limited purposes after transition). This provision seems intended to ensure that new legislation after the end of transition does not have to be interpreted subject to EU law (or retained EU law), unless in a field such as citizens’ rights where the Withdrawal Agreement applies in some respects after the end of transition. It

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 arrangements under the Withdrawal Agreement to protect the rights of individual citizens actually exercising these rights at the end of transition and to the possible recognition of wider “acquired rights”, many important rights enjoyed by UK businesses and citizens in the EU will (in the absence of further agreement) be lost 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 future relationship between the UK and the EU](#).
- 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 after the end of 2020. See the accompanying section: [Aviation](#).

does nothing to preclude an interpretation that takes account of compatibility requirements at the time the implementing legislation was passed, if that was before the end of transition, as it has no express retrospective effect.

There will be exceptions to the general approach outlined above where domestic implementing law (explained below) forms part of separation agreement law as will be the case for citizens' rights law and some trade regulatory provisions applicable in Northern Ireland after Brexit. In those cases, existing EU rules are likely to continue to apply in most respects.

### Rules of interpretation for retained direct EU legislation

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 direct 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 Agreement Act has removed references to the interpretation of retained EU law, which seems to confirm that it is to be treated as a form of domestic law. It also now calls for the interpretation of EU Treaties and instruments to be treated as a matter of law not evidence (Withdrawal Agreement, as amended, Schedule 5, paragraph 3). This provision does not preclude the interpretation of EU law or retained EU law by UK courts in the same way after the end of transition as before, but does nothing to clarify the position. The amendments to the [Interpretation Act](#) appear to apply UK construction rules only to amendments to retained direct EU legislation.

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 precedent value of CJEU decisions

The Withdrawal Act provides that the UK courts will not generally be bound to follow post-transition 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, which follows the same pre/post end-of-transition approach as for recognising the decisions of the CJEU or EU regulators.

Further uncertainty to this already somewhat uncertain position has been added by the Withdrawal Agreement Act section 26 which adds a power for government ministers to make regulations which change the position set out in the Withdrawal Act generally or for specific purposes and in relation to some or all courts and tribunals. It allows Government to change not only the extent to which the court is bound to apply EU case law, but also retained domestic case law which relates to retained EU case law.

Any such regulation can only be made after consulting specified senior members of the judiciary and must be made before the end of transition. While these factors should limit the risks of use of this power creating uncertainty, in particular by limiting the opportunity for "case-by-case" orders, it remains to be seen if this power can be used to produce a more logical approach to precedent than that contained in the Withdrawal Act in its original form and if this can be done in a manner that does not involve the executive in the judicial process.

### Separation agreement law

These rules do not apply to separation agreement law provided for in the Withdrawal Agreement, the EEA EFTA Separation Agreement and the Swiss citizens' rights agreement. Separation agreement law applies to citizens' rights issues and to financial matters and the Northern Ireland Protocol, where the UK and EU have made arrangements which will continue after the end of the transition period. These provisions and corresponding parts of UK law are to be interpreted in accordance with the Withdrawal Agreement, which is an EU Treaty (and, where relevant, the other two separation agreements).

### General principles of EU law

The Withdrawal Act specifically provides that general principles of EU law developed after the end of transition will not apply in the UK, although the UK courts may in some circumstances be able to apply general principles of EU law, such as the well-established principle of proportionality, in the interpretation of retained direct EU legislation.

In addition, after the end of transition, there will be no cause of action in the UK based on a failure to comply with a general principle of EU

### Equivalence

There has been a lot of talk about "equivalence". Under EU law, this is a status which can unilaterally be awarded to certain institutions or systems of regulation outside the EU, in particular in the field of financial services. It is based on an assessment of the effect of the regulatory system in question and, where relevant, its impact on an institution subject to that system of regulation. The effect of a formal declaration of equivalence varies and will be determined according to the relevant EU law. Example effects are that:

- in the case of an equivalent market outside the EU, an equivalence declaration enables relevant regulated EU businesses to trade on the market concerned: eg an exchange outside the EU. There are also recognition decisions in relation to some individual institutions outside the EU, such as Central Counterparties, which are of similar effect and allow those institutions to trade with regulated EU institutions;
- in the case of a system of regulation and its accompanying law of a non-EU country, an equivalence declaration may enable a financial institution regulated in the relevant country to trade in the EU without independent verification by the EU authorities of certain prudential matters.

The UK has introduced the ability to make some equivalence declarations in relation to foreign institutions or regulatory regimes by mirroring EU law in UK legislation. This will enable the UK and the EU to make reciprocal equivalence decisions. Work with a view to making certain declarations by as soon as June 2020 is envisaged in the non-binding Political Declaration that accompanies the Withdrawal Agreement.

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 three years of the end of the transition period 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 the end of transition. 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, as amended, and in particular the complexity 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 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, but this paper does not take account of further changes in the Withdrawal Agreement Act.

Finally, 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.

Again, these provisions will not apply to separation agreement law.

### Timing

The Parliamentary impasse, which was only resolved by the UK General Election on 12 December 2019, also curtailed the time between the UK leaving the EU and the end of transition on 31 December 2020, which was set to coincide with the end of the current EU 5-year budget. Not only has the UK Government legislated to prevent agreement of an extension to the transition period, but there would be a need to agree new budget contributions by the UK in the event of an extension of transition.

The time for agreeing the terms of a new future trading relationship are therefore very tight. As things presently stand, business should plan on the basis that retained direct EU law will replace directly effective EU law at the beginning of 2021 and that UK domestic law will increasingly be interpreted without

regard to EU law, even when its origins lie in an EU Directive or other EU law.

Whether there is any change to that position will depend on how the UK/EU negotiations on the future relationship progress.

## Scotland, Northern Ireland and Wales

### 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) had said that it will do everything possible to keep Scotland in the EU (or, at least, in the Single

Equivalence declarations are a useful regulatory tool, but are far from a full recognition of a third country system of law or regulation and can be withdrawn at any time. Third country regulatory law recognised as equivalent does not acquire the same status within the EU as the law of an EU Member State, but for certain purposes may enable an institution to satisfy a requirement of EU regulatory law.

Market), but it is now clear that this cannot be achieved and Scotland, as part of the UK, has left the EU into transition in accordance with the Withdrawal Agreement.

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 her latest request has been rejected by the UK Government and there is no indication that any new application will be better received. 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 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.

### 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. The [Good Friday or Belfast Agreement of 1998](#) (the “**Good Friday Agreement**”) brought to an end a period of violence and civil unrest in Northern Ireland, with some overspill to Great Britain, linked to the issue of sovereignty over Northern Ireland. The UK’s sovereignty was recognised until such time as a majority of the people of Northern Ireland decided that Northern Ireland should become part of the Republic of Ireland and the Irish Constitution was changed accordingly after referendums in both Northern Ireland and the Republic had approved this approach. A power-sharing Assembly for Northern Ireland was set up, ensuring representation for pro-republican parties in the governance of Northern Ireland, and a number of co-operative bodies were set up involving

representatives of the Republic. The UK agreed to dismantle their existing check-points, which including those along the border between the two parts of the island of Ireland.

The Withdrawal Agreement now contains long-term provisions to safeguard the continuation of the Good Friday Agreement, including that the border between Northern Ireland and the Republic of Ireland will remain open without border check-points, but at the cost of a number of measures retaining EU standards for goods put on the market in Northern Ireland and affecting tariffs on these goods where they may pass into the Republic of Ireland. To enforce these rules, additional measure are applicable to goods making the sea/air crossing between the UK and Northern Ireland, particularly affecting goods which might pass onto the Republic of Ireland market. EU duty rates will be payable on such goods although they may be recoverable, if the goods are actually consumed within Northern Ireland. This will be less of a problem if the UK agrees tariff-free terms with the EU, but would still apply to third country origin goods from countries that trade with the EU on WTO terms and even some of those with free trade agreements with the EU. Non-tariff barriers are also likely to be an issue in relation to this sea/air crossing, where, even within the EU, there is some regulation, in particular as the island of Ireland forms a different phytosanitary zone from Great Britain for certain agricultural products. The categories of goods affected by confirmations that they meet EU standards when crossing the Irish sea are likely to increase in number.

The Northern Ireland Assembly was suspended until early 2020 because of differences between the DUP and Sinn Fein, the political parties essential to a power-sharing devolved government. During this period, the UK Government was able to make 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.

However, in practice, EU law will continue to apply in Northern Ireland to a much greater extent than in the rest of the UK, with no room for divergence on matters relating to goods that may be traded into the Republic of Ireland. As a result, Northern Irish law will diverge further from the law in the rest of the UK in these areas.

### 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 have been listed in successive Queens Speeches at the openings of Parliament since the decision to leave the EU. Several of these have now become law: the best summary of legislation still to come is in the October 2019 Queen’s speech, which is quoted from below. Others lapsed as a result of the ending of the 2017-2019 session of Parliament shortly before the [Queen’s speech in October 2019](#). The General Election called for 12 December 2019 meant that no further progress could be made until after that election. As at 5 March 2020, the position on actual and planned legislation is as follows:

- Immigration: Part 3 of the Withdrawal Agreement Act governs the status of EU national resident in the UK and their family members and deals with social security co-ordination. This means that the [Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill](#) which lapsed in September 2019 is no longer needed to deal with this issue. As regards long term immigration policy, the UK Government, after considering various options, on 5 March 2020 introduced the Immigration and Social Security Co-ordination (EU Withdrawal) Bill. This will end free movement at the end of transition and pave the way for the UK to adopt its own points-based system: see accompanying section: [Migration](#).
- Trade: the Queen’s speech says no more than that “Legislation will be taken forward to capitalise on the opportunities that will come from our newly independent trade policy and deliver for UK businesses and customers.” The [Trade Bill](#) which was intended to put in place the necessary framework for an independent trade policy for the UK outside the EU lapsed in

September 2019. It seems probable that any legislation will come late in 2020, when it is clearer what the trade relationship with the EU is likely to be.

- 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 reclaim control over who can fish in UK waters and under what terms, ensuring the sustainability of the UK's marine life and environment was introduced on 29 January 2020, replacing a Bill that lapsed in September 2020.
- An [Agriculture Bill](#), introduced on 16 January 2020, creates a system to replace the UK's membership of the EU Common Agriculture Policy. According to the Queen's speech, this will reform UK agriculture policy, introducing schemes to pay for public goods like environmental protection and strengthening transparency and fairness in the supply chain. This also replaces a Bill that lapsed in 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 is 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](#).
- Financial Services: according to the Queen's speech, the UK Government intends to introduce a Financial Services Bill that will provide certainty and stability for this critical sector, maintaining the UK's world-leading regulatory standards and keeping the UK open to international markets after Brexit. No legislation has yet been introduced which appears Brexit inspired.
- International Law: according to the Queen's speech, there will be a new Private International Law (Implementation of Agreements) Bill which will make sure that individuals, families and businesses in the UK who become involved in international legal disputes have a clear framework for cross-border resolutions. Now introduced as the [Private International Law \(Implementation of Agreements\) Bill](#).
- Intellectual Property: The Withdrawal Agreement between the EU and the UK contains provisions which 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 has been addressed by statutory instruments, including, the [Intellectual Property \(Exhaustion of Rights\) \(EU Exit\) Regulations 2019 \(SI 2019 No.265\)](#): see accompanying section: [Intellectual Property](#).

- Two other Acts 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](#).

**“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**

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