

# A PRACTICAL GUIDE TO RETAINED EU LAW

A Practical Guide from 2TG

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## Introduction

1. On 23 June 2016 the United Kingdom voted to end its membership of the European Union. To avoid a legal cliff edge, Parliament passed the European Union (Withdrawal) Act 2018 (as amended) ("**EU(W)A 2018**") which, at the end of the implementation period ("**IP**") on 31 December 2020 ("**IP Completion Day**"),<sup>1</sup> effectively froze EU law as it applied in the United Kingdom pre-IP Completion Day. The EU(W)A 2018 provided that this new type of law ("**retained EU law**") would continue to operate in the United Kingdom post-IP Completion Day insofar as it was not amended or repealed by domestic legislation.
2. Inevitably, the precise application of the EU(W)A 2018 and retained EU law will depend on future judicial guidance and there will be important issues arising in relation to the new regime which will impact across many practice areas. For example, when will a domestic court still follow European Court case law? When will directly effective Directive rights still be able to be invoked? Will EU regulations still take precedence over domestic legislation? The aim of this Practical Guide is to give an overview of the legislative framework within which such questions will need to be addressed.

## Retained EU Law: Five Categories

3. Pursuant to section 6(7) EU(W)A 2018 there are five categories of retained EU law: (i) EU-derived domestic legislation; (ii) direct EU legislation; (iii) saved directly effective EU rights; (iv) retained EU case law; and (v) retained general principles of EU law.



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<sup>1</sup> Section 1A EU(W)A 2018..

### EU-derived domestic legislation

4. Section 2 EU(W)A 2018 provides that EU-derived domestic legislation, as it had effect before IP Completion Day, continues to have effect in domestic law. EU-derived domestic legislation includes any enactment made under the European Communities Act 1972 ("ECA 1972").<sup>2</sup> In essence, this captures domestic enactments (e.g. primary and secondary legislation), which were enacted so as to implement the United Kingdom's obligations as a member of the EU. Examples include the Working Time Regulations 1998, the Management of Health and Safety at Work Regulations 1999, and the European Communities (Rights against Insurers) Regulations 2002.

### Direct EU legislation

5. Section 3 EU(W)A 2018 provides that direct EU legislation, so far as it had effect before IP Completion Day, continues to have effect in domestic law without any further domestic enactment. Section 3(2) EU(W)A 2018 provides that direct EU legislation means *"any EU regulation, EU decision or EU tertiary legislation, as it has effect in EU law immediately before IP completion day"*.
6. Only the English language versions of the saved direct EU legislation are in fact incorporated into domestic law, but section 3(4) EU(W)A 2018 specifically provides that reference to alternative language versions of the legislation is permissible for the purposes of interpreting the legislation.
7. Important examples of such saved direct EU legislation include Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) and Regulation (EC) No 864/2007 on the law applicable to non-

contractual obligations (Rome II). Both Rome I and II continue to be applicable in the domestic legal setting.<sup>3</sup> Looking forward, issues are likely to arise as to how faithfully the English courts follow the CJEU jurisprudence on such saved direct EU legislation.

### Saved EU rights

8. Section 4 EU(W)A 2018 operates as a catch-all provision. In short, this provides that any *"rights, powers, liabilities, obligations, restrictions, remedies and procedures"* that existed before IP Completion Day and were recognised by virtue of section 2(1) ECA 1972 continue to operate post-IP Completion Day (unless the same are specifically excluded). The most obvious example of such rights are the EU treaty rights that were operative in the United Kingdom before IP Completion Day.
9. Further, directly effective Directive rights (i.e. those that do not need to be implemented domestically to give rise to causes of action) would also generally be caught by section 4 EU(W)A 2018. Therefore, if rights within a Directive promulgated before IP Completion Day are directly effective, such rights are retained by section 4. However, the scope of this is unclear because section 4(2)(b) states that saved EU rights do not include *"any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they...arise under an EU directive...and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before IP completion day"*.
10. Whether a party can rely on a Directive that has not been implemented before IP Completion Day may depend on the meaning of *"a kind recognised by the European Court or any court or tribunal in the United Kingdom"*. On the one

<sup>2</sup> Section 1B(7) EU(W)A 2018.

<sup>3</sup> Albeit in fact Rome I and Rome II have been subtly modified by secondary legislation post-IP Completion Day, see the Law Applicable to

Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019.

hand, this may mean that a party can only rely on a directly effective right if the specific right had been judicially recognised before IP Completion Day (e.g. parts of the codified Motor Insurance Directive (Directive 2009/103/EC)). This would drastically reduce the ability of parties to rely on Directives which seem, on their face, to fulfil the criteria for direct effect. On the other hand, one might read section 4(2)(b) to encompass any Directive rights which satisfy the usual criteria<sup>4</sup> for direct effect. On that approach, such Directive rights will form part of retained EU law, regardless of whether they have specifically been recognised as having direct effect in a previous case.

11. There is scope for argument on this point which is likely to require resolution. It is clearly important for parties to know whether and how a Directive which was not implemented (fully or otherwise) before IP Completion Day can still give rise to a cause of action in litigation commencing post-IP Completion Day. In certain cases, this issue could be determinative of the outcome.

#### *Retained EU case law*

12. By virtue of section 6 EU(W)A 2018, retained EU law includes decisions of the Court of Justice that predate IP Completion Day – such decisions are known as retained EU case law.<sup>5</sup> Retained EU case law does not include CJEU cases enunciated post-IP Completion Day, but a domestic court may have regard to such cases insofar as they are relevant to the question before it: section 6(2) EU(W)A 2018.
13. Retained EU case law is relevant to *“any question as to the validity, meaning or effect of any retained EU law”* (section 6(3) EU(W)A 2018). Retained EU case law generally binds all

English and Welsh courts except the Supreme Court (section 6(4) EU(W)A 2018) and the Court of Appeal (regulation 3 European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020/1525) (see further below).

#### *Retained general principles of EU law*

14. Section 6 EU(W)A 2018 also provides that retained general principles of EU law include *“the general principles of EU law, as they have effect in EU law immediately before IP completion day and as far as they (a) relate to anything to which section 2, 3, or 4 [EU(W)A 2018] applies, and (b) are not excluded...”*. Paragraph 3 to Schedule 1 contains exclusions. This states that there is no cause of action based on a failure to comply with retained general principles of EU law and a court cannot disapply or quash enactments, rules of law, or conduct because it is incompatible with retained general principles of EU law. Just how far the foregoing exception in fact operates remains to be seen given the wide range of interpretive options open to domestic courts. Further, it is worth noting that the Charter of Fundamental Rights of the European Union does not fall within retained EU law: section 5(4) EU(W)A 2018.

#### **Is it a Question of Retained EU Law at all?**

15. Despite the understandable focus on retained EU law, it is worth noting that, at the time of writing, there is some debate about the precise scope of retained EU law – and where to draw the line between EU law and retained EU law. Whilst some appellate judgments have treated questions arising as ones of retained EU law, there is the potential for the argument that, because the relevant cause of action accrued before IP Completion Day, the questions posed

<sup>4</sup> I.e. that the provisions of the Directive have not been implemented by the relevant deadline and *“appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise”* *Becker v Finanzamt Münster-Innenstadt* [1980] ECR 53, [25].

<sup>5</sup> Section 6(7)(b) EU(W)A 2018: *“‘retained EU case law’ means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before IP completion day”*.

are actually ones of EU law and not retained EU law.

16. The argument arises because, pursuant to section 16 Interpretation Act 1978, when legislation (such as the ECA 1972) is repealed, the repeal does not "*affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment*", unless the contrary intention is demonstrated in the repealing statute. On this approach, if a right arises under an EU regulation in July 2019, and a claim is issued in July 2021, then the issue before the court would be one of EU law and not retained EU law. The argument is that only causes of action accruing after IP Completion Day will engage retained EU law (as opposed to EU law as it was pre-IP Completion Day).

17. Arguments surrounding the classification of law as retained or normal EU law will likely depend on the intricate features of the EU(W)A 2018, any subsequent regulations, and the particular EU law in issue.<sup>6</sup> Whether a question before a court is one of retained EU law or EU law may be important because if it is the latter then the supremacy of EU law and EU case law continues unaffected by Brexit (see below).

### **The Supremacy of Retained EU law**

18. As discussed above, general principles of EU law form part of retained EU law. Does this include the principle of the sovereignty of EU law? For example, does an EU regulation that has become part of retained EU law enjoy the same supremacy over e.g. domestic Acts of Parliament as it did as an EU regulation?

19. Generally, the answer is yes. Pursuant to section 5 EU(W)A 2018 "*the principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after IP completion day*" but the principle does

<sup>6</sup> For example, whether a party can rely on the purported directly effective rights in a Directive falls to be treated as a question of EU law (and not

apply, "*so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP completion day*").

20. As Green LJ put it in *Lipton and Anr v BA City Flyer Ltd* [2021] EWCA Civ 454, if an EU regulation is made before IP Completion Day, then insofar as that regulation "*is concerned the doctrine of supremacy applies. It therefore applies and takes precedence over any other measure of domestic law which might be inconsistent*".

21. The foregoing applies even if retained EU law is modified after IP Completion Day so long as the operation of supremacy is "*consistent with the intention of the modification*" (section 5(3) EU(W)A 2018).

22. This matters for legal certainty but risks giving rise to issues; amendments to retained EU law have been and continue to be made by the Government. The scope to argue that such modifications take a particular part of retained EU law outside of the retained supremacy principle means that parties will be able to argue, for example, that non-EU derived domestic legislation can take precedence in certain circumstances and trump retained EU law.

### **Retained EU Case Law: Departing from the Norm?**

23. If the Supreme Court or Court of Appeal is considering departing from retained EU case law, then it must apply the same test as the Supreme Court would in deciding whether to depart from the case law of the Supreme Court (section 6(5) EU(W)A 2018 and regulation 5 European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020).

retained EU law) if the claim was begun before IP Completion Day: paragraph 38 to Schedule 8 EU(W)A 2018.

24. The test the Supreme Court uses when considering whether to depart from its own case law is contained in the House of Lords' Practice Statement of 26 July 1966 (Practice Statement (Judicial Precedent) [1966] 1 WLR 1234), which applies in the Supreme Court as it did the House of Lords: *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28, [24] – [25].

25. The Practice Statement states that the apex court will only depart from a previous decision "when it appears right to do so".

26. Unsurprisingly, what the foregoing means is unclear and is likely to be context dependent. In *Tunein Inc v Warner Music UK Ltd and Sony Music Entertainment UK Ltd* [2021] EWCA Civ 441 the Court of Appeal considered whether to depart from retained EU case law. The Court of Appeal noted that "In the domestic context both the House of Lords and the Supreme Court have consistently stated that this is a power to be exercised with great caution" ([75]). Specifically in the context of retained EU case law, Arnold LJ considered various factors including:

26.1 Whether there had been a change in the domestic legislation ([78]);

26.2 Whether there had been a change in the international legislative framework ([79]);

26.3 The CJEU's "unrivalled experience in confronting [the difficult issue before the court]" ([80]); and

26.4 The uncertainty that departing from retained EU case law would create ([83]).

27. Sir Geoffrey Vos MR concurred with Arnold LJ but gave fewer reasons for refusing to depart from retained EU case law. The Master of the Rolls stated he would regard "this as a paradigm case in which it would be

*inappropriate for the Court of Appeal to exercise its new-found power to depart from retained EU law" ([197]) because the area of law under consideration derived from international treaties and the "courts of the states that accede to such treaties should, wherever possible, be striving to achieve harmonious interpretation of them, not individualistic disharmony .... The large number of cases dealt with by the CJEU in relatively few years is a testament to that. It would be undesirable for one nation to depart from the CJEU's approach without an exceptionally good reason" ([198]).*

28. Rose LJ (as she then was) agreed, simply stating "this is absolutely not a case in which this court should exercise its power to depart from the EU jurisprudence" ([184]).

29. In short, the limited case law to-date demonstrates the courts indicating they will be slow to depart from retained EU case law. Given one of the purposes of the EU(W)A 2018 is to avoid legal uncertainty, it is unsurprising that the courts would be slow to cut across established EU case law. However, the potential for departure from CJEU caselaw is an important development for litigants and, in the right case, it may well be worth serious consideration. Various factors will play into the scope for arguing that the English court should depart in an individual case. Without doubt, there may be areas where the courts will be more willing to review and potentially depart from retained EU case law. Examples include cases in the field of private international law and in the field of motor insurance.

### Conclusion

30. Whilst the EU(W)A 2018 sets out a framework for the operation of retained EU law, the precise scope and effect of the same is likely to give rise to an increasing amount of litigation. We have sought to give an overview of the EU(W)A 2018,

but, as they say, the devil is in the detail and it is that detail which will, in the coming months and years, require careful analysis in specific cases.

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# ABOUT THE AUTHORS



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## Marie Louise Kinsler QC

Marie Louise Kinsler QC specialises in private international law and EU law. She is a creative lawyer who brings a combination of high-level academic expertise and practical experience to her cases. She has appeared in many of the leading cases on jurisdiction and choice of law in cross-border claims including 6 cases in the Supreme Court - most recently acting for the Defendants in the litigation arising out of the death of Professor Sir Ian Brownlie QC and acting for the Claimants in *Vedanta Resources plc v Lungowe*, a landmark jurisdiction dispute in a group environmental claim concerning copper mining in Zambia. Marie Louise has particular expertise on the EU choice of law Regulations and the application of foreign law by the English courts. Her expertise was recognised by her recent appointment as the National Rapporteur for the UK and Ireland for the European Commission's review into the application of Rome II in the Member States. Alongside her practice, and on a part-time basis, Marie Louise lectures in private international law Cambridge University, where she has also previously taught EU law. She has been recommended in the legal directories for many years.

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Tom is frequently instructed in disputes involving Brexit's impact on domestic litigation. He is particularly well placed to advise on and act in cross-border disputes involving questions of jurisdiction and applicable law post-Brexit, having worked on the same for multiple Part 11 challenges.

After completing pupillage at 2TG in 2019, Tom was a judicial assistant at the UK Supreme Court to both Lady Arden and Lord Leggatt. Whilst there, Tom was involved in a range of cases involving jurisdiction and applicable law issues (e.g. *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38) and worked as part of a small committee of Justices and judicial assistants tasked with briefing the Justices on Brexit related issues.

Prior to pupillage, Tom graduated first in his year. He was later awarded a PhD by Cambridge University after being examined by Lord Reed (President of the Supreme Court). Tom continues to teach (including on the impact of Brexit) at Cambridge and is a Bye-Fellow at Murray Edwards College.

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