Retained EU law is a legal term introduced into UK law under the European Union (Withdrawal) Act 2018. It captures EU-derived rights and legislation the government intends to retain and preserve in UK law for legal continuity after Brexit. There is no specific list of retained EU law for lawyers to refer to. It is a matter of statutory interpretation. A must-read for lawyers looking to understand this new legal concept, in this analysis Kieran Laird, director and head of constitutional affairs at Gowling WLG, examines its meaning, scope and status, and provides essential tips for navigating and interpreting retained EU law.

What is retained EU law?

EU law takes effect in the UK through the European Communities Act 1972 (ECA 1972). The ECA 1972 will be repealed by section 1 of the European Union (Withdrawal) Act 2018 (EU(W)A 2018) on ‘exit day.’ Exit day is defined in the section 20 of the EU(W)A 2018 as 11pm on 29 March 2019.

For the purposes of legal continuity, the government wishes to preserve, as far as possible, the legal position which exists immediately before exit day by taking a snapshot of all of the EU law that directly applies in the UK at that point and bringing it within the UK’s domestic legal framework as a new category of law-retained EU law.

The EU(W)A also provides powers for the government and devolved legislatures to amend retained EU law through statutory instruments (SIs) to ensure that it operates effectively after Brexit.
When will the snapshot of retained EU law be taken?

The intention in the EU(W)A 2018 is to repeal the ECA 1972 on exit day and for the snapshot to be taken just before that point.

However, the situation has been complicated by the Withdrawal Agreement negotiated between the UK and the EU27 which provides for a transition period until at least 31 December 2020, during which all EU law will continue to apply in the UK as it does now (and not in any amended UK version). The EU(W)A 2018 is not drafted to accommodate this.

Although the simplest way to deal with this would be to amend the definition of exit day to align with the end of the transition period (and the EU(W)A 2018 includes a power for Ministers to do so), this is likely to prove politically unpalatable for the government.

Instead, in its White Paper of 24 July 2018 on a proposed Bill to give effect to the Withdrawal Agreement, the government stated its intention to retain the definition of exit day and repeal the ECA 1972 on that date. However, the proposed Bill would save and amend certain parts of the ECA 1972 during the transition period so that EU law would continue to flow through the ECA 1972 into UK law.

The proposed Bill would also change the date at which the 'snapshot' was taken for the purposes of retained EU law until the end of the transition period.

So, if a Withdrawal Agreement is approved by Parliament and contains a transition period as currently envisaged, the point at which retained EU law is created as a new category will be postponed until the end of the transition period. If, however, the UK leaves the EU without a Withdrawal Agreement, the snapshot to create retained EU law will be taken immediately before exit day.

What will the snapshot capture?

Retained EU law will be made up of the four following components -

1. EU-derived domestic legislation section 2 of the European Union (Withdrawal) Act 2018 (EU(W)A 2018)-secondary legislation made under section 2(2) of the European Communities Act 1972 (ECA 1972), and other domestic legislation which implements EU obligations, made prior to exit day. This will include provisions in UK primary
2. Direct EU legislation section 3 of the European Union (Withdrawal) Act 2018 (EU(W)A 2018)-EU law that has direct effect in the UK prior to exit day, such as EU regulations and decisions:
   - The retained provisions will include those that are in force before exit day, the effect of which will crystallise later. The explanatory notes to the EU(W)A give the example of Regulation (EU) 517/2014 on fluorinated greenhouse gases. This Regulation has been in force since 2015 and prohibits the supply of equipment containing certain substances from specified dates, some of which fall after 29 March 2019. Because the latter prohibitions are in force now they will be retained, even though they do not apply until after exit day;
   - however, the EU(W)A 2018 carves out 'exempt EU instruments' (EU(W)A 2018, s 20(1) and Sch 6)-these are certain decisions and regulations which by virtue of certain protocols do not apply to the UK on exit day. This includes legislation on the Euro as well as certain freedom, justice and security measures that the UK did not opt into. Decisions of EU bodies aimed at other EU Member States are also carved out; and
   - where direct EU legislation is retained, it will be the English language text of such legislation that will be authoritative

3. Any remaining 'rights, powers, liabilities, obligations, restrictions, remedies and procedures' which are available in domestic law through ECA 1972, s 2(1) prior to exit day (EU(W)A 2018, section 4)-this will include rights under EU Treaties and directly effective provisions of directives which confer rights without the need for domestic implementation:
   - Rights under directives will only be retained where they are 'of a kind' recognised by the Court of Justice of the European Union or 'any court or tribunal' in the UK in a case decided before exit day section 4(2)(b) of the European Union (Withdrawal) Act 2018. What this will mean in practice is open to debate and is sure to be tested in the courts; and

4. Retained EU case law section 6(7) of the European Union (Withdrawal) Act 2018-principles laid down by, and decisions of, the Court of Justice of the European Union in relation to the above three categories which have effect in EU law before exit day, except where excluded by other parts of the EU(W)A 2018.

It should also be noted that the Charter of Fundamental Rights of the EU will not form part of retained EU law section 5(4) of the European Union (Withdrawal) Act 2018.
In addition, no general principle of EU law will be retained unless it was recognised as such by EU case law before exit day and, even where it is retained, from three years from exit day, failure to comply with it cannot give rise to a right of action (EU(W)A 2018, Sch 1, paras 2 and 3).

How are existing ambulatory references to EU law treated? How far do the provisions on interpretation of ambulatory references stretch? Do they extend to contracts or other legal documents?

An ambulatory reference is a reference in a provision which cross-refers to a provision in EU law as it is amended from time to time. It therefore tracks the provision referred to as it changes over time. The ambulatory references which are dealt with in the EU(W)A 2018 are those contained in -

- any enactment;
- any EU regulation, EU decision, EU tertiary legislation or provision of the EEA agreement; which will become part of retained EU law by virtue of EU(W)A 2018, s 3; or
- any document relating to anything falling into the above two categories

Where the reference is to a provision of direct EU legislation which becomes retained EU law under EU(W)A 2018, s 3 (EU regulations, decisions, tertiary legislation or provisions of the EEA agreement) the reference will track the retained version as it is amended by UK law from time to time (EU(W)A 2018, Sch 8, para 1).

Where the reference is to a provision in any other type of EU law, such as a directive, it will be read as a reference to the provision as it had effect immediately before exit day (EU(W)A 2018, Sch 8, para 2), save where an SI made under the EU(W)A 2018 provides that the provision should be read in a particular way. An example is the current draft of the Electricity and Gas etc. (Amendment etc.) (EU Exit) Regulations 2019, which makes specific provision for the way in which references in the Gas Act 1986 (GA 1986) to certain provisions in the Gas Directive, Directive 2009/73/EC are to be read.

The ambulatory references caught by the EU(W)A 2018 are only those in particular types of legislation, legal instrument, or document. Ambulatory references in standard
commercial contracts will not be caught and, depending on the drafting, it may be that these continue to track the subject provision as it exists and develops in EU law.

In addition, ambulatory references will not be caught where they are contained in powers in retained EU law under EU(W)A 2018, s 2 (i.e. domestic law which currently implements EU law) to make, confirm or approve subordinate legislation which is subject to a procedure before Parliament or the devolved legislatures.

**What are the key rules for application/interpretation of EU-derived laws in the UK pre-/post exit day?**

Currently, under the principle of supremacy of EU law, where there is a conflict between EU law and UK domestic law, the latter is disapplied. Indeed, a conflict with EU law is the only basis on which a UK judge can disapply an Act of Parliament.

The existing hierarchy will be retained in relation to domestic laws passed before exit day section 5(2) of the European Union (Withdrawal) Act 2018 (EU(W)A 2018). So, for example, where an Act of the UK Parliament passed before exit day conflicts with a regulation of EU origin retained under EU(W)A 2018, s 3, the retained regulation will prevail.

However, after exit day, the principle of supremacy of EU law will not apply to any domestic law passed after exit day (EU(W)A 2018, s 5(1)). So domestic law passed after exit day will trump provisions in retained EU law that are of EU origin and which would have benefitted from the principle before Brexit.

Any question as to the meaning of a provision of retained EU law which has not been modified by UK law is to be decided by reference to relevant domestic case law and pre-exit EU case law (where retained) and the general principles of EU law insofar as these have been retained (EU(W)A 2018, s 6(3)).

So a UK court will follow the case law of the EU courts before exit day when interpreting unmodified retained EU law (even the approach in EU case law subsequently diverges).

However, a court or tribunal in the UK will not be bound by any decisions of the EU courts which are handed down after exit day (EU(W)A 2018 s 6(1)). It can, however, have 'regard'to any decision of the Court of Justice of the European Union, or any other EU entity, made after exit day where this is relevant to the matter before it (EU(W)A 2018, s...
The Supreme Court is not bound by retained EU case law and neither is the High Court of Justiciary when sitting in relation to certain matters of Scottish law (EU(W)A 2018, s 6(4)). They may depart from retained EU case law where they consider it appropriate to do so.

Can retained EU law be challenged? If so, how? Are there any particular areas where a challenge is likely?

Domestic law which becomes retained EU law by virtue of EU(W)A 2018, s 2 will continue to be classed as primary or secondary legislation as relevant (EU(W)A 2018, s 7(1)).

The primary legislation which falls within EU(W)A 2018, s 2 will be capable of challenge only on the basis that it contravenes another provision of retained EU law which would have benefitted from the principle of supremacy. The secondary legislation which falls within EU(W)A 2018, s 2 can be challenged on the same basis, as well as on the same general public law grounds as any other secondary legislation.

Under EU(W)A 2018, Sch 1, para 1, no provision of retained EU law can be challenged on or after exit day on the basis that an EU instrument, such as an EU regulation or decision, was invalid. However, this preclusion does not apply where the Court of Justice has found the EU instrument to be invalid prior to exit day, or where regulations made by a Minister allow the challenge.

At the time of writing the Challenges to Validity of EU Instruments (EU Exit) Regulations 2019 are making their way through Parliament and will become law if both Houses of Parliament approve them. If made, the Regulations will allow the courts to decide challenges to the validity of EU instruments which have been begun before exit day but are not yet concluded.

The EU(W)A 2018 draws a distinction between:

- retained direct principal EU legislation-EU regulations which are not tertiary legislation, and annexes to the EEA agreement, retained under EU(W)A 2018, s 3; and
- retained direct minor legislation-all other EU law retained under EU(W)A 2018, s 3 (mainly tertiary legislation and decisions of EU bodies).

Retained direct principal EU legislation is treated as primary legislation for the purposes of
challenges under the Human Rights Act 1998 (HRA 1998), i.e. it can be found incompatible, but that finding does not affect continued validity. Conversely, retained direct minor EU legislation is treated as subordinate legislation for HRA 1998 purposes, so it can be disapproved if found to be incompatible (EU(W)A 2018, Sch 8, para 30).

The majority of challenges are likely to be in relation to modifications made to retained EU law by Ministers using the powers conferred by the EU(W)A 2018. EU(W)A 2018, s 8 confers broad powers to amend retained EU law to ensure that it operates effectively or to remedy any other deficiency within it. Deficiencies are defined widely in EU(W)A 2018, s 8(2).

These powers caused a great deal of debate during the passage of the EU(W)A 2018 and continue to be controversial. Practitioners will be scrutinising carefully whether any amendments made to retained EU law are within the powers conferred by EU(W)A 2018, s 8, and it is almost certain that some will be challenged.

What are your top tips for navigating retained EU law?

Firstly, be absolutely clear about what will be retained and what will not. The big issue here will be around rights in EU directives which, unlike directly applicable EU legislation, will not automatically be retained. Be prepared to do some digging in the case law to establish whether or not a particular right is retained, and be prepared to argue your position.

Secondly, be aware of the form in which a particular piece of legislation has been retained. By 29 March 2019, the government aims to have in place around 600 statutory instruments amending retained EU law, and some pieces of legislation will be amended by several different SIs.

Thirdly, keep an eye on the courts as the application of the EU(W)A 2018, and the validity of the SIs made under it, will be the subject of much judicial consideration over the next few years. Remember that decisions of Court of Justice of the European Union made before exit day will be binding on UK courts and tribunals (except the Supreme Court and High Court of Justiciary as noted above), but not those made after exit day—although the latter should be referenced where relevant as the domestic court or tribunal may take account of them.

Finally, be alive to situations in which advice is required on both retained EU law (in the
UK) and EU law (in the EU27). There are times when clients operating in both jurisdictions will need to know the differences between the two bodies of law and the effect that such differences may have on the client's operations.

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