

**BREXIT
LEGISLATION
REPORT**



**HOW DOES EU LAW
APPLY IN THE UK
AFTER BREXIT?**







CONTENTS

BACKGROUND	2
EU LAW IN THE UK DURING THE IMPLEMENTATION PERIOD	3
EU LAW IN THE UK AFTER THE IMPLEMENTATION PERIOD	7
IMPLEMENTING THE REST OF THE WITHDRAWAL AGREEMENT	11
NOTABLE POINTS FROM A PUBLIC LAW PERSPECTIVE	15



NEGOTIATIONS

BREXIT

BACKGROUND

BEFORE BREXIT, EU LAW TOOK EFFECT IN THE UK THROUGH THE EUROPEAN COMMUNITIES ACT 1972 (THE ECA 1972).

This was intended to give effect to the UK's obligations as a Member State under the relevant EU treaties to comply with EU law.

Under section 2(1) of the ECA 1972, certain types of EU rights and obligations, which are intended to be directly effective, were given effect in the UK without the need for any further domestic legislation. This included rights in the EU treaties as well as EU regulations which contain detailed legal rules.

Other types of EU law were given effect through UK regulations made under section 2(2), or in some cases through separate Acts of Parliament. This included EU directives which set out broad outcomes or frameworks but which leave it to each Member State to make its own provision to achieve the required legal effect.

In terms of its application, EU law is 'supreme'. This means that where there was a conflict between EU law and UK domestic legislation, the latter could be disapplied - a principle which provided the only circumstance in which a UK court can disapply an Act of Parliament.

UK judges were also bound to follow decisions by the Court of Justice of the EU (CJEU) under section 3(1) of the 1972 Act.

Over the last 40 or so years, EU law has come to form a large part of the law which applies in the UK, covering a range of different issues. The UK has therefore not needed to – and indeed could not – formulate its own domestic laws in relation to such issues where EU law applied directly. Nor could it take a different approach to areas covered by EU Directives which required a particular approach to be taken in domestic legislation.

As of the point of its exit from the EU, the UK is no longer be subject to the EU treaties as it will no longer be an EU Member State. Directly applicable EU law will no longer apply to the UK under the EU treaties, nor will it be required by those treaties to ensure that domestic legislation meets the requirements set out in EU Directives.

Instead, the UK's relationship with the EU is now governed by the Withdrawal Agreement, a new international treaty negotiated by the UK and the EU under Article 50 of the Treaty on European Union. The Withdrawal Agreement is intended to –

- tie up the administrative and financial loose ends from the UK's membership of the EU,
- protect UK and EU citizens living in each other's territory, and
- provide a stand-still period in relation to the application of EU law in order to allow for the negotiation of a trade deal, referred to in the Withdrawal Agreement as the 'transition period' and in UK legislation as the 'implementation period'.¹

On 26 June 2018, the European Union (Withdrawal) Act 2018 (EU(W)A 2018) received royal assent. Its purpose is to avoid the legal vacuum that would be created once EU law ceases to be applicable in the UK, given that much of our law has come from the EU through the EU treaties. As enacted, the EU(W)A made no provision for an implementation period despite the fact that the UK had signalled that it would seek one in Prime Minister May's speech in Florence on 22 September 2017.

The European Union (Withdrawal Agreement) Act 2020 (EU(WA) A 2020) was passed on 23 January 2020. It fulfils two functions. The first is to amend the EU(W)A 2018 to accommodate the implementation period set out in the Withdrawal Agreement, under which the UK will continue to be bound by EU law until at least 31 December 2020. The second is to make provision in UK law for other aspects of the Withdrawal Agreement, including citizen's rights, the financial settlement and the Ireland/Northern Ireland Protocol. The EU(WA)A 2020 thus contains a mix of amendments to the EU(W)A 2018, together with a number of substantive provisions.

This paper gives an overview of both the EU(W)A 2018 and the EU(WA)A 2020, as well as highlighting some of their interesting implications from a public law perspective. Given the connection between the two pieces of legislation, rather than discuss each in turn, a thematic approach is taken with discussion first centring on the application of EU law in the UK after Brexit – both during and after the implementation period – before moving on to how other aspects of the Withdrawal Agreement are given effect in domestic law.

¹This Practice Note will refer to the 'implementation period' as this is the term used in the UK legislation discussed.

EU LAW IN THE UK DURING THE IMPLEMENTATION PERIOD



EU LEGISLATION DURING THE IMPLEMENTATION PERIOD

The Withdrawal Agreement makes provision for an implementation period from the date of the UK's exit from the EU until 31 December 2020. This period is capable of a single extension of either one or two years by mutual agreement between the UK and EU.²

The intention is to provide a standstill period after the UK has officially left the EU during which businesses can adapt to the change, and the UK and EU can negotiate a future trade deal. As such, apart from participation in EU institutions and governance structures and some other exceptions, the UK will be treated as if it continued to be an EU Member State in EU law for the duration of the implementation period.³ The legal foundation for this will be the Withdrawal Agreement rather than the EU treaties.

The UK will remain part of the EU single market and customs union and must continue to respect the four freedoms of movement of goods, people, services and capital, as well as continuing to apply the EU customs code to imports into the UK from third countries.

To facilitate this, under the Withdrawal Agreement, the UK will continue to apply most EU law during the implementation period as if it was still an EU Member State. Any changes or additions to EU law made during the implementation period will also apply.⁴

However, under the EU(W)A 2018, the ECA 1972 – through which EU law currently applies in the UK – is due to be repealed on exit day.⁵ 'Exit day' is defined as 31 January 2020.⁶ This would mean that directly effective EU law – such as EU regulations – would cease to have effect in the UK and the subordinate legislation made under the ECA 1972 to enact other forms of EU law would also fall away.

Rather than change the definition of exit day, the EU(W)A 2020 inserted provisions into the EU(W)A 2018 which seek to preserve the effect of certain provisions of the ECA 1972 for the duration of the implementation period, with some amendments as to how those provisions are read.⁷ This is to reflect the fact that the UK's relationship with the EU will be governed by the Withdrawal Agreement rather than by virtue of it being an EU Member State.

²Articles 126 and 132 Withdrawal Agreement.

³Articles 7 and 127 Withdrawal Agreement.

⁴Articles 4 and 127(1) Withdrawal Agreement.

⁵Section 1 EU(W)A 2018.

⁶Section 20(1) EU(W)A 2018.

⁷Section 1A EU(W)A 2018.

Ministers and devolved authorities (Scottish and Welsh Ministers and Northern Ireland departments) have the power to make further provision, through subordinate legislation, for the way in which EU law is read during the implementation period.⁸ Any regulations made under that power are subject to Parliamentary scrutiny using the affirmative procedure (under which each House must positively vote to adopt them) where they amend, repeal or revoke primary legislation or an EU regulation that was not tertiary legislation (a delegated or implementing act). Otherwise, they are subject to the negative procedure (under which they will continue in effect unless either House votes to annul them within a certain period of time).⁹

The EU(WA)A 2020 also inserted a saving provision to preserve subordinate legislation made under section 2(2) of the ECA 1972, as well as certain other domestic provisions which currently give effect to EU law.¹⁰

Under the Withdrawal Agreement, the UK must ensure that the EU law that takes effect in the UK by virtue of the Withdrawal Agreement produces the same legal effects as in EU Member States.¹¹ This means that –

- in certain circumstances individuals and businesses should be able to rely directly on the terms of the Withdrawal Agreement before UK courts,
- EU law must prevail over UK domestic law (the principle of supremacy must be maintained), and
- provisions of EU law made effective through the Withdrawal Agreement must be interpreted in line with EU principles.

To achieve this, the EU(WA)A 2020 inserts a new provision into the EU(WA)A 2018 which gives domestic legal effect to all 'rights, powers, liabilities, obligations and restrictions' created by or arising under the Withdrawal Agreement.¹²

Taken together, the above provisions mean that UK law will continue to track relevant EU law as it develops during the implementation period and that EU law will remain supreme over domestic law during transition.

However, it also means that those 'rights, powers, liabilities, obligations and restrictions' are not set out in the EU(WA)A 2018 or the EU(WA)A 2020 and practitioners will need to go to the Withdrawal Agreement – and then to the EU law to which it refers – to figure out what they are and how they apply. Although this approach simplified the drafting required in the EU(WA)A 2020, it does make ascertaining the correct legal position more complicated.

Certain new EU laws coming into effect during the implementation period must be the subject of debate in the House of Commons or the House of Lords where either the Commons European Scrutiny Select Committee or the Lords EU Select Committee, as relevant, states that the legislation raises a matter of vital national interest to the UK.¹³ However, the UK is obliged to implement those new laws under the Withdrawal Agreement, so any debate subsequent vote will have no legal effect.

The UK government and devolved authorities have the power to modify domestic law to ensure continued compliance with EU law during the implementation period.¹⁴

Such amendments, together with:

- the 'rights, powers, liabilities, obligations and restrictions' created by or arising under the Withdrawal Agreement (and rights etc. under the EEA EFTA Separation Agreement and the Swiss Citizens' Rights Agreement); and
- any domestic law (including Acts of Parliament and secondary legislation) implementing other parts of the Withdrawal Agreement (apart from Part IV on the implementation period) and the EEA EFTA Separation Agreement and the Swiss Citizens' Rights Agreement,

will form a category of law known as 'relevant separation agreement law'.¹⁵

Any question as to the validity, meaning or effect of any relevant separation agreement law is to be decided:

- in accordance with the Withdrawal Agreement, the EEA EFTA Separation Agreement and the Swiss Citizens' Rights Agreement, as relevant; and

⁸Section 8A and Part 1A of Sch 2 to the EU(WA)A 2018.

⁹Para 8B, Sch 7 to the EU(WA)A 2018.

¹⁰Section 1B EU(WA)A 2018.

¹¹Article 4(1) Withdrawal Agreement.

¹²Section 7A EU(WA)A 2018.

¹³Section 13A EU(WA)A 2018.

¹⁴Section 8A and Part 1A of Sch 2 to the EU(WA)A 2018.

¹⁵Section 7C(3) EU(WA)A 2018.

- having regard (among other things) to the desirability of ensuring consistency between the relevant separation agreement law which implements similar provisions across two or more of those agreements.¹⁶

When considering the interpretation of relevant separation agreement law, practitioners will need to keep track of any decisions by any arbitration panel under the dispute resolution mechanisms in the Withdrawal Agreement, as well as any decisions by CJEU on the interpretation of EU law to which the Agreement gives effect.

EU CASE LAW DURING THE IMPLEMENTATION PERIOD

During the implementation period, case law from CJEU will continue to be applied in the UK as it was before Brexit and UK courts may continue to refer cases to CJEU.



¹⁶Section 7C(1) EU(W)A 2018.



EU LAW IN THE UK AFTER THE IMPLEMENTATION PERIOD



RETAINED EU LAW

The effect of the ECA 1972 in relation to EU legislation, decisions and case law is preserved until 'IP completion day'. IP completion day is defined in the EU(WA)A 2020 as 11pm on 31 December 2020.¹⁷ That date can be amended by a Minister to align with any change to the end of the implementation period.¹⁸ However, the EU(WA)A 2020 inserted a provision into the EU(W)A 2018 precluding the government from agreeing to an extension to the implementation period.¹⁹

On IP completion day, the effect of the ECA 1972 Act will cease and it will no longer serve as the conduit through which EU takes effect in the UK. However, for the purposes of legal continuity, the legal position which exists immediately before IP completion day will continue to be preserved, to a large degree, 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.

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

- EU-derived domestic legislation – secondary legislation made under section 2(2) of the ECA 1972, and other domestic legislation which implements EU obligations, made prior to IP completion day. This will include provisions in UK primary legislation.²⁰
- Direct EU legislation – EU law that has direct effect in the UK prior to IP completion day, such as EU regulations and decisions:²¹
 - The retained provisions will include those that are in force and apply before IP completion day, the effect of which will crystallise later. The explanatory notes to the EU(W)A 2018 give the example of Regulation (EU) 517/2014 on fluorinated greenhouse gases. This Regulation has been in force and applies since 2015 and prohibits the supply of equipment containing certain substances from specified dates, some

¹⁷Section 1A(6) EU(W)A 2018; section 39 EU(WA)A 2020.

¹⁸Section 39(4) EU(WA)A 2020.

¹⁹Section 15A EU(W)A 2018.

²⁰Sections 1B(7) and 2 EU(W)A 2018.

²¹Section 3 EU(W)A 2018.

of which fall after IP completion day. Because the latter prohibitions are in force now they will be retained, even though they do not apply until after IP completion day.

- However, the EU(W)A 2018 carves out 'exempt EU instruments' – these are certain decisions, and legislation made under those decisions.
- Where direct EU legislation is retained, it will be the English language text of such legislation that will be authoritative.
- Any remaining 'rights, powers, liabilities, obligations, restrictions, remedies and procedures' which are available in domestic law through section 2(1) ECA 1972 prior to IP completion day – this will include rights under EU Treaties and directly effective provisions of directives which confer rights without the need for domestic implementation. It will also include those rights available after the implementation period under the Withdrawal Agreement, and under the EEA EFTA Separation Agreement and the Swiss Citizens' Rights Agreement.²³
 - 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 IP completion day. What this will mean in practice is open to debate and is sure to be tested in the courts.²⁴
- Retained EU case law – 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 IP completion day, except where excluded by other parts of the EU(W)A 2018.²⁵

The Charter of Fundamental Rights of the EU will not form part of retained EU law after the implementation period.²⁶

In addition, no general principle of EU law will be retained unless it was recognised as such by EU case law before IP completion day and, even where it is retained, from three years from IP completion day, failure to comply with it cannot give rise to a right of action.²⁷

Aside from the arrangements in relation to Northern Ireland, under the Withdrawal Agreement, EU law is mainly intended to apply in the UK only for the duration of the implementation period (although

certain aspects of it may apply in the longer term by virtue of any trade deal). Despite this position under the Withdrawal Agreement, the effect of the EU(W)A 2018 is to freeze in place EU law as it applied in the UK immediately before IP completion day. So the law that was intended to apply only during the implementation period will therefore continue to have effect indefinitely as retained EU law unless or until it is changed or disapplied as discussed below.²⁸

REGULATIONS AMENDING RETAINED EU LAW

Ministers are given the power to amend retained EU law by regulations which the Minister considers 'appropriate' to:

'...prevent, remedy or mitigate -

- (a) any failure of retained EU law to operate effectively, or
- (b) any other deficiency in retained EU law,

arising from the withdrawal of the United Kingdom from the EU.²⁹

The explanatory notes to the EUWA state that the concept of a deficiency is intended to cover circumstances where a retained EU law 'does not function appropriately or sensibly'.

Deficiencies include where a particular provision is redundant after Brexit, where it confers powers on EU bodies that can no longer exercise those powers in the UK, and where the Minister considers that reciprocal or other arrangements are no longer appropriate, as a result of Brexit.³⁰

Regulations may make any provision that can be made by an Act of Parliament, thus providing a 'Henry VIII power' to amend Acts of Parliament.³¹

However, there are a number of limits imposed on the power to make regulations, including a time limit on the power of two years after IP completion day.³² In addition, there is a list of things that cannot be done through regulations, such as imposing or increasing taxation, making retrospective provision and creating new criminal offences punishable by imprisonment of more than two years.³³

In terms of Parliamentary scrutiny, the default position is that most regulations made under section 8(1) will be subject to the

²³Section 4 EU(W)A 2018.

²⁴Section 4(2)(b) EU(W)A 2018.

²⁵Section 6(7) EU(W)A 2018.

²⁶Section 5(4) EU(W)A 2018.

²⁷Paras 2 and 3, Sch 1 and para 39(5), Sch 8 to the EU(W)A 2018.

²⁸Section 5A EU(W)A 2018.

²⁹Section 8(1) EU(W)A 2018.

³⁰Section 8(2) EU(W)A 2018.

³¹Section 8(5) EU(W)A 2018.

³²Section 8(8) EU(W)A 2018.

³³Section 8(7) EU(W)A 2018.

negative resolution procedure, meaning that they will receive scant consideration by Parliament.³⁴ A small number of regulations will be subject to affirmative resolution and thus will need to be positively approved by both Houses of Parliament.³⁵ 'Sifting' committees in both Houses may also recommend that negative regulations should instead be subject to affirmative resolution. However, that recommendation does not have to be followed.³⁶

In the relative absence of Parliamentary scrutiny, much judicial ink will be spilled in defining the parameters within which Ministerial powers can be exercised under section 8(1). For example, where a process currently set out in an EU law is deficient simply because it refers to EU bodies, should a Minister be confined simply to replacing those bodies with UK equivalents? What if the Minister tries to rewrite the process more widely or concentrate power in the hands of one decision-maker where the original process involved input from several stakeholders?

When laying regulations before Parliament a Minister is required to make an explanatory statement:

- confirming that, in the Minister's opinion, the proposed amendments do no more than is necessary;
- explaining why there is good reason for the amendments and why they are a reasonable course of action; and
- drawing attention to any amendment, repeal or revocation of equalities law.³⁷

These statements are intended to aid the Parliamentary sifting committees in deciding whether to recommend greater scrutiny for particular regulations. However, they will also prove valuable sources of insight into Ministers' reasoning that can be considered by potential challengers and ultimately by the Court in deciding whether a particular use of section 8(1) powers has been lawful.

Following the passing of the EU(W)A 2018 hundreds of regulations were made by the government, most of which sought to make provision for a no-deal Brexit. The EU(WA)A 2020 provides that those regulations (or parts of them) which had commencement provisions framed in terms of exit will now be read as if those commencement provisions referred instead to IP completion day.³⁸ However, that default position may be disapplied by regulations.³⁹

EU CASE LAW AFTER THE IMPLEMENTATION PERIOD

UK courts will no longer be bound by any principles laid down, or decisions made, by CJEU after IP completion day.⁴⁰ However, a UK court may have regard to decisions and principles from CJEU – as well as anything done by the EU or any of its entities – after IP completion day if it considers it 'appropriate' to do so.

It remains to be seen how the lower courts will interpret 'appropriate' when considering how to treat developments in EU law after the end of the implementation period. However, it is likely that judges will pay greater attention to post-Brexit developments in EU law in relation to matters on which any trade deal with the EU requires harmonious interpretation. It will also be interesting to see how the courts will treat the principles of EU law. In EU jurisprudence these are intended to permeate the interpretation of EU law, but some of these principles have been carved out of retained EU law, with the remainder no longer being able to found a cause of action. It may be that the courts will simply base their decisions on common law principles which mirror EU principles - as the Supreme Court did in *R (Unison) v Lord Chancellor*. Where a common law analogue cannot be found, EU principles may come to be treated in the same way as customary international law - used as an aid to interpretation and a source of inspiration for the development of the common law.

Retained EU law is to be interpreted in line with any relevant case law from the EU and UK courts from before IP completion day.⁴¹ This means that UK Courts will continue to follow caselaw from CJEU from before IP completion day where this concerns EU law that has been retained. The Supreme Court may depart from pre-exit day decisions of the EU courts where it considers it appropriate to do so.⁴²

However, the EU(WA)A inserts a power into the EU(W)A for Ministers to make regulations setting out circumstances in which a lower court may depart from retained EU case law, as well as the test to be applied in deciding whether to depart. Any such regulations must be made before IP completion day and following consultation with senior members of the judiciary.⁴³ They must also be positively approved by each House of Parliament under the affirmative procedure before being made.⁴⁴

³⁴Para 1(3), Sch 7 to the EU(W)A 2018.

³⁵Para 1(2), Sch 8 to the EU(W)A 2018.

³⁶Para 3, Sch 7 to the EU(W)A 2018.

³⁷Para 30, Sch 7 to the EU(W)A 2018.

³⁸Para 1(1), Sch 5 to the EU(WA)A 2020.

³⁹Para 1(3), Sch 5 to the EU(WA)A 2020.

⁴⁰Section 6(1) EU(W)A 2018.

⁴¹Section 6(3) EU(W)A 2018.

⁴²Section 6(4)(a) EU(W)A 2018.

⁴³Section 6(4)(ba) and 6(5A) EU(W)A 2018.

⁴⁴Section 6(5C) EU(W)A 2018.

⁴⁵Para 9A, Sch 7 to the EU(W)A 2018.



IMPLEMENTING THE REST OF THE WITHDRAWAL AGREEMENT



RATIFYING THE WITHDRAWAL AGREEMENT

As enacted, section 13 of the EU(W)A 2018 required the government to secure MPs' approval of the Withdrawal Agreement and Political Declaration before the Withdrawal Agreement was ratified. This requirement was removed by the EU(WA)A 2020 together with the application of section 20 of the Constitutional Reform and Governance Act 2010 which would have required the Withdrawal Agreement to be laid before Parliament for 21 sitting days during which time either House could oppose ratification, with MPs able to prevent ratification indefinitely.⁴⁶

⁴⁶Sections 31 and 32 EU(WA)A 2020.

⁴⁷Articles 9 – 39 Withdrawal Agreement.

These amendments allowed the government to ratify the Withdrawal Agreement once the EU(WA)A 2020 was passed with no further input from Parliament.

CITIZENS' RIGHTS

Under the Withdrawal Agreement, persons exercising EU free movement rights in the UK prior to withdrawal will continue to enjoy certain core rights to reside, work and otherwise remain indefinitely in the UK after Brexit. References to CJEU to enforce those rights may be made up to eight years after the expiry of the implementation period.⁴⁷

These rights are mirrored with respect to EEA and Swiss citizens under the EEA EFTA Separation Agreement and the Swiss Citizens' Rights Agreement.

These rights are made directly enforceable in the UK by section 7A of the EU(W)A 2018.

In addition, the EU(WA)A 2020 provides Ministers with a series of regulation-making powers to:

- require those protected by the Withdrawal Agreement (and the EEA and Swiss agreements) and others who fall within the EU Settlement Scheme set out in the Immigration Rules (such as those not exercising free movement rights, or who derive their status from a UK citizen) to apply for a UK immigration status;⁴⁸
- protect 'frontier workers' – those who are economically active, but do not live, in the UK at the end of the implementation period;⁴⁹
- restrict entry and residence of those who would otherwise have those rights on the basis of their actions (including fraud or abuse of those rights) during the implementation period;⁵⁰
- grant a right of appeal to the First-tier Tribunal in relation to certain relevant immigration decisions;⁵¹
- implement the provisions in the Withdrawal Agreement (and the EEA and Swiss agreements) relating to the recognition of professional qualifications;⁵²
- implement provisions in the Withdrawal Agreement (and the EEA and Swiss agreements) relating to social security co-ordination to ensure that persons moving between the UK and EU prior to the end of the implementation period are not disadvantaged in their access to pensions, benefits, and other forms of social security, including healthcare cover;⁵³ and
- ensure that UK legislation is consistent with the provisions on non-discrimination and equal treatment in relation to persons residing in the UK in exercise of rights granted under the Withdrawal Agreement (and the EEA and Swiss agreements).⁵⁴

The EU(WA)A 2020 also creates an Independent Monitoring Authority (IMA) to oversee the citizens' rights agreements.⁵⁵

THE FINANCIAL SETTLEMENT

The EU(WA)A 2020 sets out the mechanisms by which payments will be made between the UK and the EU. The amounts of the payments themselves will be calculated under the Withdrawal Agreement.⁵⁶

REPORTING REQUIREMENTS

The version of the EU(WA)A 2020 submitted to Parliament prior to the December 2019 general election contained requirements for Parliamentary oversight of the negotiations between the UK and EU on a future trade deal. These were removed from the version introduced after the election.

In addition, there is no explicit provision for Parliament to scrutinise the government's actions in the Joint Committee established by the Withdrawal Agreement to oversee its implementation and interpretation. However, the EU(WA)A 2020 inserts a provision into the EU(W)A 2018 to require that the role of the UK co-chair of the Committee be undertaken by a Minister.⁵⁷ This will allow the UK's main representative on the Committee to be questioned in Parliament, thus affording some degree of oversight.

The EU(W)A 2018 was also amended to require the relevant Minister to be present when decisions or recommendations are adopted by the Committee by precluding the use of the procedure in the Withdrawal Agreement which would allow such actions to be undertaken in writing.⁵⁸

In addition, the government is required to provide a written statement to Parliament where, after the implementation period, an arbitration panel is used or when CJEU gives a ruling under the dispute mechanism in the Withdrawal Agreement, and to report annually on the numbers of disputes.⁵⁹ This will help Parliament keep informed of important decisions by arbitration panels on the interpretation of the Withdrawal Agreement, and hence the interpretation of relevant separation agreement law.

⁴⁸Section 7 EU(WA)A 2020.

⁴⁹Section 8 EU(WA)A 2020.

⁵⁰Section 9 EU(WA)A 2020.

⁵¹Section 11 EU(WA)A 2020.

⁵²Section 12 EU(WA)A 2020.

⁵³Section 13 EU(WA)A 2020.

⁵⁴Section 14 EU(WA)A 2020.

⁵⁵Section 15 and Sch 2 EU(WA)A 2020.

⁵⁶Section 20 EU(WA)A 2020.

⁵⁷Section 15B EU(W)A 2018.

⁵⁸Section 15C EU(W)A 2018.

⁵⁹Section 13B EU(W)A 2018.

THE PROTOCOL ON IRELAND/ NORTHERN IRELAND

Under the Withdrawal Agreement, Northern Ireland will remain part of the UK's customs territory and VAT area but will apply EU Single Market rules for goods and remain aligned to EU rules on customs and VAT. The Withdrawal Agreement contains a consent mechanism under which the Northern Ireland assembly will vote every four years on whether to continue to be bound by certain Articles in the Protocol (extendable to eight years where cross-community support is obtained).

Under the EU(W)A 2018, Ministers are empowered to make regulations to implement the Protocol and deal with any matters relating to it.⁶⁰ Ministers are given a Henry VIII power to make, through regulations, any provision that could be made by an Act of Parliament, including amending the EU(W)A 2018 itself.

In terms of Parliamentary scrutiny, such regulations must be approved in draft by each House in certain circumstances, including where they:

- amend, repeal or revoke primary legislation or EU regulations which are not tertiary legislation,
- establish a public authority,
- facilitate the access to the market within Great Britain of qualifying goods from Northern Ireland.⁶¹

In all other cases (including the creation of new criminal offences, retrospective provision and increases in taxation and fees) the negative procedure is used under which the regulations are made and one or other House must vote to annul them.

A number of restrictions are placed on that power, including that Ministers must act in a way that is compatible with the terms of the Northern Ireland Act 1998 and they must neither diminish North-South co-operation as provided for by the Belfast Agreement, nor create or facilitate any physical infrastructure on the border between Ireland and Northern Ireland.⁶²

Likewise, a Minister may not agree to any recommendation in the Joint Committee that would alter arrangements for North-South co-operation, establish any new North-South implementation body or change the functions of any existing implementation body.

The devolved authorities are given parallel regulation-making powers to those given to Ministers, with similar restrictions.⁶³

The Withdrawal Agreement requires that there is 'no diminution of rights, safeguards or equality of opportunity' as set out in the Belfast Agreement because of Brexit. It also provides for a number of EU directives in relation to equality and non-discrimination to continue to apply in Northern Ireland indefinitely.⁶⁴ These requirements are implemented through the EU(WA)A 2020 by way of amendments to the Northern Ireland Act 1998, which restrict the legislative competence of the Northern Ireland Assembly to pass any law that is incompatible with the relevant provisions of the Protocol and provide the Northern Ireland Human Rights Commission and the Equality Commission of Northern Ireland with additional functions.⁶⁵

OTHER SEPARATION ISSUES

Ministers are given broad powers to make such regulations as they deem 'appropriate' to implement Part 3 of the Withdrawal Agreement, which covers separation issues such as –

- market access for goods,
- ongoing customs,
- VAT and excise matters,
- intellectual property,
- ongoing police and judicial co-operation in both criminal and civil/commercial matters,
- the protection of data obtained before the end of transition,
- ongoing public procurement procedures,
- Euratom issues,
- ongoing EU judicial/administrative processes, and
- privileges and immunities.⁶⁶

Any regulations made under that power are subject to Parliamentary scrutiny using the affirmative procedure (under which each House must positively vote to adopt them) where they amend, repeal or revoke primary legislation or an EU regulation that was not tertiary legislation.⁶⁷

⁶⁰Section 8C EU(W)A 2018.

⁶¹Para 8F, Sch 7 EU(W)A 2018.

⁶²Section 10 EU(W)A 2018.

⁶³Sections 10 and 11 and Part 1C, Sch 2 EU(W)A 2018.

⁶⁴Article 2(1) of the Protocol on Ireland/Northern Ireland.

⁶⁵Section 23 and Sch 3 to the EU(WA)A 2020.

⁶⁶Section 8B EU(W)A 2018.

⁶⁷Para 8B, Sch 7 EU(W)A 2018.



NOTABLE POINTS FROM A PUBLIC LAW PERSPECTIVE



There is no doubt that the EU(W)A 2018 and the EU(WA)A 2020 will come to be recognised by the courts as constitutional statutes and it is clear that UK lawyers will be dealing with law that originated in the EU for a long time to come – no matter what type of trading relationship is eventually agreed.

It will take some time to fully appreciate the effects that leaving the EU will have on UK law and its political and constitutional arrangements. However, at this stage four broad areas can be flagged.

COMPLEXITY

Firstly, the framework established by the EU(W)A 2018 and EU(WA)A 2020 has the potential to be very complex. Two new

categories of law are established – relevant separation agreement law and retained EU law – and it will require some digging on the part of practitioners to assess exactly what these new categories encompass. This is particularly true of the former, with practitioners being required to ascertain what EU law takes effect through the Withdrawal Agreement and then to read it through the lens of the Agreement, together with any arbitration panel or CJEU decisions under the Agreement's dispute resolution mechanisms.

The potential for the government to modify relevant separation agreement law (as well as retained EU law) adds further complexity.

SCRUTINY OF SECONDARY LEGISLATION

Secondly, taken together, the EU(W)A 2018 and EU(WA)A 2020 grant a great number of powers to the government to legislate using secondary legislation. Although the powers to amend retained EU law are subject to sifting by Parliamentary committees, some of the powers granted by the EU(WA)A 2020 are not. They also allow for regulations containing certain provisions to be subject only to scrutiny using the negative procedure in circumstances that were not permitted under the EU(W)A 2018 as enacted. Such circumstances include the creating or widening the scope of a criminal offence and increasing fees or taxes.

The sifting committees in the Commons and the Lords have already been struggling with the amount of secondary legislation that they have been required to consider. It is also relatively certain that the government will seek to include extensive powers to make delegated legislation in the other Brexit-related Acts of Parliament that will be enacted in this session. It is therefore not feasible that the committees in their current form could adequately consider all Brexit-related regulations put forward by the government under the negative procedure to ascertain whether a higher degree of scrutiny is warranted.

However, this does mean that a vast amount of important legislation will be made over the next few years with relatively little oversight. Some of it will be controversial and some of it will have errors. All of it will be susceptible to judicial review in a way that primary legislation is not.

THE COURTS

Thirdly, prior to the EU(WA)A 2020, the EU(W)A 2018 had established a relatively clear position with respect to the way in which the decisions of EU courts were to be applied by UK judges. The water has been muddied, however, by the granting of a regulation-making power to Ministers to allow lower courts to depart from EU case law that they would otherwise have had to apply. This has the potential to damage legal certainty and to increase litigation as claimants seek to persuade UK courts to depart from certain aspects of EU law. Of course, we have yet to see how the government will seek to use this power and how judges will seek to use it. It may be that judges in lower courts shy away from changes to retained EU case law even where they are given the power to depart from CJEU decisions.

DEVOLUTION

Finally, it should be noted that the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly all declined to provide legislative consent for the EU(WA)A 2020. Although this did not stop the Act making it onto the statute book, it does illustrate that the devolved legislatures may have a different approach to legislating for the UK's withdrawal from the UK than does Westminster. Given that the devolved authorities have parallel regulation-making powers to those given to UK Ministers, there may be some friction in how those powers are used in different parts of the UK – or by UK Ministers legislating for a devolved region – where the matter in hand is a devolved matter.

This may be particularly acute in Northern Ireland, given the difference in treatment of that jurisdiction under the Protocol on Ireland/Northern Ireland – together with the requirement for the Northern Ireland Assembly to periodically assent to the continuation of those arrangements, and suggestions from the UK government that it will seek test the boundaries of what is required under the Protocol in its discussions in the Joint Committee.

KIERAN LAIRD

Partner

+44 (0)121 393 0384

+44 (0)7921 881344

kieran.laird@gowlingwlg.com



Gowling WLG, Official Legal Advisers -
Birmingham 2022 Commonwealth Games.

GOWLING WLG (UK) LLP

T +44 (0)370 903 1000

gowlingwlg.com

Gowling WLG (UK) LLP is a member of Gowling WLG, an international law firm which consists of independent and autonomous entities providing services around the world. Our structure is explained in more detail at www.gowlingwlg.com/legal

DESIGN0001449



GOWLING WLG