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Brexit: what now?

Uncoupling UK law from the EU

Much UK law is currently linked to that of the EU. Ending the UK's membership of the EU will require significant uncoupling of the two legal systems.

This paper provides an introduction to the inter-relationship of UK law and EU law and the legal mechanisms that might be used to separate them. As the issues surrounding implementation are highly complex, this introductory paper tries to provide a clear outline that can act as the foundation for more detailed analysis.

The **"ECA"**: The European Communities Act 1972 – the key UK statute implementing the UK's membership of the EU.

UK Membership – legal status

UK law has historically taken the view that an international treaty (or non-UK law ratified by the UK Government) does not form part of the domestic laws of the UK unless and until it is given effect by, or pursuant to, an Act of the UK Parliament. In limited circumstances, the UK Government can give effect to treaty obligations without specific legislation. The EU law perspective is that the obligations of EU law apply throughout the EU as an automatic consequence of membership of the EU. This means that EU law will, on its own terms, no longer apply in the UK immediately after the UK stops being an EU Member State. As a result, the UK's membership of the EU operates on three levels:

- **International level:** For so long as the UK is part of the EU, the UK's compliance with the EU Treaties is governed by EU law. After the UK has left, it may still have obligations arising from international law. As a general principle, international law regulates relationships between states rather than the rights and obligations of citizens or business although there are significant exceptions, such as the EEA Agreement and fundamental rights provisions;
- **EU level:** As a result of EU membership, the relationship of an EU Member State with the institutions of the EU, and the Member State's compliance with its obligations under the EU Treaties[1], is regulated by EU law, as distinct from international and domestic law; and
- **Domestic level:** In UK law, the ECA provides the UK law basis for the relationship between EU and UK law and gives EU law precedence over UK law. To implement Brexit the UK will need to amend or repeal the ECA and other legislation.

Categories of EU Law

EU law can be defined in the following principal categories:

- **EU Treaties:** The primary law of the EU. Binding on the UK as an EU Member State. The EU Treaties also contain important provisions that create rights and obligations for private persons throughout the EU, and which are directly enforceable in the UK for so long as it is part of the EU;
- **EU Regulations:** EU Regulations are binding and directly applicable and so do not require transposition by the UK into domestic law to be directly enforceable in the UK courts;
- **EU Directives:** Directives are binding upon Member States as to the result to be achieved but, with limited exceptions, are not directly applicable or enforceable in domestic law without Member States taking steps to transpose them. Directives are generally transposed into UK law by domestic primary or secondary legislation; and
- **Decisions of the institutions of the EU:** Some decisions of EU institutions are binding on the parties to whom they address, and tend to address matters specific to those parties and so can be relied on in the UK courts.

1 The Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), referred to together as the "EU Treaties".

Implementation of EU Law in the UK

The different categories of EU law described in this paper are implemented in UK law in different ways:

- Under EU law, some elements (including EU Regulations and certain provisions of the EU Treaties) are directly applicable, or have direct effect, in Member State domestic law. Section 2(1) ECA incorporates this category of EU law into UK law so that it takes effect in UK domestic law automatically without the need for further UK legislation. This mechanism provides a "short cut" to implement a wide range of EU legislation into UK law;
- Section 2(2) ECA provides a mechanism to give UK legal effect to EU law provisions that are not directly applicable and do not have direct effect. It gives power to the UK Government[2] to make secondary legislation, such as statutory instruments, to implement any EU law obligation, without the need for further primary legislation. A large number of EU law provisions are currently incorporated into UK law through secondary legislation under this section. This secondary legislation can even amend primary legislation (section 2(4) ECA);
- Some other EU law measures which do not have direct effect are incorporated into the UK by other specific primary or secondary legislation. In some cases, this goes further than the relevant EU law and/or predates the EU law; and
- Section 3(1) ECA requires UK national courts to construe all primary legislation in line with EU law, as interpreted by the Court of Justice of the European Union ("CJEU"), and disapply any legislation that is inconsistent[3]. The effect is that rulings of the CJEU on the correct interpretation of EU law are binding in the UK.

As EU law takes effect in different ways, a variety of approaches would be needed to give effect to Brexit.

How might the UK implement Brexit in UK law?

The only formal process for the UK to leave the EU is that set out in Article 50 of the EU Treaty. This provides that, on exit, the EU Treaties will "cease to apply" to the UK. Whilst it is possible the UK's exit could be executed by agreement (i.e. without triggering Article 50), we assume for the purposes of this paper that in any event the EU Treaties will no longer apply to the UK on Brexit.

Applying this assumption and by way of illustration, we outline in this paper three theoretical approaches (plus a variation of Option 2) that could apply to UK law on exit. These models are useful in understanding the key issues but, in practice, as we describe at the end of this paper, the actual process of withdrawal is likely to be far more complex.

Key points

Principal ways in which UK law incorporates EU law:

- Directly applicable or effective provisions of EU law are automatically recognized and enforceable in UK law under section 2(1) ECA;
- Provisions of EU law that are not directly applicable or effective are transposed into UK law by domestic primary or secondary implementing legislation. Much of this is done through secondary legislation enacted under section 2(2) ECA; and
- EU Court decisions on the interpretation of EU law are binding in the UK.

In some areas, the current UK regulatory regime relies entirely on directly applicable EU law provisions.

In other areas, the UK regime may incorporate EU law as part of the domestic framework. Sometimes UK law goes further than the minimum standards required under EU law.

2 As result of devolution, the Scottish, Welsh and Northern Irish devolved administrations have concurrent responsibility to comply with, transpose and implement the UK's obligations to implement EU law which relates to devolved matters.

3 Where the correct interpretation of a provision of EU law is disputed, the national courts can refer the question to the CJEU under the Article 267 TFEU.

Option 1: Brexit with no domestic UK legal implementation

In this scenario:

– At the point at which the UK stops being a member of the EU no changes would be made to UK domestic legislation; and

– The ECA would remain in force in its current form, as would all other primary and secondary legislation giving effect to EU law.

It is relevant in this context that the implementation of specific legislation to repeal implementation of EU law would, in most cases, require an active decision of the UK Parliament. This is a matter that is subject to some political uncertainty so, to the extent there were no such active decision, there would be no domestic UK legal implementation of Brexit.

Section 2(1) ECA operates by giving force in UK law to any "enforceable EU right" within the meaning of that section. When the UK stops being an EU Member State directly applicable EU law rights will no longer be "enforceable EU rights" for this purpose. As a result, EU Regulations and directly applicable EU Treaty provisions will no longer have effect as a matter of UK domestic law[4].

By contrast, all secondary legislation adopted under section 2(2) ECA and all other primary and secondary legislation giving effect to EU law would remain in force and would be unaffected by Brexit. As a result, EU legislation that is not directly effective in the UK would continue to apply as a part of UK domestic law unless and until the UK Parliament actively repealed or amended those laws.

However, although statutory instruments giving effect to EU law under section 2(2) ECA would not be rendered automatically invalid, their provisions would no longer serve the purpose for which they were enacted, namely to give effect to the relevant provisions of EU law. There is a risk that this could open up those provisions to challenge in the UK national courts.

In addition, although the provisions of indirectly effective EU law (primarily EU Directives) would continue to apply through UK implementing legislation, they would arguably be "frozen" in that form and would not track any changes to the underlying EU law unless and until amended to that effect by the UK Parliament.

In some areas, for example the telecommunications sector, UK regulation is constituted by a combination of directly applicable EU Regulations and domestic law which "fills in the gaps". This scenario would be particularly unsatisfactory for the affected areas as parts of the regime would remain whilst others would no longer apply.

Option 2: Remove EU-influenced law from UK law

In this scenario the UK Parliament would pass legislation to repeal the ECA in its entirety and without replacement.

In a variant to this option, (Option 2A in the table of options), Parliament could go even further and legislate to repeal all UK primary and secondary legislation which implements EU law in the UK, with effect from the date on which the UK leaves the EU.

This would represent an active decision by the UK Parliament to "turn the UK's back" on everything connected with the EU.

Repealing the ECA without replacement would have the following results:

– All directly applicable and directly effective provisions of EU law (including all EU Regulations), which have no domestic implementing legislation, would immediately no longer apply; and

– All secondary legislation adopted under section 2(2) ECA to implement other provisions of EU law would lapse as at the date that the repeal took effect, unless such provisions were expressly saved by the repealing legislation.

If the legislation were more wide-ranging it might try to terminate the effect of all UK primary or secondary legislation which implements EU law. However, in practice it would be challenging to identify precisely the UK law falling into this category as some UK laws reflect the same principles as are embodied in EU law, whilst not being explicitly derived from those EU laws.

4 There is a separate question about whether rights acquired under the EU law before Brexit could be enforced after Brexit in these circumstances, which we consider below.

Under section 16 of the Interpretation Act 1978, unless the repealing legislation expressly provides otherwise, the repeal would not affect the previous operation of the enactments repealed or lapsed. Rights acquired, obligations accrued or liabilities or penalties incurred under an EU-derived UK law before the date of repeal would not be affected. For example, a person who became liable to a penalty as a result of contravening, before the date of Brexit, a requirement imposed by a provision of an EU Regulation would still be liable to pay the penalty for that breach.

In this scenario large areas of regulation that are regarded as non-controversial and which have been implemented throughout the EU would no longer have effect, leaving considerable gaps in the legislative and regulatory framework in the UK.

Option 3: Retain all EU law as part of UK law

In this scenario the UK Parliament would enact new legislation with the intention of preserving the application of EU law as part of UK law following Brexit. The mechanism used could be amendment of the ECA or the introduction of a new "Brexit Act".

This option might be favored if, for example, the UK wishes to preserve the domestic law status quo to provide stability at the point of Brexit, with a view to Parliament making changes progressively following Brexit[5].

An amended ECA or a Brexit Act could ensure the preservation of secondary legislation enacted under section 2(2) ECA. Indeed, a Private Member's Bill introduced in the UK Parliament in 2013, but not enacted, sought to repeal the ECA whilst providing that all secondary legislation previously enacted under it would continue in force until subsequently amended or repealed. Other primary and secondary legislation implementing EU law would remain in place, as under Option 1.

The position of EU law that is currently directly applicable or effective in the UK (EU Regulations and Treaty provisions) would be more complex.

In theory a revised ECA or a Brexit Act could give these rules a new legal basis in UK law – most likely as new secondary legislation.

However, the construction and operation in a non-EU state of provisions which started life as EU legal instruments would not be straightforward. To take one simple example, it is not clear how an EU Regulation providing for the involvement of an EU institution or and/or EU level procedures would operate in this scenario.

Given this, in practice it is likely that every specific provision of EU law will need to be reviewed before the date of Brexit. To the extent that the UK Parliament wishes the effect of those provisions to continue, even on a temporary basis pending more substantive reform, technical amendments will need to be considered to ensure the status quo is preserved.

5 One possibility is that a Brexit Act could be constructed to include a "sunset clause" so legislation would fall away automatically after an extended period allowed to preserve an amended regulatory regime.

Summary

	Option 1 No domestic UK legal implementation	Option 2 ECA repealed; no replacement	Option 2A*** All UK implementation of EU law repealed	Option 3 Retain EU law in the UK
EU Treaties (directly applicable or effective provisions)	No continuing impact in UK law	No continuing impact in UK law	No continuing impact in UK law	Continue to apply in UK law**
EU Regulations	No continuing impact in UK law	No continuing impact in UK law	No continuing impact in UK law	Continue to apply in UK law**
EU Directives (As implemented by secondary legislation under section 2(2) ECA)	Continue to apply in UK law*	No continuing impact in UK law	No continuing impact in UK law	Continue to apply in UK law**
EU Directives (As implemented by primary or secondary legislation other than section 2(2) ECA)	Continue to apply in UK law**	Continue to apply in UK law**	No continuing impact in UK law	Continue to apply in UK law**

* Directives implemented via section 2(2) ECA potentially challengeable in the national courts
** In some cases operation is likely to be unclear unless specific amendments made
*** This Option is a variation of Option 2

Some potential practical complexities

In this section, we consider some of the issues that will need to be borne in mind when assessing the practical implementation of Brexit in UK law.

1. Identifying relevant EU Law

   As will be clear from the summary section, it is unlikely that any of the three options described will be implemented in their purest form.

   The primary reason for this is that it is unlikely to be considered either practical, or desirable, to abandon immediately all UK law that reflects EU law, as significant elements are likely to be considered appropriate to be retained as UK law in any circumstances. Similarly, if the UK leaves the EU it is unlikely to be politically acceptable to retain all EU law as part of UK law.

   So a key issue will be to determine which elements of EU law are to be retained within UK law following Brexit, whether on a permanent basis or "provisional" basis pending longer term amendment.

2. Need for a smooth transition

   As already discussed, there is a significant risk that the Brexit process could create significant gaps in the UK's legal and regulatory structure and/or uncertainty as to its effect.

   If, for example, post-Brexit all EU law that takes effect through section 2(1) ECA no longer has effect but all EU law that is transposed into UK law by domestic primary legislation or secondary legislation remains in force, the resultant UK regime would in some areas be a patchwork of incomplete and inconsistent elements which would be difficult to operate.

   Whatever political decisions are eventually made regarding the nature of the future relationship between the UK and EU, on a practical level it will be important to ensure the process provides for a coherent process of transition.

3. Changing EU Law

   The uncoupling process will have to be done in a way that allows an effective transition, and does not undermine the UK's domestic regulatory and legislative coherence.

   Understanding the complex task ahead is key to effectively analyzing the implications of Brexit and engaging successfully now with the EU and the UK Government. There is a risk that if the UK Government implements Brexit in a way that does not achieve regulatory and legislative coherence, then this could lead to uncertainty and legal anomalies in policy areas and industry sectors in which EU law forms an integral part. The UK Government has already begun the task of mapping how EU law interacts with and/or affects all aspects of UK law. Businesses should now be doing the same in respect of their business so as to identify the potential risks and opportunities in the transitional period.

4. CJEU judgments

   The CJEU makes definitive interpretations of EU law. National courts of EU Member States refer to the matters of interpretation to the CJEU (the national courts determine how EU law, as interpreted by the CJEU, applies to the facts of a specific case). A number of issues could arise, including:

   – It is likely that, following Brexit, the UK will retain laws that currently implement EU law in the UK, for example, some of the primary or secondary legislation that currently implements EU Directives;

   – The UK courts may well continue to treat relevant CJEU judgments which have already been applied by the UK courts before Brexit as having some precedential status in interpreting those laws. However, it is possible those decisions might be open to challenge in the UK courts once the UK has left the EU;

   – It is less clear whether pre-Brexit decisions of the CJEU which have not yet been applied by the UK courts (e.g. decisions taken by the CJEU on a reference from the courts of another EU Member State) would be treated as binding precedent; and

   – It is also unclear what, if any, precedential weight would be given to post-Brexit decisions of the CJEU regarding relevant EU laws. It might, for example, be given similar status to that which the UK currently gives to decisions of other Common Law jurisdictions (e.g. Australia).

5. Mutual recognition

   There is a substantial issue relating to whether actions taken by individuals and businesses after Brexit pursuant to UK laws that originally implemented EU law rules would continue to have effects under the EU regime in the remaining EU Member States.

One practical example might be the Extradition Act 2003, which provides a domestic basis for the European Arrest Warrant ("EAW"). Unless amended, the Extradition Act 2003, as primary legislation, would continue in force post-Brexit and provide a continuing legal basis for the EAW regime as a matter of UK law post-Brexit.

However, requests from the UK under the EAW regime would only continue to be acted upon by other EU Member States following Brexit if, presumably as part of the agreed future relationship, those states and/or the EU introduce laws to that effect.

6. Devolution

The Devolution Acts currently constrain the flexibility for the devolved administrations of Scotland, Wales and Northern Ireland by requiring them not to legislate or act contrary to EU law, and gives those administrations concurrent responsibility to comply with, transpose and implement the UK's obligations to implement EU Directives where they relate to devolved matters.

After Brexit, assuming the Devolution settlement remains broadly as it is presently, it would be for the devolved administrations to decide whether to retain, repeal or amend provisions of EU law in relation to devolved matters. As part of the Brexit settlement, a decision will need to be made whether this freedom would continue to be constrained in any way.

The Devolution Acts

The Scotland Act 1998, the Government of Wales Act 2006 and the Northern Ireland Act 1998 (together, the "Devolution Acts") are the legislation that gives effect to devolution to nations of the UK.

There is a strong possibility that the Devolution Acts will need to be amended by the UK Parliament to take account of Brexit. There is a political convention that the UK Parliament will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament. Therefore, there is a significant possibility that there will be substantial political pressure on the UK Parliament to obtain some form of consent from, at least, the Scottish Parliament to make changes to the ECA.

7. Regulatory bodies

Brexit will potentially lead to the need for new domestic regulatory authorities in areas where oversight was previously carried out at an EU level.

What should businesses be doing?

The scale of the task of reviewing the entire legislative and regulatory framework of EU law in the UK in advance of Brexit taking effect is considerable – even if the UK simply wishes to ensure the status quo prevails from a pre-Brexit to post-Brexit settlement, rather than conduct an immediate overhaul of EU law in the UK before Brexit. The uncoupling of the EU and UK legal systems is therefore likely to dominate the domestic policy and regulatory agenda for the foreseeable future.

The domestic Brexit process represents a risk of uncertainty and instability for businesses operating in a range of industry sectors in the UK, but for businesses that equip themselves effectively it also can be an opportunity. Businesses are well placed to analyze which provisions of EU law matter to their business and what is needed in order to ensure that the transitional period is not unduly disruptive to their operations.

Businesses need to start now reviewing the impact of EU laws on their operations and preparing to engage with the UK Government and EU Institutions during the transitional phase about the desired terms of the UK's withdrawal negotiations, and to support Government through the transition.

Questions to ask might include:

- Is access to the Single Market of paramount importance for your business?
- Are your operations particularly at risk if there is a less-than-smooth transition to a post-Brexit settlement in the UK?
- How can the UK Government best repatriate EU regulatory regimes and what, if any, improvements could be made in the repatriation process?

Business should immediately engage with the EU and the UK Government to make clear their priorities in the process, whilst also assessing the potential impact of the various possible outcomes for their business operations.

You can learn more about our practical response strategy for engaging on Brexit by visiting our Brexit toolkit at www.hoganlovellsbrexit.com.

For more information, contact our Brexit team members in the UK, EU and beyond using the details below, or via Brexit@hoganlovells.com.

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Notes

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