

client alert

EU | BREXIT | LEGAL UPDATE

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INCORPORATING THE *ACQUIS COMMUNAUTAIRE* INTO UK DOMESTIC LAW

The *acquis communautaire* is the whole body of EU rights and obligations. It comprises the content, principles and political objectives of the EU Treaties, EU legislation and the case law of the Court of Justice of the European Union (the **CJEU**), declarations and resolutions adopted by the EU, instruments under the Common Foreign and Security Policy, international agreements concluded by the EU and those entered into by the Member States among themselves in areas of EU activity.

In the 44 years of the UK's membership of the EU, an enormous amount of EU-related legislation has been implemented in the UK and its wholesale abolition would leave serious gaps in the UK's statute books. We have known since Prime Minister Theresa May's speech to the Conservative Party Conference in October last year that the Government's favoured approach to deal with the *acquis* was to incorporate all EU laws then binding on the UK into domestic law on the day the UK leaves the EU. The European Union (Withdrawal) Bill, currently making its way through Parliament, provides more detail on how this is to be achieved. Depending on the nature of its connection with EU law, EU-related legislation will either be **preserved** in, or **converted** into, domestic law and is defined as **retained EU law**.

REPEAL OF THE EUROPEAN COMMUNITIES ACT 1972 (ECA)

The ECA is the principal piece of domestic legislation which gives effect to EU law in the UK and gives EU law supremacy over UK domestic law. The Bill repeals the ECA on the day the UK ceases to be a member, removing the mechanism by which new EU law flows into UK law.

EU-DERIVED LEGISLATION

Much of the *acquis* was imported into UK by means of secondary legislation under the ECA; secondary legislation normally lapses automatically when the related primary legislation (in this case the ECA) ceases to have effect, so the Bill **preserves** EU-derived legislation.

DIRECT EU LEGISLATION

EU legislation does not form part of the UK legal system. EU regulations are directly applicable and fully binding in the UK because the ECA provides that such legislation is to have effect "in accordance with the EU Treaties". The repeal of the ECA will end that mechanism, so the Bill provides that direct EU legislation is **converted** into domestic legislation, but only "so far as operative immediately before exit day". Where EU legislation is scheduled to come into force in stages, only those parts which have come into force before exit day will be converted into domestic legislation.

SUPREMACY OF EU LAW

The principle of supremacy of EU law means that EU law has a superior status within the legal systems of Member States. Domestic laws must be disapplied by domestic courts if they are inconsistent with EU law, even if the domestic law was made after the relevant EU law. The Bill provides that the principle will not apply to legislation which is passed on or after exit day. So if an Act of Parliament passed after exit day is inconsistent with an EU law preserved or converted by the Bill, the new Act will take precedence. If there is a conflict between pre-exit domestic legislation and retained EU law, the principle of the supremacy of EU law will continue to apply.

INTERPRETATION OF EU LAW

The Bill provides that the relationship between the UK domestic courts and tribunals and the CJEU will be as follows:

- decisions of the CJEU made after exit day will not be binding on domestic courts;
- there will be no appeal to the CJEU on or after exit day; and
- domestic courts need not have regard to anything done by the CJEU, the EU or an EU entity on or after exit day, but they may do so "if they consider it appropriate".

Any question as to the validity, meaning or effect of any retained EU law is to be decided in the UK courts in accordance with pre-exit CJEU case law and general principles. However, the UK Supreme Court (the **UKSC**) will not be bound by either retained general principles or retained CJEU case law, and decisions of the UKSC will have equal weight in domestic courts as retained CJEU judgements. UKSC judges will be able to depart from previous CJEU case law, but only after applying the same tests as they would when considering whether to depart from their own previous decisions. The UKSC may only depart from previous decisions "where it appears right to do so", and in practice does so very rarely.

CONCLUSION

Whilst there is no obvious alternative to the approach set out in the Bill, it raises a number of issues. UK law moves slowly - some of the statutes and case law cited in the Miller Case, for example, were centuries old. So it is inevitable that UK lawyers will have to refer back to the status quo of EU law at midnight on 29 March 2019 for many years, long after the relevant provisions have been amended or repealed in the rest of the EU. The process of the divergence of UK law from the EU position will start immediately - on 30 March 2019 some EU laws imported into UK law will cease to have effect anywhere else in the Union, and other new EU legislation will come into effect everywhere else except the UK. New CJEU decisions will be passed down and have no effect in the UK, potentially giving rise to anomalies where remaining EU citizens have remedies not available to UK citizens with the same causes of action. Nevertheless, the Bill does provide some much-needed clarity and reassurance as to what the UK legal landscape will look like, post Brexit.



Check out our dedicated **Gide / Brexit** LinkedIn page to learn more about the consequences and legal implications of Brexit.

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