

# Retained EU law: the incorporation of EU law into UK law at the end of the transition period

Most current EU law will become part of UK law after the end of the transition period on 31 December 2020, ensuring continuity in many areas. However, the way in which current EU law will apply in the UK will change fundamentally and some of its content will be modified as a result of Brexit.

Until 31 January 2020, EU law applied in the UK due to provisions of the European Communities Act 1972 (ECA). The ECA was repealed with effect from 31 January 2020. However, there was little practical change on this date because the EU (Withdrawal) Act 2018 provided that EU law would continue to apply in and to the UK (as if it were still a member state) during the transition period.

At the end of the transition period, EU law in force at that moment will become part of the UK's domestic legal framework as a new category of **retained EU law**, pursuant to the EU (Withdrawal) Act 2018.

The tables that follow set out an overview of the framework within which EU law (as it stands on 31 December 2020) becomes part of UK law, as well as the key differences, in order to aid understanding of the concept of retained EU law. As a complex position sits behind many of the overview summaries, we recommend that you contact us for advice on issues arising in the course of your business.

## What continues? (components of retained EU law: the basic rules)

EU-derived domestic legislation	EU legislation with direct effect	Any remaining "rights, powers, liabilities, obligations, restrictions, remedies and procedures"	Retained EU case law
<p>Domestic legislation which implements EU obligations, made prior to the end of the transition period, is preserved and retained.</p> <p>This can be primary or secondary legislation, whether made under the dedicated power in section 2(2) ECA to implement the UK's obligations under EU law or otherwise (e.g. in some areas, such as health and safety, EU legislation was implemented by other, more specific powers to make secondary legislation).</p>	<p>Certain categories of EU legislation which are directly applicable in the UK prior to the end of the transition period, and so have effect without the need for implementing legislation, are converted into domestic law. This includes EU regulations and EU decisions.</p>	<p>Any remaining "rights, powers, liabilities, obligations, restrictions, remedies and procedures" which are directly applicable in the UK prior to exit day as a result of s2(1) ECA, are converted into domestic law.</p> <p>This primarily refers to provisions of EU treaties which are sufficiently clear and unconditional to confer rights directly on individuals. Examples include the provisions in TFEU as to freedom of movement, citizenship rights and competition law. However, where these rights arise from reciprocal arrangements which will come to an end or are otherwise no longer appropriate following the UK's departure, they are likely to be repealed or amended by statutory instrument (see below).</p>	<p>In order to achieve continuity, case law of the Court of Justice of the European Union (CJEU) in judgments delivered before the end of the transition period remains binding on most UK courts, and domestic law interpreting EU rights and obligations is retained (but can be overturned by a subsequent UK Supreme Court decision).</p>

## What will be different?

### Future divergence of laws

Retained EU law is a snapshot of EU law as it stands at the end of the transition period; it is not a "dynamic" concept. Over time, retained EU law (as part of the UK's domestic law) and EU law (as it will continue to apply to the member states) may diverge as a result of new UK or EU legislation.

### Amendments to EU laws to ensure that they operate effectively following exit

Immediately after the end of the transition period, the retained EU law version of a provision may not be identical to the corresponding provision in EU law. Retained EU law will have effect subject to amendments made by way of regulations by the UK government and devolved administrations under a power enabling them to correct "defects" of EU law that would otherwise cause the measure not to operate effectively in a purely UK context (e.g. an obligation to notify the European Commission).

### General principles of EU law

Some general principles of EU law are removed or modified by the EU (Withdrawal) Act 2018. A significant example is that the UK government can no longer be sued for damages as a result of failure to implement EU law on the basis of so-called *Francovich* principles.

### Powers to depart from retained EU case law

Questions as to the meaning of unmodified provisions of retained EU law will be determined in accordance with relevant retained EU case law.

However, the UK Supreme Court will not be bound by retained EU case law. Rather, it can depart from previous decisions "*where it appears right to do so*". The same applies to the High Court of Justiciary in Scotland in criminal matters.

At the time of writing, the government has laid regulations before Parliament that will, if adopted, extend the power to depart from retained EU case law to other domestic appellate courts, including the Court of Appeal.

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