Analysis

Brexit and EU law rights

Speed read

At the end of the Brexit 'implementation period' on 31 December 2020, the relationship between UK and EU law fundamentally changed. In some respects, those changes are retrospective, applying to cases decided after 31 December 2020 but relating to facts occurring before then. For example, no matter how long ago the facts of the case occurred, a UK court can no longer refer any EU law issues to the CJEU; it must decide them itself. Nor will any future CJEU judgments be binding on a UK court (except where it made a reference before 31 December 2020). It is, however, doubtful whether the superior appellate courts' new power to depart from prior CJEU decisions applies in cases relating to facts occurring before 31 December 2020. The ban on new claims based on 'general principles of EU law' is retroactive, but may to that extent be challenged as a breach of EU law; arguably, it is limited anyway to free-standing claims based on such 'general principles'.

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Since the end of the Brexit transition period (or 'implementation period') on 31 December 2020, UK courts and tribunals have issued numerous judicial decisions concerning the effect of Brexit on EU law rights in diverse legal spheres. In *Lipton v BA City Flier Ltd* [2021] EWCA Civ 454 (a case about compensation under Regulation (EC) 261/2004 for a delayed flight), Green LJ observed (at para 53):

> 'Submissions and argument advanced to us during the appeal proceeded very much as it would have done in 2019, when the UK was a member of the EU, or even in 2020 when the transitional period … was still in force (until 11pm 31st December 2020). However, the hearing took place in February 2021 when the transitional period had expired. As at this point in time a new set of legal arrangements are in place which govern the relationship of the UK to EU law. The Court cannot therefore assume that the old ways of looking at EU derived law still hold good. We must apply the new approach. There is much that is familiar but there are also significant differences.'

This is, of course, a huge and complex area, and in this article we can only hope to explore some of the main differences. We offer some reflections on their potential relevance to direct taxation.

It is necessary to distinguish between, on the one hand, cases relating to periods and events occurring before the end of the transition period on 31 December 2020 and, on the other, cases relating to periods and events occurring after that date. We will focus mainly on the former since these are the cases involving EU law issues which are now reaching hearings and decisions of the courts.

Legal mechanisms

The UK left the EU on 31 January 2020 ('exit day'). Under article 50 of the Treaty on European Union (TEU) on that date the Treaties ceased to apply to the UK. However, under article 127 of the Agreement on the Withdrawal of the UK from the European Union (the 'Withdrawal Agreement'), EU law continued to be 'applicable to and in the United Kingdom' during the transition period (implementation period), which ended at 11pm UK time (defined in UK legislation as 'IP completion day') on 31 December 2020. The legal position applicable in the transition period is governed by Part 4 of the Withdrawal Agreement.

Up to 'exit day', the Treaties had effect by virtue of the European Communities Act 1972 (ECA 1972). It has been well-established since *Van Gend en Loos* (Case C-26/62) that the Treaties have 'direct effect' such as to confer rights on nationals (and resident companies) against a member state. Most CJEU cases concerning direct taxation – beginning with the famous *Avoir Fiscal* case (*Commission v France* (Case C-270/83)) in 1986 – have relied on this principle of 'direct effect', for example to enforce against the relevant member state in a tax context the right to the freedom of establishment and the free movement of capital. The domestic law mechanism achieving this effect in respect of the UK was ECA 1972 s 2(1), which provided that rights, obligations and remedies which, under the Treaties, were without further enactment to be given legal effect, 'shall be recognised and available in law, and be allowed, enforced and followed accordingly'.

Upon the UK leaving the EU, this changed. With effect from exit day on 31 January 2020, the ECA 1972 was repealed by s 1 of the European Union (Withdrawal) Act 2018 (EUWA 2018). However, EUWA 2018 s 1A preserved the continuing effect of the ECA 1972 – and thus, under s 2(1), the Treaties – during the transition or implementation period. For this purpose, s 1A also extended the definition of the Treaties to include Part 4 of the Withdrawal Agreement. The clear intent of the Withdrawal Agreement is that it, too, is to give rise to directly effective rights. Article 4(1) provides that the provisions of the Agreement shall produce in respect of the UK the same legal effects as they produce within the EU and its member states, and 'accordingly legal or natural persons shall in particular be able to rely directly on the provisions … in this Agreement which meet the conditions for direct effect under Union law'. Specifically in relation to the transition period, article 127(3) provides that during the transition period, EU law shall produce in respect of the UK the same legal effects as within the EU and its member states, and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the EU. This is given effect in UK domestic law by EUWA 2018 s 7A, which (similarly to ECA 1972 s 2(1)) provides that rights etc. under the Withdrawal Agreement are to be recognised

and available in domestic law and enforced, allowed and followed accordingly.

'Retained EU law'

From there, however, the position gets more complicated. The EUWA 2018 makes very substantial changes to the application of EU law in the UK. Although those changes only have effect after 'IP completion day' (11pm on 31 December 2020), it is unclear which of those changes apply to cases *decided after* that time but relating to periods and events *occurring before* that time. This suggestion may appear counter-intuitive; but it is beyond all doubt that some, at least, of those changes *do* apply to cases decided after 31 December 2020 but relating to earlier periods. For example, this clearly does apply to the bar on referring any matter to the CJEU (EUWA 2018 s 6(1)(b)). It also applies to the newly non-binding status of CJEU decisions made after that date (EUWA 2018 s 6(1)(a)). As to the *other* changes made by EUWA 2018, the complex structure created by that Act is lacking in clear transitional principles governing which of those changes do or do not likewise apply to UK cases relating to earlier periods.

The legislative intent of EUWA 2018 Sch 1 para 3 is to prevent new *free-standing* claims based on 'general principles of EU law'

First and foremost of those changes is the new concept of 'retained EU law'. The basic principle of EUWA 2018 is that all of the rules applicable in the UK as at 31 December 2020 by virtue of EU law *continue to apply* in the UK unless specifically repealed by UK statute or statutory instrument. However, the basis of such application is fundamentally different from before. From IP completion day, EU law as it stood immediately before that time is incorporated directly into domestic law as 'retained EU law'. As defined in EUWA 2018 s 6(7), 'retained EU law' means:

- EU-derived domestic (UK) legislation as it has effect in domestic law immediately before IP completion day (which continues to form part of domestic law by virtue of s 2);
- Direct EU legislation (EU Regulations, EU Directives and EU tertiary legislation) so far as in operation immediately before IP completion day (which continues to form part of domestic law by virtue of s 3); and
- Rights, powers, liabilities, restrictions, remedies and procedures which, immediately before IP completion day, were (a) recognised and available in domestic law by virtue of ECA 1972 s 2(1) and (b) enforced, allowed and followed accordingly (which continue to form part of domestic law by virtue of s 4).

In the Court of Appeal case of *Lipton v City Flyer* cited above, Green LJ (with whom Coulson and Haddon-Cave LJJ agreed) seems to have assumed (for example, at paras 58, 60 and 72) that after IP completion day (31 December 2020) the case fell to be determined by 'retained EU law' (specifically by Regulation (EC) 261/2004 *as amended by UK regulations having effect from IP completion day*), even though the flight delay in issue in the case occurred in January 2018. That said, none of the post-31 December 2020 amendments made by the UK regulations were specifically relevant to the facts of the case. Had any such amendments been relevant, it is doubtful whether the court would have followed this approach through. Arguably, where the applicable facts occurred before 31 December 2020, EU law falls to be applied *as such* (as 'EU law', *not* as 'retained EU law') pursuant to the ECA 1972. This will be particularly relevant in direct tax cases, where for example the freedom of establishment never even became part of domestic law as retained EU law under s.4 EUWA 2018 on IP completion day, having been immediately *repealed* on IP completion day by the Freedom of Establishment and Free Movement of Services (EU Exit) Regulations, SI 2019/1401. In the writers' view, that plainly does not affect cases relating to periods before 31 December 2020, as such cases fall to be determined under EU law as (at that time) having effect pursuant to the ECA 1972 (as extended to cover the transition period).

No more references to the Court of Justice

As already noted, one change that clearly does apply retroactively is the bar on any new references to the CJEU pursuant to article 267 of the Treaty on the Functioning of the EU (TFEU). Under EUWA 2018 s 6(1)(b), a court or tribunal 'cannot' refer any matter to the European Court after IP completion day. This means that the UK courts and tribunals will now have to determine all EU law matters themselves – in relation to both the application of 'retained EU law' (for periods after 31 December 2020) and the application of 'actual' EU law (for periods before that date).

The UK courts and tribunals do of course have many years' experience of determining EU law issues in direct taxation cases. For courts and tribunals against whose decisions a domestic law appeal lies, any reference to the CJEU was in any event discretionary: under TFEU article 267 such court 'may' request the CJEU to give a ruling if it considers it necessary to enable it to give judgment. Even for a court of final appeal (such as the UK Supreme Court), the case law (*CILFIT* (Case C-283/81)) recognised that it could refrain from a reference to the CJEU if the EU law was 'acte clair', i.e. 'so obvious as to leave no scope for reasonable doubt'. It is also true that in direct tax cases the UK tribunals and courts have become increasingly confident, in recent years, to determine EU law issues themselves (for example, see the recently decided cases of *Gallaher Ltd* [2019] UKFTT 207 (TC), *Esso Exploration & Production UK Ltd* [2020] SFTD 628 and *VolkerRail Plant Ltd* [2020] UKFTT 476, to name but three) – even where there is room for disagreement on those issues (see, on appeal, *Gallaher Ltd* [2020] UKUT 354 (TCC) and indeed see *Coal Staff Superannuation Schemes* [2019] STC 2146 where the Court of Appeal and Upper Tribunal reached a diametrically opposite conclusion from the First-tier Tribunal in concluding that it was *acte clair* that the manufactured overseas dividend rules infringed the free movement of capital).

However, the difference now is that the UK tribunals and courts cannot refer EU law questions to the CJEU even if they would have wished to. It remains to be seen what the effect will be. Clearly in the light of Brexit, the UK judiciary is unlikely to be inclined to *extend* the scope of EU law (or retained EU law) as against 'pure' domestic law. The bar on references to the CJEU may also make deciding cases more difficult. See, for example, *Covea Insurance plc v Greenaway* [2021] 3 WLUK 379: had a reference to the CJEU been possible, the CJEU could have had the benefit of submissions in intervention from

multiple member states regarding the meaning in their respective jurisdictions of the term 'stolen' in the Sixth Motor Insurance Directive (2009/103/EC); absent that possibility, the UK court had to make do with allowing evidence from four expert witnesses.

Future CJEU judgments not binding

Also retroactive (in the sense of applying to pre-31 December 2020 periods and events) are the provisions relating to future CJEU judgments. Under EUWA 2018 s6(1)(a), a UK court or tribunal is not bound by principles laid down or decisions made by the CJEU after IP completion day; under s 6(2), however, a UK court or tribunal *may* have regard to such decisions so far as relevant to any matter before it. The intention is to 'freeze' the CJEU case law as at 31 December 2020. Interesting consequences arise. In cases where a reference has been made to the CJEU before 31 December 2020 but the CJEU gives judgment after that date (as will occur, for example, in the *Gallaher* case), it seems that the CJEU's judgment will not be binding other than on the particular case in which the reference was made. On the other hand, if the referring UK court or tribunal (or, on appeal, a higher court) then *applies* the CJEU judgment, the decision of the UK court or tribunal will be binding on other cases in accordance with the usual rules of precedent. Thus, the procedural vicissitudes of the case may have a somewhat arbitrary effect on whether tribunals and courts in other cases end up being bound by, say, an extension of the scope of the Treaty freedoms by the CJEU. For this reason, it may be that the UK courts would in such cases tend to exercise their power under EUWA 2018 s 6(3) to have regard to the relevant post-IP completion day decision of the CJEU.

Supreme Court and Court of Appeal can depart from existing CJEU judgments

Under EUWA 2018 s 6(4)(a), the Supreme Court is not bound by any 'retained EU case law'. Under s 6(4)(ba) and the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations, SI 2020/1525, the same applies to the Court of Appeal and other courts of coordinate jurisdiction in the other nations of the UK. 'Retained EU case law' is defined by s 6(7) as any principles laid down or decisions made by the CJEU as they have effect in EU law immediately before IP completion day and *so far as they relate to anything to which s 2, 3 or 4 applies* (and are not excluded by s 5 or Sch 1). Section 6(5) and SI 2020/1525 provide that, in deciding whether to exercise their power to depart from retained EU case law, the Supreme Court and Court of Appeal must apply the same test as the Supreme Court would apply in deciding whether to depart from its own case law.

It is debatable whether the power to depart from prior CJEU decisions applies in respect of periods before IP completion day. We have argued above that for such periods, EU law falls to be applied *as such*, not as 'retained EU law'; similarly, ss 2, 3 and 4 do not apply, as they only apply from IP completion day. If this is right, prior CJEU decisions are not 'retained EU case law' insofar as, in a case coming before a UK court after IP completion day, they relate to facts occurring in periods before IP completion day. This point seems particularly relevant to prior CJEU decisions relating to the freedom of establishment, and indeed the freedom to provide services, both of which were repealed on IP completion day and to which EUWA 2018 s 4 therefore never applied. We contend that prior CJEU decisions relating to those freedoms, so far as relating to facts that occurred before IP completion day in a case coming before a UK court after that time, are not 'retained EU case law' and so the power to depart from such decisions does not apply in those circumstances; rather, the UK courts must simply apply such decisions as part of EU law as applicable up to 31 December 2020 pursuant to the ECA 1972.

In *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441, the Court of Appeal assumed that in principle it had power under s 6(4)(ba) to depart from prior CJEU decisions in the case before it (which related to facts occurring before IP completion day); but the contrary does not appear to have been argued. In any event, it declined to depart from the prior CJEU jurisprudence, for a good number of reasons including that the CJEU's approach was neither impeding nor restricting the proper development of the law nor leading to results which were unjust or contrary to public policy.

Provisions of EUWA 2018 itself may be susceptible to challenge as incompatible with EU law

In direct tax cases which reach the Court of Appeal, HMRC may now seek to argue that the court should depart from prior CJEU case law which has already held that the UK legislation in issue in the case contravened the Treaty (e.g. the fundamental freedoms). In our view, however, such contention would be misconceived – *a fortiori* in cases concerning pre-IP completion day periods. The legislation requires the application of the same test as the Supreme Court applies in deciding whether to depart from its own prior decisions. The Supreme Court's approach is guided by the 1966 Practice Statement [1966] 3 All ER 77 and the 60 or so cases in which it has been considered since then. The House of Lords and Supreme Court have repeatedly reiterated that, in order to avoid prejudicing legal certainty, they should exercise their discretion to depart from prior decisions 'rarely', 'cautiously' and 'sparingly', and be 'very circumspect' before accepting an invitation to do so. Of particular relevance to tax cases is that the Statement itself emphasises that the court must 'bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into'. Since court cases by definition relate to facts that have already happened, a decision by a court to depart from prior case law is inevitably retrospective in effect. In a tax case this is rarely, if ever, likely to be appropriate – and especially not if the facts occurred before exit day and IP completion day, or even (as in a number of cases currently progressing through the tribunals and courts) before the June 2016 Brexit referendum.

End of supremacy of EU law

Under EUWA 2018 s 5(1), the principle of supremacy of EU law does not apply to any UK enactment or rule of law made on or after IP completion day. This may not add much, because the effect of the UK's withdrawal is anyway that, under TEU article 50, the Treaties – and EU law with them – cease to apply to the UK (save as provided in the Withdrawal Agreement). In any event, s 5(1) is unlikely

to apply to cases relating to events before IP completion day, in the absence of retroactive legislation passed after that date. And s 5(2) makes clear that supremacy of EU law *does* apply after IP completion day so far as relevant to the interpretation, disapplication or quashing of any UK enactment or rule of law passed or made *before* IP completion day. Interestingly, s 5(2) appears to apply to EUWA 2018 itself: this raises the possibility that provisions of EUWA 2018 themselves may be susceptible to challenge as incompatible with EU law.

Charter of Fundamental Rights ceases to apply

Under EUWA 2018 s 5(4), the Charter of Fundamental Rights 'is not part of domestic law after IP completion day'. Again, it is unclear whether this repeal of the Charter is intended to be retrospective for events occurring before IP completion day. However, the transitional rule in EUWA 2018 Sch 8 para 39(3) provides that s 5(4) does not apply to proceedings begun in a UK court or tribunal before IP completion day. If the exclusion of the Charter were not intended to apply to events occurring before that time, para 39(3) would be unnecessary.

In *Fenniche v Kuwait Health Office* 2204871/2019 (23 March 2021), the Employment Tribunal stated (at para 98): 'For claims brought since 31 December 2020, the Charter is no longer part of UK law'. If correct, it would follow that in cases begun after that date, parties cannot rely on the Charter in relation to earlier events. To that extent, s 5(4) might be challenged as a breach of EU law. In practice, however, inapplicability of the Charter may be of limited impact, to the extent of overlap with the European Convention on Human Rights, which remains applicable pursuant to the Human Rights Act 1998.

No right of action based on general principles of EU law

One of the most controversial and difficult provisions of EUWA 2018 is para 3 of Sch 1. Under para 3(1), there is no right of action in domestic law after IP completion day based on a failure to comply with any of the 'general principles of EU law'. Under para 3(2), no court or tribunal may, after IP completion day, (a) disapply or quash any enactment or other rule of law or (b) quash any conduct or otherwise decide that it is unlawful, because (in either case) it is incompatible with any of the 'general principles of EU law'. This rule does appear to be intended to apply retroactively even if the relevant facts occurred before IP completion day; this again raises the question whether, to that extent, it is susceptible to challenge as a breach of EU law.

The transitional rule in Sch 8 para 39(3) provides that Sch 1 para 3 does not apply to proceedings begun in a UK court or tribunal before IP completion day. There is a further, more limited, exception in Sch 8 para 39(5) for proceedings brought by 31 December 2023 and involving a challenge to anything which occurred before IP completion day, but this does not apply where the challenge is for the disapplication or quashing of (i) UK primary legislation or a non-statutory rule of law or (ii) anything which gives effect to such legislation or rule.

As for what is meant by the 'general principles of EU law', the explanatory notes to EUWA 2018 expand (at para 50): 'The general principles are the fundamental principles governing the way in which the EU operates. … Examples include proportionality, non-retroactivity …, fundamental rights [e.g., the right to property or freely to pursue trade and professional activities] … equivalence and effectiveness'. Conversely, it is very clear that the 'general principles of EU law' do *not* include specific Treaty rights, such as the freedom of establishment under TFEU article 49 or the free movement of capital under article 63.

In *Allianz Global Investors GmbH v Barclays Bank plc* [2021] EWHC 399 (Comm), involving claims for compensation for breaches of the prohibition in TFEU article 101 on price-fixing and cartels, Sir Nigel Teare referred to Sch 1 para 3 and held obiter (at para 72): 'Thus a beneficiary who commences proceedings after 31 December 2020 will not be able to rely on the principle of effectiveness to disapply any provision of English law which made it impossible for him to enforce the duty owed to him pursuant to [article 101]'.

Few direct tax cases rely *primarily* on general principles of EU law (for a rare example, see *FII* (Case C-362/12)); but direct tax cases quite commonly rely on general principles such as effectiveness and equivalence as *ancillary* to Treaty rights such as the fundamental freedoms. One example of many is the *Marks & Spencer* cross-border group relief case in the UK tribunals and courts up to the Supreme Court [2014] STC 819 (see para 28 onwards): the UK tax procedural legislation in FA 1998 Sch 18 had to be 'moulded' to ensure that the taxpayers' EU law right to the freedom of establishment was effective in the sense of not being excessively difficult to exercise. Similar 'moulding' may well be required in relation to direct tax cases now progressing through the tribunals and courts and relying on the Treaty freedoms. However, in the writers' view, that is not what Sch 1 para 3 is about. In our view, its legislative intent is to prevent new *free-standing* claims based on 'general principles'.

No right to *Francovich* damages

Lastly, under EUWA 2018 Sch 1 para 4, there is no right in domestic law after IP completion day to damages based on the rule in *Francovich* (unless, under Sch 8 para 39(3), proceedings were begun before IP completion day). In practice this will have little impact on tax cases, due to the great difficulty anyway in satisfying the stringent conditions in *Brasserie du Pêcheur* (Case C-46/93) (notably, the requirement of a 'sufficiently serious breach').

Cases about periods after 31 December 2020

Space does not permit detailed consideration of the impact of Brexit on direct tax cases regarding periods after IP completion day. Under the Trade and Cooperation Agreement of December 2020 (the 'TCA'), of course, there are no free movement rights. In any event, article COMPROV.16(1) of the TCA provides that nothing in the TCA confers any rights on persons other than the parties (the UK and the EU) or permits the TCA to be invoked in domestic proceedings. Freedom of establishment and freedom to provide services have moreover been repealed by SI 2019/1401, as noted above. The free movement of capital has not been repealed, so it is now 'retained EU law'. For post-31 December 2020 periods, what is the relationship between this extant 'fundamental freedom' and pre-existing UK tax law which may be incompatible with it? Yet another unanswered question. ■

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