

KEY POINTS

- Post-Brexit, there will no longer be a CJEU to defer to or whose rulings continue to bind domestic courts.
- Unless Parliament were to prescribe for a doctrine of direct effect/applicability in relation to the “EU law” that it preserved after Brexit a court would have to imply such a doctrine into its canons of interpretation alongside all the other general principles of EU law that render it distinct from domestic law.
- The only way in which true EU law might be given effect to by the courts despite ostensibly contrary domestic law provision is if future domestic rulings were to hold that the common law itself had developed since our accession to the EU.

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The UK courts after Brexit

In this article Richard Gordon QC considers two core questions which will need to be addressed by the UK courts in their treatment of “EU law” that is preserved after Brexit: (i) the legal status of that law; and (ii) the extent to which the common law may be reshaped by the experience of EU membership.

Although, to say the least, astonishing, it appears to be the case that David Cameron had no “plan B” for how to amend our laws in the event of a vote for Brexit. Since 24 June a great deal of civil service thinking has gone into the *legislative* challenges that lie ahead but so far little analysis has been undertaken on how our courts should (or even might) respond to the common law implications of Brexit.

On the premise that there will, inevitably, be a large simulacrum of “EU law” remaining after Brexit there are two core questions that will need to be addressed by the courts of the UK when giving future effect to the common law. These are:

- the legal status of law whose provenance lies in the Treaties but which has post-Brexit been preserved as a construct of domestic law;
- the extent to which the common law may be reshaped by the experience of EU membership.

Let me start, though, with some fundamentals. In certain areas it is, depending on the post-Brexit model adopted, entirely possible that a large amount of EU-type law *with a legal structure in practice indistinguishable from that of the EU* would stay in place.

For example, in the context of financial services regulation, if the UK – following the Norwegian model – were allowed to join the EEA (together with EFTA membership) the UK would be required to maintain its existing financial regulatory

frameworks within an essentially EU governed framework. EEA obligations are interpreted at the highest level by the EFTA Court whose jurisdiction is, in practice, very similar to that of the jurisdiction of the Court of Justice of the European Union (CJEU). True it is that there is no principle, as such, of direct effect or supremacy of EEA law (as exist in EU law) but as regards EEA rules that have been implemented by a member state there is an obligation of consistent interpretation and of priority of EEA rules over conflicting domestic rules.

It is, in practice, inconceivable in an area governed by EEA rules that a domestic court would do otherwise than to apply EEA law in the same way as that in which EU law is currently applied even though neither the content nor the principles are identical.

Similarly (though less obviously) it may be possible to bind non-member states – such as the UK would be following Brexit – into a compulsory EU jurisdiction by means of international agreements to which the EU was a party and which incorporated the jurisdiction of the CJEU.¹

Thus, the two issues addressed here do not arise where an EU-type legislative superstructure such as EEA regulation has been built onto the framework of domestic law.

That discrete situation aside, however, there is a strict timetable for a departing member state for EU law to continue to apply in its territory. By virtue of Art 50(3) of the Treaty on the European Union (TEU):

‘[t]he Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification ... [of intention to withdraw from membership of the EU] unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.’

So, after the prescribed timetable under Art 50 has expired, whatever similarities we might wish to see between the old and the new orders the reality is that we will no longer have EU law in the UK in the sense of legal rights and obligations flowing from the Treaties. Amongst other things, this means that laws engaging the involvement of EU institutions (such as the reference system to the CJEU under Art 267 of the Treaty on the Functioning of the European Union (TFEU)) cannot simply be replicated by a statute or preserved in aspic by retaining directly applicable EU regulations until Parliament chooses to enact a different law.

For our legislature this presents something of a minefield given the need to ensure that repeal of EU law complies with the requirements of the Human Rights Act 1998 and the large number of EU-infused laws that have come in through diverse routes, with different effects and that often require the involvement of some EU agency to make them cohere. But for our courts it presents both an opportunity and a challenge. There is the opportunity to reshape the common law and, in the process, to break free of the less desirable elements of EU law; there is also the challenge of ensuring that the common law develops in ways in which our law has been enriched as a result of EU membership whilst preserving the effectiveness of

those parts of “EU law” that need to be retained. These dynamics are, though, likely to produce tension in court rulings post-Brexit reflected in the two core issues identified above.

Core issue 1 is the legal status of “EU law” that is retained after Brexit. As implicitly foreshadowed earlier, the term “EU law” is, in this sense, a misnomer. Save for regimes (such as EEA membership) that deliberately create or retain an EU-type structural hierarchy and that depend upon the willingness of the European institutions to engage with them, any “EU law” after we leave the EU will have as its legal foundation solely a statutory source of authority.

A particular statute may provide for specific rules of precedent, status or interpretation for this kind of retained “EU law” but it cannot incorporate any EU institutions into its legislative framework. Moreover, in the absence of such express provision ordinary common law principles of statutory interpretation would apply. In the absence of statutory provision to the contrary, common law rules would govern the situation and it is highly questionable to what, if any, extent they could accommodate the new hybrid or mutant breed of former EU law now masquerading as domestic law. Pre-Brexit, the European Communities Act 1972 (ECA) was regarded at common law as a “constitutional statute”² but there is no clear common law doctrine enabling post-Brexit statutes to be treated in the same way.

Interpreting and giving effect to true EU law involves applying a distinctive set of principles that – because they emanate from the Treaties, EU legislation and from rulings of the CJEU – do not simply replicate domestic principles of interpretation. In that fashion, relevant decisions of the CJEU bind the national courts as a matter of statutory obligation under ECA s 3(1).³ For that reason, in terms of precedent as a matter of EU law (as reflected in the ECA) lower courts are not bound by the decisions of either the Strasbourg Court or higher courts where to follow the higher court ruling would be to breach EU law.⁴

Post-Brexit, however, different questions

will surface. Will our courts treat previous decisions in which ECJ/CJEU rulings were followed, or in which EU law was applied, as legally binding precedent? It seems unlikely. There will be no longer be a CJEU to defer to or whose rulings continue to bind domestic courts. EU law will instantly be stripped of its former legal status. The concept of EU law supremacy will vanish and, with it, notions of direct effect, direct applicability and, insofar as they differ from domestic common law, general principles of EU law. So, too, will remedial elements such as the power of a court to dis-apply an Act of Parliament that is contrary to EU law.⁵

The legislative consequences are serious. To take but one example: simple repeal of the ECA would wash away much of recent financial services law implemented, as it has been, by EU regulation without the need for implementing domestic laws. At least in the short term it seems likely that directly applicable regulations of that kind would be retained with a Henry VIII clause permitting them to be amended or repealed from time to time by statutory instrument as the need arose. In the course of time that would be superseded by a new statutory regime.

But how would or could the courts interpret and apply “EU law” that no longer formed part of EU law in the true sense and that derived its status solely from provisions of national law?

Under the so-called *Marleasing* principle⁶ national courts have an obligation to interpret insofar as possible provisions of national law so as to give effect to the terms of EU law. This means stretching the language of the provision in question if necessary so as to implement EU law. There is a direct parallel in the interpretative duty to read statutes as far as is possible compatibly with fundamental rights under s 3 of the Human Rights Act 1998 (HRA). But EU law in the *Marleasing* sense means EU law as reflecting the *acquis communautaire* (ie the accumulated body of EU law from 1958 to the present day including CJEU rulings). That concept becomes obsolete after Brexit because EU law in its true sense has ceased to apply and

cannot be revived by the singular act of a national Parliament.

Parliament could try to apply a form of EU law by analogy. A model is afforded by s 60 of the Competition Act 1998 which has as its purpose (see s 60(1)) ‘... to ensure that so far as is possible (*having regard to any relevant differences between the provisions concerned*), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the community’ (my emphasis).

The difficulty with this attempted resolution is that, even if (which is by no means obvious) a formulation of that kind were to be enacted, there is no true EU law to “fit” the analogue. A court determining an issue where the focus was on a domestic “EU” provision would, if it were to complete the circuit and marry true EU law to its domestic shadow, have to resurrect doctrines of EU law supremacy and discrete general principles of EU law which the very notion of Parliamentary sovereignty had, at least in theory, repudiated. Moreover, if the s 60 route were selected a court would be enjoined to ‘have regard to any relevant differences’ which, it may be inferred, would compel a court to take into account that EU law was no longer supreme thus producing a *circulus inextricabilis*.

Unless Parliament were to prescribe for a doctrine of direct effect/applicability in relation to the “EU law” that it preserved after Brexit a court would, in order to give proper effect to true EU law, have to imply such a doctrine into its canons of interpretation alongside all the other general principles of EU law that render it distinct from domestic law. An example of a discrete EU law general principle is the principle of equality which goes far beyond anything in the HRA and Art 1 Protocol 1 of the European Convention on Fundamental Rights. It is possible, though by no means inevitable, that a court would decide to apply true EU law insofar as it considered it possible to do so. Yet it is doubtful in the event of conflict

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that UK courts would find it possible to do so after Brexit. The status of CJEU rulings in a particular area might be persuasive and in the short term likely to be followed but where a CJEU ruling came up against a contrary statutory provision or other competing provision of domestic law the courts would have no principle of interpretation such as currently exists to enable, still less require, a contrary CJEU ruling to be followed.

The only way in which true EU law might be given effect to by the courts despite ostensibly contrary domestic law provision is if future domestic rulings were to hold that the common law itself had developed since our accession to the EU.

This leads to consideration of core issue 2 which is the extent to which the common law may be held to have been reshaped following EU membership.

There can be no doubt that (amongst other different jurisdictions) CJEU principles have, to some extent, already influenced the development of the common law. For example, one of the earliest axioms of the common law was the declaratory theory which, succinctly outlined by Lord Reid in *West Midland Baptist Association Inc v Birmingham Corporation* [1970] AC 874, 898-9, has the result that: '[w]e cannot say that the law was one thing yesterday but is to be something different tomorrow. If we decide that [the existing rule] is wrong, we must decide that it always has been wrong.'

Yet, in *Re Spectrum Plus Ltd* [2005] 2 AC 680 the House of Lords said precisely that, by introducing the doctrine of prospective overruling which had, as its premise, the reality that the common law tomorrow may be diametrically opposite to the common law today by fiat of the court. Prospective overruling has long been a remedial option of the CJEU as the House of Lords acknowledged in the *Spectrum* case (of the many cases see *Defrenne v Sabina* [1976] ECR 455).

However, despite having recourse to CJEU jurisprudence in developing the common law it seems clear that the domestic courts would, even before Brexit takes effect, not be prepared to elevate even the most

fundamental doctrines of EU law over our over-arching constitutional principles.

A recent instance of this is afforded by *dicta* of the Supreme Court in *HS2* [2014] UKSC 3. There, the claimants sought judicial review of the government's decision to promote the high speed rail network by means of the hybrid bill procedure in Parliament. In part, the challenge involved both an attack on a particular parliamentary procedure as well as the way in which Members of Parliament had considered the Bill as falling short of that required by the relevant EU directive.

The Supreme Court was, thus, faced with a potential conflict between the doctrine of EU law supremacy and the fundamental constitutional principle enshrined in Art 9 of the Bill of Rights that proceedings in Parliament may not be questioned by a court. Although the conflict was able to be circumvented by the detail of the court's decision, Lord Reed grappled with the role of the national court in a case where such a conflict could not be avoided. In an important statement of principle (at [79]) he said this:

'[i]f there is a conflict between a constitutional principle, such as that embodied in article 9 of the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom.'

Slightly earlier than *HS2* (see: *HMRC v. Aimia Coalition* [2013] UKSC 15) the Supreme Court declined to treat a CJEU ruling following a reference as conclusive of the issues on the footing, holding instead that it was entitled to consider arguments not advanced on the reference and to consider factors not addressed by the CJEU.

Increasingly robust decisions such as these suggest that any real conflict between common law and EU law principle after Brexit would result in a weakening of EU principle rather than an extension of the common law to encompass EU principle.

None of this is to say that in an

appropriate case our courts would not continue to "find" in the common law, helpful common law principles that have their source in EU law. But in looking to the legal landscape after Brexit this is likely to lie in the breadth of the common law as opposed to any EU imperative. As Lord Justice Laws observed in his third Hamlyn lecture at [7]:

'This, then, is the catholicity of the common law. It was Rudyard Kipling, who coined the phrase, "[w]hat should they know of England, who only England know?" Our law has embraced these legal importations from foreign sources as its own... In making them our own we have re-fashioned them, or some of them to bear the colour and stamp of common law principle'.

- 1 See the combined effect of Opinions of the CJEU 1/91, 1/92 and 1/09
- 2 See *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).
- 3 See: *Litster v Forth Dry Dock* [1990] 1 A.C. 546, 554 per Lord Keith.
- 4 See *Kay v Lambeth; Leeds CC v Price* [2006] UKHL 10 at [28] per Lord Bingham.
- 5 See: *R (Factortame Ltd) v Secretary of State for Transport* [1990] UKHL 7.
- 6 See Case C-106/89 *Marleasing SA v La Comercial Internacional De Alimentacion SA* [1990] ECR 4135.

Further Reading:

- Crossing the river: the Brexit transition [2016] 8 JIBFL 443.
- The ultimate irony: fiscal policy and legal challenge [2016] 8 JIBFL 448.
- LexisNexis Loan Ranger blog: Brexit and the future of the Capital Markets Union.