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## Brexit – untying the Gordian Knot

For over four decades, EU-derived law has been interwoven into the UK legal landscape. Post Brexit, what is to become of it all? The short answer is that there will have to be a decoupling process by which the UK decides which parts of EU law will be kept, jettisoned or amended. This will not be straightforward, but hopefully it will be a process on which the business sector will be consulted, potentially giving rise to opportunities to influence aspects of the post-Brexit legal regime. This document provides a general overview of the most important issues as we see them.

To be clear, the practical implications of the decoupling process on commercial parties may not, in fact, be very significant. For example, English laws applicable to transactions (mainly relating to contract, trusts and security) have not been materially influenced by EU law. Nevertheless, it will be beneficial for commercial parties to have a broad understanding of the wide legal context. We will publish further editions from time to time as events unfold. In the meantime, click [here](#) for the key points to take away.

Note that we do not cover the specific legal issues that arise as a result of the extensive devolution that has occurred within the UK in the past 20 years and the fact that there has been some direct incorporation of EU law into the powers and duties of the devolved legislatures.



# TRAVERS SMITH

## Key points to take away

- There is no immediate change in the status or applicability of EU-derived law in the UK.
- Certain EU-derived laws will fall away automatically upon the UK's withdrawal from the EU and / or upon repeal of the [European Communities Act 1972](#) (the "ECA 1972"), the UK statute that gives domestic effect to EU law in the UK. The **Great Repeal Bill** is intended to act as a holding device. It intended not only to repeal the ECA 1972, but also to preserve and carry over into UK law all EU law not already implemented in national law. This is to avoid a legal vacuum and to allow consideration of whether to keep these laws to be postponed to a later date.
- However, the Great Repeal Bill will not be able to hold the *status quo* by itself. Its ability to stipulate that an EU law will remain in force will depend on the extent to which that law was drafted on the assumption that the UK was a member of the EU and whether it is dependent on reciprocal recognition by EU member states. Additional legislation to replace / amend individual laws not amenable to holding legislation will be required. Some of this work will have to be done before the UK withdraws from the EU to avoid legal black holes.
- Notwithstanding any enactment following the Great Repeal Bill, Parliament and/or the executive will then have to review each individual element of EU-derived law to decide whether it should be kept, jettisoned or amended. The diverse ways in which EU law has entered into our domestic law means that there is no wholesale solution to legal extrication; the way in which any repeal or amendment is achieved will depend on the type of law in question.
- The task at hand is complex and will take many years to complete. It will be complicated by the fact that it will be conducted against the backdrop of the wider Brexit negotiation of the UK's withdrawal from, and future relationship with, the EU. The latter will affect the extent to which the UK will be able to retain large parts of EU law with a reciprocal element, even if it wants to.

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## AS IT CURRENTLY STANDS: THE MAIN SOURCES OF EU LAW



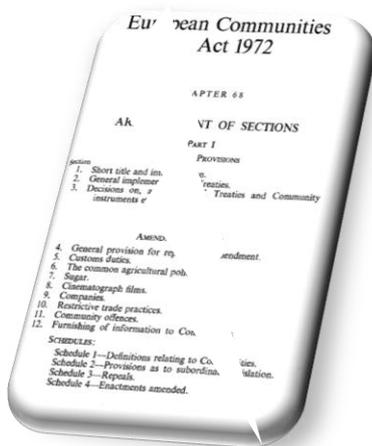
Click [here](#) for an overview of the ways in which EU law has become incorporated into UK law.

## ON LEAVING THE EU, WILL ALL EU-DERIVED LAW AUTOMATICALLY CEASE TO APPLY?

It is important to note that primary legislation transposing EU law will not be affected by the UK's withdrawal from the EU, nor the repeal of the ECA 1972. For example, the Companies Act 2006 will remain intact.

Article 50(3) of the Treaty of the European Union provides for the UK to leave the EU from the date of entry into force of any withdrawal agreement, or failing that, two years after the UK gives it withdrawal notice under Article 50(1). Upon either event, **all directly applicable EU law, including the EU treaties and regulations, will automatically cease to apply to the UK. That will be the case regardless of whether or not the ECA 1972 has been repealed.** Such laws will include, for example, Articles 101 and 102 of the Treaty on the Functioning of the European Union which concerns competition law and the Recast Brussels Regulation on jurisdiction and the enforcement of judgments. Important UK industries will also be affected, for example directly applicable regulations dealing with matters such as energy supply, food labelling and chemical law will fall away.

UK citizens and entities will also be unable to rely on the principle of direct effect and/or direct applicability in respect of those EU laws that will fall away, including Directives. The same will apply in respect of secondary legislation made under the ECA 1972 when that Act is repealed.



On repeal of the ECA 1972, the automatic disappearance from UK law of directly applicable EU law and secondary legislation made under that Act would create a number of large holes in our domestic law. This legislative void, most evident in fields such as consumer protection, health and safety and the environment, has the potential to cause great uncertainty.

This is why the UK cannot achieve legal extrication from EU law simply by repealing the ECA 1972 without suffering the consequences of the automatic repeal of a substantial body of UK law. Further, it would not in any event be desirable (even if it were possible) to repeal all EU law wholesale: in many cases, EU laws have been adopted with the active support of the UK because they accorded with UK policy, and may continue to do so. For example, company law in the UK has absorbed a body of EU-harmonised rules over the years which has become part and parcel of company law in the UK, and with which lawyers and business have become familiar. There would be no rational reason for repealing it wholesale simply because of its EU origins.

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## WHAT WILL THE UK DO TO ADDRESS THE LEGISLATIVE VOID?

The most straightforward way to address the legislative void would be for the UK Parliament to pass legislation that maintains in force all EU-derived law that was in force immediately before the UK left the EU. In October 2016, Theresa May set out plans for a "Great Repeal Bill" to be included in the next Queen's Speech and introduced in the next parliamentary session (due to begin in May or June 2017). The Bill is not only intended to repeal the ECA 1972 at the point the UK leaves the EU, but it will transpose into UK law all EU law not already implemented in national law and then allow the government to decide if/when to repeal, amend or retain individual measures in the future, following Brexit. That second limb of the Great Repeal Bill is intended to maintain the *status quo*. We await more detail from the government as to how it envisages that it will be achieved in practice.

Such legislation will work satisfactorily, without more, for EU-derived laws that only lay down rules or standards and which do not depend on continuing EU membership (for example, laws relating to bank capital requirements, water quality and consumer protection). For continuity, and for practical reasons, the UK is likely initially to continue to apply the same rules. Once outside the EU, the UK could, of course, revisit all these laws when the need arose and legislative capacity allowed.

However, the Great Repeal Bill transposition mechanism will not work in respect of:

1. those areas of EU-derived law which, because of their very nature, will be rendered obsolete by Brexit;
2. directly applicable EU law that is based on reciprocity (for example, the Recast Brussels Regulation on jurisdiction and the enforcement of judgments and EU rules on insolvency recognition); nor
3. those laws that are premised on the UK having access to the wider EU market (for example, passporting).

It would be neither practical nor desirable for the UK to decide to continue unilaterally with obligations in the absence of any corresponding obligation on the part of the remaining EU member states, not least because the enforceability of those provisions as against remaining member states and their nationals would be uncertain or difficult. These categories of EU-derived law will need to be considered separately, as a matter of urgency, preferably in advance of Brexit. The extent of any reciprocation by EU member states will be a matter for negotiation as part of the wider terms of the UK's withdrawal from the EU, the outcome of which will not necessarily be in the UK's control.

If negotiations failed and the UK decided against one-sided recognition, it is likely that it would revert to any applicable domestic common law (for example, on jurisdiction issues, by dealing with EU member states in the way it currently deals with non-EU member states such as the US). Otherwise, it would have to pass new laws to implement a new regime for dealing with EU states.

The UK would also have to consider and deal with, ideally prior to withdrawal from the EU, primary legislation currently in existence that would not make sense post Brexit. For example, the Competition Act 1998 is predicated on the UK's membership of the EU and so contains numerous references to the Commission and the Community. That Act would have to be amended to replace references to the EU institutions with the relevant UK institution following Brexit<sup>1</sup>.

The table below summarises the steps that are likely to be required:

Action	Timing
Holding legislation passed that maintains in force EU-derived law that would otherwise fall away automatically upon withdrawal of the UK from the EU and / or repeal of the ECA 1972.	Likely to form part of the Great Repeal Bill, holding legislation to be in place before expiry of the 2-year (or longer if extended) negotiation period that commences when the UK makes its Article 50 notification.
Review of all areas of EU-derived law to decide which will be caught by the Great Repeal Bill and which cannot (for example, because they are dependent on reciprocation by EU member states, or access to the wider EU market).	This process should start immediately.
For those EU laws for which unilateral UK holding legislation will not work, and which will otherwise fall away upon Brexit / repeal of the ECA 1972, the government will have to replace or amend each of those laws to meet the needs of the UK once outside the EU.	This process should start immediately so that the revised form of the relevant laws can come into force on the day of the UK's departure.
Each of the EU-derived laws maintained by holding legislation, and EU-derived law that will not fall away upon Brexit / repeal of the ECA 1972, must be reviewed to see whether it should be kept, jettisoned or amended.	This process is less urgent and is likely to continue over the course of several years.

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<sup>1</sup> However, even with these amendments, the Competition Act 1998 is based on EU law concepts and case law. If these are jettisoned, the statute will not work as intended.

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## WHAT STATUTORY MECHANISM OR PROCESS MIGHT BE USED TO UNCOUPLE EU LAW?

Given the different ways that EU law is incorporated into UK law, there is no realistic complete solution. Instead, there will have to be a process whereby each piece of EU-derived law is reviewed and a decision made on whether it should be kept, amended or discarded.

In the case of **primary legislation transposing EU law**, the position is relatively straightforward: the implementing primary legislation could be left on the statute book and amended or repealed piecemeal, under proper parliamentary scrutiny. Even if such legislation slips through the net and is not subject to parliamentary review, one way to deal with any problem of legislation not making sense in a non-EU world would be a sweeper "savings" clause (which would most naturally form part of the Great Repeal Bill). This would state that the courts are to use their discretion to interpret legislation so that it works in a UK context.



The position in relation to (i) **directly applicable EU law** and (ii) the large amount of **secondary legislation implementing EU law** is more difficult. One statutory mechanism that has been proposed for decoupling domestic law from EU law, known as the "generalised model", demonstrates well the difficulty of alighting upon a single legislative scheme that will achieve effective extrication in respect of all of the different types of EU-derived law. The generalised model involves (i) repeal of the ECA 1972; (ii) primary legislation rendered obsolete by the repeal of the ECA 1972 to be repealed via statutory instrument ordered by the Secretary of State; and (iii) secondary legislation made under the ECA 1972 to continue in force until amended or repealed, any such amendments or repeals to be made by statutory

instrument<sup>2</sup>. This model is problematic for two main reasons:

1. It fails to address directly applicable EU law which, as explained above, derives directly from the EU institutions and are not shaped by domestic legislation.
2. All of the heavy lifting in respect of secondary legislation is proposed to be achieved via a "Henry VIII" clause, that is, provisions in a law that allow the government to amend or repeal legislation through secondary (subordinate) legislation, often without further parliamentary scrutiny. For obvious reasons, Henry VIII clauses are controversial as they could be used to abolish fundamental rights with minimal parliamentary scrutiny, but they have been used before in the banking crisis when dealing with the bank bailouts. Given the scale of the task, the government may have little choice but to adopt them in respect of secondary legislation. An acceptable compromise might be to confine the power to make changes to those that are reasonably necessary to address the fact that the UK will no longer be a member of the EU, pending a proper, evidence-based, review of the relevant laws after the UK has left the EU.

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## THE SCALE OF THE TASK IN CONTEXT

The task of deciphering UK domestic law from EU-derived law is immense and complex. Daniel Greenberg, Parliamentary Counsel, has described the review process as "*awe-inspiringly large*" and "*the largest scale legislation and policy exercise that has ever been carried out*".

Recent statistics suggest that Parliament only has capacity to deal with up to 30-40 bills per year (in most years, it deals with 20-30.) However, research undertaken for the House of Commons library estimates that, over the period 1993-2014, 4,514 EU-related Acts and statutory instruments were passed. Whilst the bulk of that figure is made up of statutory instruments, it included 231 Acts related to EU law. EU Regulations are in addition to this figure and if one included pre-1993 legislation, it would be even higher. Parliament

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<sup>2</sup> This model was proposed in a Private Member's Bill introduced by Douglas Carswell MP in 2013 which did not complete its passage through Parliament.

will clearly be hard pressed to prioritise, debate and review such a large corpus within any sensible timescale, especially if the government wishes to pass other, non-Brexit-related legislation.

That said, assuming the Great Repeal Bill does postpone the need to review large chunks of EU-derived law until a later date, UK businesses can be reassured that many of the most contentious EU-derived laws which will be prioritised for review are unlikely to be of direct significance to them (for example, laws relating to agriculture and fishing). Indeed, we do not expect any priority to be given to a review of well-established and well-integrated legislation such as the Companies Act 2006, if any review is contemplated at all. Many commentators go so far as to suggest that most EU-derived law will end up being retained in some form or other, not least to avoid double regulation in areas like competition law and financial services.

We hope that the government will, in the coming weeks and months, indicate which areas of EU-derived law it intends to prioritise. For example, we anticipate that there may be pressure from some quarters to reconsider EU-derived employment legislation in areas such as TUPE, holiday pay, agency workers and working time, but this will have to compete with lobbying from other sectors, as well as the broader Brexit negotiations and trade deals to get anywhere near the top of the "to do" list.



What is clear is that there is unlikely to be a "bonfire of red tape" following any review because (i) the UK is already lightly regulated by international standards; (ii) in some areas the UK is likely to wish to keep its regulation aligned with the EU to make life easier for business; and (iii) the government faces a huge legislative task in respect of which it will need to consult others if it wishes to make radical changes, which will inevitably take time.

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## HOW LONG WILL THE PROCESS TAKE?

At this stage, it is difficult to say how long the unravelling of EU law from the UK legal regime will take. Some commentators have suggested it could take a decade or more.



If the government manages to get the Article 50 Bill through Parliament and trigger Article 50 by the end of March 2017, as per its original plan, it will have a period of a little over two years i.e. until April 2019 in which to get the Great Repeal Bill on the statute books and deal as best it can with those EU-derived laws not caught by it.

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## WHO WILL CARRY OUT THE REVIEW?

It is currently unclear who will carry out the process of reviewing all EU-derived law and deciding which bits to keep, discard, amend or replace. Parliament is unlikely to have the capacity to handle the task alone.

Inevitably, Parliament will have to share some of the review process with the executive under delegated powers. Presumably, each government department will take charge of legislation within its area of responsibility. However, in order for that to work, those departments will need to be very clear about the framework for revision and their remit. Parliamentary supervision or at least some degree of scrutiny would be ideal, but may not always be possible. In any event, the civil service already has little spare capacity and is likely to be preoccupied with other weighty Brexit tasks like negotiating exit terms and new trade agreements.



We wait to hear how the division of labour will work in practice and hope that the government will allow business (and other interested groups) to have a meaningful role, via consultations and the like, in shaping the post-Brexit legal landscape.

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## WHAT WILL BE THE IMPACT OF POLITICAL CONSIDERATIONS?

As well as the technical challenges, the review process will also involve a series of fundamental policy decisions about how we wish to regulate basic aspects of the UK's economic and social life in the future.

There is an inherent tension between the fact that the UK has voted to leave the EU – and, arguably, by extension, to leave behind European law – and the fact that so much EU-derived law is considered to be integral to the economic and social success of the UK. As noted above, it may be that most EU-derived law will end up being retained in some form or other.

In many areas of our domestic law, such as competition, EU law is integral to the operation of that law. In some areas, such as employment law on equality and discrimination, EU principles are deeply ingrained into our culture and business practices. Those conducting the review will have to ask, in respect of almost every aspect of national policy, from immigration to financial services, whether, just because something is done in a particular way already, it should continue to be done that way. For example, should we retain European policy on the Working Time Directive, or should we do something different? The political impact might be less significant if the UK ends up in the EEA, but whatever Brexit model is adopted, there will still be a myriad of politically-sensitive policy decisions to be made.

## ASSUMING THAT SOME EU LAW WILL REMAIN, HOW WILL OUR COURTS INTERPRET IT?

We are in a novel situation and the following questions arise on which we are yet to receive guidance:

- When the ECA 1972 is repealed, the doctrine of supremacy of EU law will lapse unless statutorily revived or otherwise implied by the courts. The duty of a domestic court of last resort to refer questions of EU law (unless clear) to the Court of Justice of the European Union (the "CJEU") will also lapse. Commentators note that this would most likely encompass principles of interpretation of EU law which have the doctrine of EU supremacy at their root, and that, even where EU law survived in that name in a domestic statute, the appropriate principles of interpretation would be a matter solely for domestic law. This has the potential to cause uncertainty in the resolution of disputes. In particular, the ability to obtain the opinion of the CJEU on points of disputed interpretation or application – which may be relevant either to directly or indirectly effective rights – will disappear long before EU law itself is out of our system.



- How the courts will deal with decisions of the CJEU is considered [below](#).
- Within EU law, a hierarchy is accorded to the different types of EU legislation so that, for example, treaty provisions have a higher status than directives. Whether or not the same hierarchy will apply post Brexit will be a matter of legislative choice or for our domestic courts to decide.
- In the absence of clear legislation, it might be open for the UK courts to determine that the common law had been altered during our membership of the EU. They might, for example, rule that EU-derived principles such

as equality are now firmly entrenched in the common law.

It is worth noting that these questions are linked to the issue of which legislative model should be adopted to achieve legal Brexit because any new legislation may reduce or expand the scope for judicial intervention and activism.

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## HOW WILL THE COURTS DEAL WITH DECISIONS OF THE CJEU?

The status of judgments of the CJEU will almost certainly change. Upon repeal of the ECA 1972, the current binding status of CJEU judgments will disappear. Unless new domestic legislation specifies the status to be accorded to CJEU judgments, our domestic courts will have to decide how far to take them into account when determining questions of EU law. The CJEU's jurisprudence will not stand still during any transition period, and the CJEU may continue to issue opinions in cases involving the remaining member states that bear upon rights and obligations that remain part of English law. The English courts will therefore have to work out what weight to give the CJEU's developing jurisprudence (all the more complicated because, without a UK voice on the court, the CJEU's approach may shift).

Insofar as the aim of Brexit is to achieve political independence from the influence of EU institutions, it is difficult to envisage the CJEU continuing to have direct influence on UK jurisprudence. However, in practice, our domestic

courts are likely to continue to have regard to the rulings of the CJEU in the short term. In addition, previous CJEU decisions have influenced many areas of English case law (and similarly, the English courts have looked at the wording of EU Directives for the purposes of construing UK legislation which was passed to give them effect). (See, for example, the equal pay decision by the House of Lords in *Pickstone v Freemans plc* [1988] ICR 697 (HL)). Further, in some areas, like the Competition Act 1998, key legislative provisions are conceptually dependent on CJEU case law. It seems likely that, in those areas, CJEU case law will retain at least advisory or highly persuasive status.



It is possible that our domestic courts may start to move away from such decisions over time. Indeed, the UK courts may treat the fact that they are no longer obliged to apply CJEU judgments as a materially different circumstance justifying a complete departure from previous rulings. However, it seems more likely that they will continue to uphold many established doctrines (at least to preserve legal certainty), retreating only from more extreme decisions that have required words to be read into legislation.

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## Appendix

### HOW HAS EU LAW BECOME INCORPORATED INTO UK LAW?

In this Appendix, we look at the main types of EU law and how each has been incorporated into UK law, namely: (1) the European treaties, (2) European Regulations, (3) European Directives and (4) decisions of the CJEU. We also explain the purpose of the ECA 1972 in more detail.

#### THE TREATIES

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The EU treaties, the primary source of EU law, set out the fundamental laws of the European Union and must be ratified by member states. They are currently binding on the UK as an EU member state. The EU treaties contain terms that create rights and obligations for individuals throughout the EU that will remain directly enforceable in the UK for as long as the UK remains part of the EU. One such example is the Treaty of Lisbon (2009) which made binding the Charter of Fundamental Rights of the European Union.

#### EU REGULATIONS

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EU Regulations automatically have binding legal force in every EU member state by virtue of the EU treaties and, in the UK, the ECA 1972. They rely on the principle of direct applicability and apply in the same form in all member states. Consequently, they would automatically cease to apply at the moment of the UK's withdrawal from the EU.

The impact of Regulations on UK law varies considerably. Some have a very substantial effect, akin to Directives, such as the General Data Protection Regulation and the Recast Brussels Regulation covering jurisdiction and enforcement.

However, many deal with matters of relative detail, such as technical requirements for certain financial transactions. Those Regulations are more on a par with statutory instruments in terms of their impact, but like statutory instruments, form an essential part of the legislative framework.

#### EU DIRECTIVES

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Directives are a form of order to member states setting out a policy direction towards which all member states must adapt their national legislation. Once a Directive has been passed at EU level, it must be implemented by national legislation as well. However, it is up to individual member states to decide on the form of the legislation necessary to achieve the result intended by the EU. Numerically, Directives make up a relatively small part of the total number of EU legislative acts which affect the UK (although in terms of their overall impact on UK law, Directives tend to be among the more significant EU legislative acts). The EU Company Law Directives which gave rise to the Companies Act 2006 are a good example.

#### DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ("CJEU")

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The CJEU is the collective term for the European Union's judicial arm. The CJEU comprises three separate courts, all of which have their own specific jurisdiction:

- the **Court of Justice**, which deals with requests for preliminary rulings from national courts;
- the **General Court**, which mainly deals with competition law, state aid, trade, agriculture and trademarks; and
- the **Civil Service Tribunal**, which rules on disputes between the EU and its staff.

The CJEU is the final arbiter of questions of the interpretation of EU law and its decisions constitute binding precedent. The most common types of cases brought before the CJEU include: (i) interpreting EU law (i.e. where a national court or tribunal seeks a preliminary ruling from the CJEU on a question of EU law), (ii) enforcement of EU

law (e.g. against a national government for failing to comply with EU law) and (iii) reviewing the legality of the acts of the EU institutions.

Under the doctrine of the supremacy of EU law, where there exists a conflict between a decision of the CJEU and domestic law, the decision of the CJEU takes precedence. The series of judgments in *R (Factortame Ltd) v Secretary of State for Transport* in the late 1980s concerning the compatibility of the Merchant Shipping Act 1988 with EU law highlighted this principle.

**Decisions** of the CJEU (for example, imposing a fine on a member state for an infringement of EU law) are addressed to a limited and defined group of persons such as a member state or a corporation, and bind only those to whom they are addressed.

**Opinions** of the CJEU (for example, ruling on the interpretation of EU law) are, in contrast, binding on all member states, and not simply the particular member state that has made a reference to the CJEU.

## UK COURT DECISIONS

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It is worth mentioning briefly that EU law has also impacted upon our domestic law via decisions made by our domestic courts which take into account EU law. For example, the English courts have looked at the wording of EU Directives for the purposes of construing UK legislation which was passed to give them effect. This has been seen in the area of public procurement, for example.

## "SOFT" EU LAW

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In addition to the sources of EU law set out above, the EU has also sought to regulate the affairs of the union via various quasi-legal instruments (often referred to as "soft law") such as recommendations, opinions, communications, notices and guidelines issued by the European Commission. Whilst not legally binding, they can have a significant practical effect, for example because they may be regarded as influential statements of how the law should be interpreted.

It is likely that this soft law would cease to apply upon a Brexit, but the Great Repeal Bill is unlikely to be wide enough to cover it. Therefore, the government will have to consider prioritising soft law in its review of the UK statute book to decide

whether it should be replicated in domestic law post-Brexit, or left behind.

## THE ECA 1972

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In addition to providing for the European treaties existing as at the date of the ECA 1972 to be incorporated into UK law, the ECA 1972 authorised the implementation of future EU legislation through secondary legislation.

The statutory mechanism pursuant to which the European treaties form part of UK law is section 2(1) of the ECA 1972. The effect of this section is that EU treaty rights automatically form part of UK law (the corollary being that, once the ECA 1972 ceases to confer such rights by reason of its repeal, they will cease to apply).

The EU principles of "direct effect" and "direct applicability" also take effect through section 2(1) of the ECA 1972 and have enabled EU law to operate directly in the UK without implementing legislation. The concepts of direct effect and direct applicability are often conflated but their meaning is distinct.



## Direct effect

Direct effect refers to the ability of member state nationals to enforce rights derived from EU legislation directly in national courts, irrespective of whether those rights exist under national law. If, therefore, a provision of an EU Treaty, Regulation, or Directive satisfies the requirements for direct effect, national courts must enforce those rights and there is no need for nationals to go to the CJEU to plead their cases.

## Direct applicability

Direct applicability refers to an EU rule or law that becomes part of a member state's national law without the need for specific implementation by

the national government. Regulations and some EU Treaty provisions<sup>3</sup> are directly applicable, as they come into force without the need for any further action on the part of the member states.

Further, sections 2(4) and 3(1) of the ECA 1972 provide for the supremacy of EU law over national law and, where there is a doubt as to EU law, require the UK courts to refer the question to the CJEU. Section 2(4) also has the effect that all primary legislation enacted by Parliament after the entry into force of the ECA 1972 on 1 January 1973 is to be construed by the courts and take effect subject to the requirements of EU law. This means that the domestic courts must disapply legislation that is inconsistent with EU law.

Section 2(2) of the ECA 1972 provides the mechanism through which parts of EU law that are not directly applicable or directly effective, such as Directives, can be transposed into UK law by secondary legislation. If, however, the ECA 1972 is repealed, then the secondary legislation derived from it will also fall away, unless Parliament acts to preserve it, which it will almost certainly do in the Great Repeal Bill.

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<sup>3</sup> For example, Article 101 and 102 of the Treaty on the Functioning of the European Union, prohibiting anti-competitive agreements/behaviour. Note: not all individual Treaty provisions are necessarily directly applicable; the provisions must be sufficiently detailed in order to be so.

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