

PUMP COURT
TAX CHAMBERS

THE CONTINUED RELEVANCE OF EU LAW ON TAX POST BREXIT

Speakers: Jeremy Woolf and Barbara Belgrano

SEPTEMBER 2020

KEY LEGISLATION

1. The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01) (WA);
2. European Union (Withdrawal) Act 2018 (EUWA);
3. Taxation (Cross-border Trade) Act 2018 (TCBTA);
4. European Union (Withdrawal Agreement) Act 2020 (EUWAA);
5. A trade agreement?

THE WITHDRAWAL AGREEMENT

1. Agrees a transitional period when EU law continues to apply until 31 December 2020: See Part 4 of the WA and s 1A EUWA;
2. Enshrines citizens rights for citizens already resident: articles 12 WA and 23-25 EUWAA;
3. Transitional arrangements post 31 December 2020: see for goods in transit: arts 47-50 (customs duties) 51 (VAT) and 52 (excise duties) WA. It also makes provisions for input tax claims under Article 15 of Council Directive 2008/9/EC for supplies made before the end of the transitional period to be made by 31 March 2021 and for the amendment of one stop shop returns by 31 December 2021.

THE WITHDRAWAL AGREEMENT

4. Northern Ireland Protocol to WA: note in particular article 5 and Annex 2 (on customs duties) and article 8 and Annex 3 of the Northern Ireland Protocol (on VAT and excise duties) and article 10 and Annex 5 (state aid rules).

EUROPEAN UNION (WITHDRAWAL) ACT 2018

- Seeks to enact EU Law as at 31 December 2020 “IP completion day”.
 1. S 3 incorporates directly effective EU Legislation, and in particular EU Regulations: but with indirect taxes note TCBTA;
 2. S 4(1) gives effect to other rights “recognised and available” on 31 December 2020. In particular includes fundamental Treaty Freedoms;
 3. S 4(2) gives effect to rights under directives if of a “kind recognised by the European Court or any court or tribunal in the United Kingdom” on 31 December 2020.

EUROPEAN UNION (WITHDRAWAL) ACT 2018 (2)

- However incorporation half-hearted which is likely to generate disputes:
 - 1 how specific does the “recognition” need to be before a right continues to be recognised under s 4? Note paras 96-97 of the Explanatory Notes;
 - 2 Charter of Rights not incorporated but underlying general principles may remain relevant: see s 5(4);
 - 3 Para 3 Schedule 1 abolished rights of action in domestic law based on a failure to comply with general principles of EU law. Also enactments and rules of law cannot be disapplied after 31 December 2000 because they are contrary to general principles.

EUROPEAN UNION (WITHDRAWAL) ACT 2018 (3)

Note:

- what is a “general principle”? Does it extend to directive specific principles such as neutrality in VAT?
- S 6(3) states that “any question as to the validity, meaning or effect of any retained EU law is to be decided...in accordance with any retained case law and any retained general principles of EU law”.

Note *JP Morgan Fleming Claverhouse Investment Trust v HMRC* [2008] STC 1180 and *Pendragon v HMRC* [2015] STC 1825. S 42(4) TCBTA states the principle of abuse and *Kittel* apply “in accordance with that Act” (i.e. UKWA 2018).

EUROPEAN UNION (WITHDRAWAL) ACT 2018 (4)

- 4 s 6(1) states that future decisions of the CJEU are not binding, although they remain persuasive. s 6(4) permits Supreme Court and possibly other courts to depart from prior CJEU decisions;
- 5 abolishes *Francovich* claims: para 4 Sched 1 EUWA.

Note:

- are these changes ECHR compatible especially when the changes are retroactive? Note possible need for a conforming interpretation/declaration of incompatibility.
- these changes do not impact on proceedings commenced before 31 December 2020: paras 38-39 of Schedule 8 EUWA.

EUROPEAN UNION (WITHDRAWAL) ACT 2018 (5)

- *Francovich* claims relating to breaches prior to 31 December 2020 can be brought within 2 years. Claims relying on breach of general principles can also be brought within 3 years but not if they seek the disapplication of an Act of Parliament or other rule of law that is not an enactment or an enactment that could not have been made differently: para 39 of Schedule 8 EUWA.

EUROPEAN UNION (WITHDRAWAL) ACT 2018 (6)

- s 5(1) makes it clear that EU principles of supremacy do not apply to legislation passed after the end of the transitional period. However, s 5(2) makes it clear that it may remain relevant to earlier legislation.
- s 8 confers wide powers to make regulations correcting deficiencies in retained EU law. However, powers cannot be “impose or increase taxation”: see s 8(7).
- TCBTA overrides and replaces many provisions in EU Regulations relating to VAT and customs and excise duties.

VAT: “retained EU law”

- Section 6(7) EUWA defines “retained EU law”:
“...anything which, on or after IP completion day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4...”
- EUWA, Section 2 (EU-derived domestic legislation, defined in section 1B(7)); Section 3 (Direct EU legislation) but note section 42(1) TCBTA); Section 4 (Saving for rights etc.).

VAT: “retained EU law”

- Section 6(3) EUWA:

“Any question as to the validity, meaning or effect of any retained EU law is to be decided...

(a) in accordance with any retained case law and any retained general principles of EU law...”

VAT: “retained case law” (1)

- Section 6(7) EUWA: retained domestic case law (principles laid down by, and any decisions of, a court or tribunal in the UK as they have effect immediately before IP completion day) and retained EU case law (principles laid down by, and any decisions of, the CJEU as they have effect in EU law immediately before IP completion day).
- Section 6(1) EUWA: principles laid down by the CJEU/decisions made by the CJEU made on or after IP completion day are not binding.

VAT: “retained case law” (2)

- EUWA, section 6(5A) to (5D) - possibility of pre-IP completion day regulations setting out the extent to which courts or tribunals are **not** to be bound by retained EU case law.
- Government consultation proposed two options *inter alia* (a) Court of Appeal and Inner House of the Court of Session or (b) High Court and the Outer House of the Court of Session can depart from CJEU decisions where they consider it “right to do so”.

VAT: “retained general principles of EU law” (1)

- Section 6(7) EUWA definition, “...general principles of EU law, as they have effect in EU law immediately before IP completion day...”
- But: EUWA, Schedule 1:
paragraph 2, “No general principle of EU law is part of domestic law...if it was not recognised as a general principle of EU law...[by the CJEU in a pre-IP completion day case]...”

VAT: “retained general principles of EU law” (2)

- EUWA, Schedule 1, paragraph 3:

“(1) There is no right of action in domestic law...based on a failure to comply with any of the general principles of EU law.

(2) No court or tribunal...may, on or after IP completion day—
(a) disapply or quash any enactment or other rule of law, or

...

because it is incompatible with any of the general principles of EU law.”

VAT: “retained general principles of EU law” (3)

- Fiscal neutrality
- Effectiveness
- Abuse (and see section 42(4) TCBTA).

VAT- Northern Ireland

- Northern Ireland Protocol, Article 8 and Annex 3. Northern Ireland to maintain alignment with EU VAT rules concerning goods.
- The UK's approach to the Northern Ireland Protocol (27 May 2020)

See <https://www.gov.uk/government/publications/the-uks-approach-to-the-northern-ireland-protocol/the-uks-approach-to-the-northern-ireland-protocol>

- European Commission, Task Force for Relations with the United Kingdom, Technical note on the implementation of the Protocol on Ireland/Northern Ireland (30 April 2020)

See https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/20200430_note_protocol_ie_ni.pdf

- Guidance on moving goods into/out of/through Northern Ireland from 1 January 2021

<https://www.gov.uk/guidance/moving-goods-into-out-of-or-through-northern-ireland-from-1-january-2021>

Tax Implications of Brexit

- In-depth analysis of the tax ramifications of Brexit including State Aid, VAT and Customs and Excise requirements, as well as cross-border reorganisations and transfers of residence, in both the UK and EU Member States.
- Pre-order this title at: www.bloomsburyprofessional.com and use **discount code: TIOBBB10 for a 10% discount** (valid until 02.11.20).

DIRECT TAXES (1)

- Mainly competence of Member States;
- Some directives where rights may arise under s 4(2) UKWA if recognised: e.g.:
 1. Directive 2009/133/EC mergers between Member States;
 2. Directive 2011/96/EU on parent companies and subsidiaries of different Member States;
- There have been many challenges to tax provisions relying on the fundamental Treaty freedoms where rights may arise under s 4(1) UKWA.
 1. equal treatment (art 18),
 2. freedom of establishment (arts 49-55),

DIRECT TAXES (1A)

3. freedom to provide services (arts 56-62)
4. freedom to move capital (arts 63-66). The freedom to move capital is significant because it extends to third countries subject to the standstill provisions in art 64.

DIRECT TAXES (2)

- The Freedom of Establishment and Free Movement of Services (EU Exit) regulations 2019 (SI 2019/1401)). These regulations state that the freedoms of establishment and to provide services cease to be recognised and available as at IP Completion Day. Does this “impose or increase taxation” for the purposes of s 8(7) EUWA?
- Note freedom to move capital currently remains.

Q&A

Jeremy and Barbara will now try to answer your questions.

Quinlan Windle is moderating.

PUMP COURT
TAX CHAMBERS

Thank you for attending our webinar.

SEPTEMBER 2020