The Retained EU Law (Revocation and Reform) Act 2023: a significant diminishment

International Tax | Management of taxes | Indirect Tax

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The Retained EU Law (Revocation and Reform) Act 2023, which has just been enacted, will significantly diminish the relevance of EU law.

In February 2021, I wrote a *Tax Adviser* article, 'EU withdrawal a half-hearted separation' (see tinyurl.com/2jzktd8y), which sought to analyse the impact of the partial snapshot of EU law enacted by the European Union (Withdrawal) Act 2018 ('the 2018 Act'). Since then, there have been court decisions that have clarified some of the consequences of the 2018 Act. Even more significantly, the Retained EU Law (Revocation and Reform) Act 2023 ('the 2023 Act') has just been enacted.

The 2023 Act

The 2023 Act will significantly diminish the relevance of EU law.

Under the 2018 Act, section 4 preserves the ability to rely on EU Treaty rights and rights arising from directives, provided they are of a 'kind recognised by the European Court or any court of tribunal of the United Kingdom' on 31 December 2000. However, as a result of section 2 of the 2023 Act, this will cease to apply after 31 December 2023.

Section 3 of the 2023 Act also abolishes the principle of the supremacy of EU law and section 4 abolishes the general principles of EU law from 31 December 2023.

Paragraphs 87-90 of the Explanatory Notes to the Bill in the House of Lords indicate that these charges are also intended to abolish requirements to adopt a muscular conforming interpretation, which in the past has resulted in legislation being construed in a conforming manner even when this did not accord with a natural reading of the UK legislation.

So, the European Union origins of legislation will just be relevant as a contextual and purposive aid to construction.

Impact on direct taxes

As a result of these changes, EU law is unlikely to have any material significance in direct tax after 31 December 2023. This probably extends to the transfer of asset provisions, where Income Tax Act 2007 s 742A provides an explicit statutory EU defence. Despite this statutory recognition, it is difficult to see how, after the 2023 changes come into force, there can be a 'contravention of a relevant treaty provision', which is a condition to this EU defence. The UK will no longer be a party to the relevant treaties and there will then be no legislation, in the form of section 4 of the 2018 Act, seeking to maintain the relevant rights as a matter of domestic law.

Unless fresh legislative action is taken, it will also impact on stamp duty reserve tax and the ability to rely on *HSBC v HMRC* (Case C-569/07) to contend that charges on issue are contrary to EU law.

Impact on indirect taxes

The repeal of section 4 of the 2018 Act means that it will no longer be possible to rely on the VAT directives to override provisions of UK legislation. However, the Value Added Tax Act (VATA) 1994 in its current form remains retained EU law or, as it will now be called, 'Assimilated Law'. The directive will therefore remain an aid to construction, although the Explanatory Notes suggest that the muscular principles of conforming interpretation will no longer apply.

Impact on UK courts

The 2023 Act clearly envisages that former judgments of the Court of Justice on the VAT directive may remain binding on lower courts. However, the general principles of EU law will no longer be part of UK law and the principles of conforming interpretation will cease to apply. This will bring into question whether past decisions that have relied on those principles remain binding on the tax tribunals.

An example of a case whose status may be brought into question is *HMRC v Axa UK plc* [2012] STC 754. In that case, the Court of Appeal considered that a conforming construction of Item 1 of Group 5 Schedule 9 VATA 1994 meant that the Group 1 should be subject to an implied exclusion for debt collection services. It must be very moot whether this will remain good law after 31 December 2023.

The 2023 Act also seeks to give higher UK courts a greater discretion to depart from decisions of the Court of Justice. Section 6 of the 2023 Act amends section 6 of the 2018 Act to make it clear that 'a relevant court of appeal is not bound by any retained EU case law' except when there is binding domestic case law.

The new section 6(5) of the 2018 Act, as inserted by the 2023 Act, also makes it clear that, when deciding whether to apply EU case law, regard is to be paid to 'any changes of circumstances which are relevant to the retained EU law' and also 'the extent to which the retained EU case law restricts the proper development of domestic law'. A court is likely to consider that these considerations are, in any event, relevant when deciding whether to follow decisions of the Court of Justice under section 6 of the 2018 Act prior to its amendment by the 2023 Act.

An example of a case where changed circumstances may mean that it is not appropriate to follow a judgment of the Court of Justice is provided by *Danske Bank v Skatteverket* (Case C-812/19), concerned with the VAT grouping. The court made comments suggesting that it is only fixed establishments within a member state that can form part of a VAT group. The court, at paragraph 33, considered that any national VAT groupings of a member state should 'where appropriate' be recognised by other member states. However, similar policy considerations no longer apply in the United Kingdom because Brexit means that there is no need to recognise VAT groupings in other countries. So different policy considerations now apply in the United Kingdom, where there is no similar need to adopt the restrictive approach applied by the Court of Justice – which, in any event, is not consistent with VATA 1994 s 43(2A), which clearly assumes that non-UK fixed establishments of a group member also form part of a UK VAT group.

Impact on HMRC

These changes will also impact upon HMRC. HMRC will equally be unable to rely on a muscular conforming interpretation of the VATA 1994.

When it was pointed out that the provisions of the 2018 Act might impact on HMRC's ability to rely on the principles of abuse of rights, specific provisions were enacted in Taxation (Cross-border Trade) Act 2018 s 42(4) and s 42(4A) confirming the continued application of the abuse principle. However, it must be doubtful whether those provisions will continue to have any effect when the 2023 Act comes into force, since the 2023 Act is later legislation that explicitly states that 'no general principle of EU law is part of domestic law'.

The arguments for contending that there has been an implied repeal are probably reinforced by the fact that s 42(4) purports to apply as 'one of the consequences of' the 2018 Act and s 42(4A) also purports to apply 'accordingly', although the wording of s 42(4A) also refers to the principles applying to 'any matter relating to VAT' and the addition of that subsection probably only makes sense on the basis that it was intended to have a wider effect.

However, the cessation of the abuse principle may be of limited comfort to tax avoiders if it makes the courts more receptive to challenges under the *Ramsa*y principle.

New reference procedures are also introduced by inserted sections 6A to 6C of the 2018 Act, so higher courts can more speedily determine whether prior EU decisions should be followed. A reference can be made under section 6A when the lower court is bound by retained case law and the issue is one of general public importance. However, in some cases, it could be contended that the first condition for a reference is not satisfied because the lower court is , in any event, no longer bound by a prior decision because the 2023 legislation has changed the legal context by removing any requirement for a conforming interpretation. It would be unfortunate if too literal a construction of the 2023 Act ousted a lower court's jurisdiction to make a reference for this reason.

The position under the 2018 Act

The 2018 Act will continue to largely govern the extent to which reliance can be placed on EU law until 31 December 2023. Since I wrote my earlier article, there have been cases that have shed further light on some of the issues arising from the 2018 Act.

Paragraph 39 of Schedule 8 of the 2018 Act suggests that some of the restrictions on the ability to rely on the general principles of EU law apply retrospectively. Paragraph 39(4) of Schedule 8 prevents any retrospectivity in relation to conduct giving rise 'to any criminal liability'. To ensure that this provision is construed in a manner that conforms to the European Convention on Human Rights, this exclusion probably extends to claims for civil penalties that are criminal for the purposes of that Convention. This may be significant with requirement to correct penalties, which may be contrary to EU law.

As anticipated in my earlier article, the significance of this point has also been significantly limited by Article 89 of the Withdrawal Agreement and section 7A of the 2018 Act. Article 89 of the Withdrawal Agreement provides for judgments of the European Court delivered prior to 31 December 2000 to have binding force. This is also extended to subsequent judgments of the court on references from the United Kingdom. Lord Lloyd-Jones, at para 8, in *Fratila v Secretary of State for Work and Pensions* [2021] UKSC 53, and Asplin LJ, at paras 63-66, in *Dawson's (Wales) Ltd v HMRC* [2023] EWCA Civ 332 accepted that these provisions preserve the binding force of judgments of the Court of Justice during periods when the UK was in the Union and during the transitional period.

The extent to which paragraph 3 of Schedule 1 of the 2018 Act prevents UK legislation being disapplied because it is contrary to the general principles of EU law has also been considered in *Adferiad Recovery Ltd v Aneurin Bevan University Health Board* [2021] EWHC 3049, *Secretary of State for Work and Pensions v Beattie* [2022] EAT 163 and *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353. All three decisions accept that the effect of that paragraph may be to preclude claims based on general principles that were possible prior to 31 December 2020. However, Judge Keyser QC, in *Adferiad Recovery Ltd* at para 120, accepted that retained general principles remained relevant when interpreting retained EU law.

None of these cases focused on paragraph 39(6) of Schedule 8 of the 2018 Act, which states that paragraph 3(2) of Schedule 1 of the 2018 Act does not apply to the necessary consequences of any court decision given before 31 December 2020. That is clearly intended to give some continued effect to the direct consequences of prior decided cases. However, its impact is limited by the fact that it just overrides paragraph 3(2), which precludes the disapplication of legislation, and not paragraph 3(1), which precludes claims based on a failure to comply with EU law.

In many cases, general principles are in substance relied upon as a defence to claims by HMRC, so it can hopefully be contended that paragraph 3(1) should not be in issue for that reason. A possible helpful analogy can be drawn with *King v Walden* [2001] STC 822, where Jacob J, at paras 57-71, accepted my arguments that tax appeals were instigated by HMRC for the purposes of the Human Right Act 1988 s 22(4).

HMRC is already contending that paragraph 3 of Schedule 1 of the 2018 Act precludes claims for restitution based exclusively on EU rights (see *Revenue and Customs Brief 4/2022*). In such cases, a taxpayer is clearly making a claim. However, the fact that paragraph 39(7) contains special rules for *Francovich* claims may possibly point to a distinction between ‘claims’ based on failures to comply with general principles and an entitlement to a remedy as a matter of EU law that arises as a result of a claim that arises for some other reason; for example, an overpayment of VAT. Even if such arguments are accepted, such claims will clearly be precluded by the 2023 Act changes.

In *R (o.a.o SS Consulting Services (UK) Ltd v HMRC* [2021] EWHC 3174 (Admin), Knowles J, at para 16, also accepted that s 42(4) and s 42(4A) of the Taxation (Cross?border Trade) Act 2018 preserved the abuse and *Halifax* principles. However, his comments do not appear to be central to his reasoning. While, as I have observed, s 42(4A) should almost certainly be construed more broadly, neither s 42(4) nor s 42(4A) are entirely clearly drafted because some of the wording suggests that they are merely declaratory of the consequences of the 2018 Act, which in fact limits the extent to which reliance can be placed on general principles of European law.

As I have observed above, the continued relevance of those sub-sections also becomes highly questionable when the 2023 Act comes into force.

Another possible area of uncertainty is how far s 4(2) of the 2018 Act enables individuals to continue to rely on the direct effect of the directive because it requires the rights to be of a ‘kind recognised by the European Court or any court of tribunal of the United Kingdom’ on 31 December 2020. This then raises questions as to how specific the recognition needs to be.

As far as I am aware, there have only been two related cases that have considered this issue: *Harris v The Environment Agency* [2022] EWHC 2264 (Admin) and *C G Fry & Son Limited v Secretary of State for Levelling Up Housing and Communities* [2023] EWHC 1622 (Admin). Both cases concerned the Habitat Directive. In the *Harris* case, Johnson J, at paragraph 91, helpfully observed that s 4(2) does not require a prior decision on the direct effect of the provision; instead it ‘only requires that it is “of a kind” that has been held to have direct effect’. Despite the absence of any prior decision expressly stating that the relevant provisions had direct effect,

both cases accepted that the provisions had direct effect.

Concluding comments

The idea of enacting a snapshot of EU law in the 2018 Act has a lot to commend it. Unfortunately, its half-hearted nature and, in particular, the way it limits the reliance that can be placed upon the general principles of EU law, creates some uncertainty. With VAT, that uncertainty will significantly increase when the 2023 Act comes into force.

The comments made in this article are all subject to any changes that might be made by either future primary legislation or by regulations made pursuant to ss 11-16 of the 2023 Act.