Our changed approach to EU law: the impact on VAT

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What impact will the change in our approach to EU law really have on VAT?

The Retained EU Law (Revocation and Reform) Act 2023 received Royal Assent on 29 June 2023. When the Bill was introduced to Parliament in September 2022, it promised 'to put the UK statute book on a more sustainable footing … by ending the special status of retained EU law'. Indeed, it was conceived as the last of a trilogy of pieces of legislation – following the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020 – that would lead to the potential divergence of domestic law from EU law following the UK's departure from the EU.

Some of the proposals within the original Bill were startling. For instance, as initially drafted, it would have repealed from 31 December 2023 any and all retained EU legislation that was not otherwise saved by government ministers. And the government's retained EU Law Dashboard (see tinyurl.com/3ehrjvse) listed numerous key pieces of VAT legislation that would, in theory, have been repealed: the 1987 Order which governs the operations of the Tour Operators Margin Scheme; the 1992 Order which blocks the recovery of input tax on certain supplies; and even the VAT Regulations themselves.

What does it mean for VAT?

Having undergone significant amendment, however, the Act passed by Parliament is very different from that original draft. So what does it mean for VAT, for businesses and practitioners?

First and foremost, the Act reversed the Bill's position on repealing retained EU law. Rather than automatically repealing all such legislation unless it is specifically saved, only the retained EU law that is specifically cited in Schedule 1 of the Act will be repealed from 31 December 2023.

Though 'relevant national authorities' (s 1(4)) may seek to save specific pieces of legislation until 31 October, Schedule 1 already lists numerous pieces of tax-related retained EU law that will be repealed at the end of the year. The vast majority, however, concern the exchange of tax information with overseas British territories. Only two – regarding the taxation of motor fuel – appear to impinge upon indirect taxes. Even so, the Act has several other implications for the interaction of domestic law and EU law in the sphere of VAT.

Section 2, for instance, repeals the saving provisions enacted by the Withdrawal Act 2018, meaning that any and all EU law rights and liabilities that have not been recognised in domestic law will be extinguished at the end of

the year. Given the four year time limit which applies to so much of the administration of VAT, one might wonder whether this will affect businesses beyond eliminating the retained EU law rights that may have accrued during 2020 (at the end of which, the Brexit implementation period expired).

Sections 3 and 4 provide for the abolition of the supremacy of EU law and the general principles of EU law, respectively. And whilst this might appear to represent a drastic change when interpreting and applying the law as it pertains to VAT – the conforming constructions and the *Marleasing* principle! – the change will be less dramatic in practice.

This is because the principles of effectiveness, proportionality and subsidiarity, for instance, are concerned primarily with the interaction of domestic law with EU law, which has not been unambiguously supreme since 2020. Accordingly, the accounting periods in which EU law *was* supreme have been gradually falling out of time in any event.

The principle of fiscal neutrality – that is, the principle that supplies which are identical or sufficiently similar from the perspective of a consumer should be taxed in the same way – is more important; a cornerstone of the VAT system. However, the Supreme Court has already recognised fiscal neutrality as underpinning 'domestic law jurisprudence in relation to VAT' (*DCM Optical Holdings* [2022] UKSC 26 at [34]). In this way, the Supreme Court has 'saved' fiscal neutrality from the abolitionist clauses of the Act.

As for the remaining general principles of EU law, such as legal certainty and the protection of legitimate expectation, English common law has long recognised comparable if not identical rights. The standard judgment on legitimate expectation, for instance, is that of the Court of Appeal in *R (oao Coughlan & Ors) v North & East Devon Health Authority* [1999] EWCA Civ 1871, as endorsed by the Supreme Court in *Finucane* [2019] UKSC 7.

Retained EU case law

Turning to the status of retained EU case law – and it should be noted that anything heretofore referred to as 'retained' will from 1 January 2024 be known instead as 'assimilated' law – the Act does not disturb the present practice, whereby the Court of Appeal in England and Wales may depart from retained EU case law (if, per the *Bristol Aeroplane* dictum, it has not already endorsed it) and the Supreme Court is not bound by any such retained EU case law.

It appears, however, that Section 6 of the Act has amended the tests that apply to decisions on whether to depart from retained EU case law. From 1 January 2024, the Court of Appeal will be obliged to consider: 'the fact that decisions of a foreign court are not (unless otherwise provided) binding'; 'any changes of circumstances which are relevant to the retained EU case law'; and 'the extent to which the retained EU case law restricts the proper development of domestic law'.

As for the Supreme Court, from 1 January 2024 it will be empowered to depart from its own retained domestic case law – i.e. previous Supreme Court and House of Lords judgments which applied EU law – if it considers it right to do so, having regard to 'the extent to which the retained domestic case law is determined or influenced by retained EU case law from which the court has departed or would depart', 'any changes of circumstances which are relevant to the retained domestic case law', and 'the extent to which the retained domestic case law restricts the proper development of domestic law'.

It would appear, therefore, that the anticipated sunset of retained EU law, retained EU case law, and the general principles of EU law will be considerably less dramatic than the draft versions of this legislation had suggested, and that the VAT system should continue to operate much as it has done since the expiration of the Brexit implementation period. How all this plays out in practice, of course, remains to be seen.

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