KEY POINTS

- The Financial Services and Markets Bill 2022-23 (FSM Bill) furthers the process of revisiting and potentially revising the existing EU-derived legal framework for financial services that was inherited at Brexit.
- The aim is to transfer this "retained EU law" to the regulators' own rules, or to legislation, as appropriate.
- The potentially broad reach of repeal is indicated in Pt 5 of Sch 1 which revokes any EU legislation and UK subordinate legislation implementing EU legislation not previously mentioned in the schedule "relating to" financial services or markets.
- In principle, revocation should not be applied retrospectively unless the clearest of statutory intention is demonstrated.

Spotlight

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Financial Services and Markets Bill: from retained EU law, to revocation and restatement

The Financial Services and Markets Bill 2022-23 (FSM Bill) makes way for potentially sweeping reforms to the UK's post-Brexit financial services regulatory framework.

In this Spotlight article, Professor Suzanne Rab discusses the revocation of retained EU law and what this could mean for the future landscape of UK financial services law.

Except where otherwise stated, this article is based on the text of the FSM Bill published on 20 July 2022 and the explanatory notes for the Financial Services and Markets Bill 2022-2023 (FSM Bill).

INTRODUCTION

The FSM Bill portends to make significant reforms to the regulation of the UK financial services sector. Many of its measures are intended to address issues arising from the UK's departure from the EU.

Some EU law has now taken on a new legal significance in the UK notwithstanding Brexit. The EU (Withdrawal) Act 2018 (EU(W) A 18) and associated legislation already makes detailed provision about the retention, status, and modification of EU law following Brexit in the form of a new legal concept and referred to in those instruments as "retained EU law". These arrangements also make provision for the supremacy of EU law in certain tightly defined circumstances even after the end of the transitional arrangements under the UK-EU Withdrawal Agreement (Withdrawal Agreement) ending at 11pm on 31 December 2020 (IP completion day).

The UK's departure from the EU left a trail of instruments encompassing virtually every area of financial services activity. These include regulations such as CRR, EMIR, MiFIR and MAR as well as directives including CRD and MiFiD and their national implementing provisions. There was a need to provide for legal continuity until the dossier-by-dossier assessment could take place to consider the continued utility of these measures. The decision was taken to "onshore" or domesticise them as an interim measure in the form of retained EU law.

The time has now come to begin the process of revisiting and potentially revising the existing EU-derived legal framework. The FSM Bill is intended to create the legislative structure to provide a mechanism to allow for a more domesticised and sustainable approach. This article considers the framework for the revocation, restatement and replacement of financial services retained EU law.

RETAINED EU LAW: A NEW LEGAL CONCEPT

Below is a summary of the core components of retained EU law and how we got to here.

Structure

The EU(WA) 18 inaugurates a new chapter in UK constitutional law with the genesis of a new legal concept "retained EU law". Sections 2-7 provide for major exceptions to the repeal of the European Communities Act 1972 (ECA 72), so as to capture in legislative formaldehyde most of the EU law in force in the UK at IP completion day.

There are four categories of retained EU law comprising: (i) EU-derived domestic legislation (s 2); (ii) direct EU legislation (s 3); (iii) certain rights under s 2(1) ECA 72; and (iv) retained case law and retained general principles of EU law. These are subject to general exceptions in s 5 and Sch 1 and are briefly mapped out below.

EU-derived domestic legislation

Section 2 covers "any enactment" either: (i) made under; or (ii) made for a purpose mentioned in s 2 of the ECA 72. It also covers "any enactment" otherwise relating to EU law. The effect is to preserve the status of EU law in force and applicable in the UK at IP completion day, subject to ss 8 and 9. This embraces both primary and secondary legislation, whether or not made under ECA 72.

Direct EU legislation

Section 3 covers "direct EU legislation" which covers EU legislation which has direct effect in the UK law without the need for UK implementing legislation. The main examples under this heading are EU regulations, decisions, tertiary legislation and the annexes and protocols to the EEA Agreement. The extent to which the recitals in that legislation will serve as an aid to interpretation where the onshored version has not been amended remains to be tested.

A further quirk is that these provisions cover those in force as at IP completion day but where the effect may not crystallise until a later date. It is only where the provision is "stated to apply" from a time that falls on or after IP completion day, that the provision would not fall within the ambit of the section. The financial services sector provides an example in Regulation

(EU) 2019/2088 on disclosures related to sustainability. This provides for staggered application with the majority of its provisions being applicable after IP completion day so out of scope of retained EU law.

The resulting position is a legal patchwork quilt where the provisions applicable before IP completion day are in scope of retained EU law by way of derogation, whereas the remainder are jettisoned.

Rights powers etc

Section 4 provides for retention of "any rights, powers, liabilities, obligations, restrictions, remedies and procedures" that are recognised before IP completion day by virtue of s 2(1) of the ECA 72. This brings in rights under the Treaties and directly effective provisions of EU directives which confer rights without the need for domestic implementation. However, relevant rights under EU directives will only be retained where they are "of a kind" recognised by the Court of Justice or "any court or tribunal" in the UK in a case decided before IP completion day. The practical effect of this is likely to be a fertile source of debate and challenge.

Retained Case Law and Retained General Principles of EU Law

A fourth category includes principles laid down by, and decisions of, the Court of Justice in relation to the above three categories which have effect in EU law before IP completion day, except where excluded by the EU(W)A 18. This category also covers the principles and decisions of domestic courts and tribunals relating to the above three categories. On first inspection this means that the rich body of EU law jurisprudence and domestic law derived jurisprudence that has built up over the decades will not be assigned to legal history; at least not immediately. However, the question of interpretation of retained EU law is likely to be the next battle ground for litigation.

RETAINED EU LAW: FINANCIAL SERVICES CONTEXT

The task of unpicking the existing landscape of retained EU law as it relates to financial services is not straightforward.

First, there is the sheer volume of legislation. The task of achieving legal continuity was truly monolithic when viewed against the 80,000 or so amendments between 2018 to 2020 that were made to in excess of 600 pieces of domestic secondary legislation, which modified retained EU law. Many such amendments were of a technical nature to ensure that retained EU would operate effectively in a domestic context. The financial services sector is one of the areas of law heavily influenced by EU legislation with the government's dashboard indicating some 365 pieces of retained legislation that relate to the sector.

Second, there is the qualitative assessment of deciding whether the corpus of retained EU law should in fact be preserved, whether it is duplicative of existing UK legislation, whether it makes sense now that the UK has exited the single market or whether it is otherwise not thought appropriate.

The conversion of EU law into instruments that were capable of continuing in the immediate aftermath of Brexit was always intended to be a temporary stop gap to ensure that the law operated effectively in a domestic context.

Furthermore, the EU(W)A 18 also provided for aids to statutory interpretation to ensure that the difference between the approach to cross-references in EU legislation and in domestic legislation reflective of the different legal traditions of those systems did not create problems post Brexit. At risk of over-generalisation, as a matter of EU law cross-references in legal instruments are presumed to be dynamic or ambulatory in the sense that they walk forward or change on a continuing basis as amendments are made to those provisions over time. There is no such domestic law presumption for cross-references to EU legislation in domestic legislation. There was therefore an issue with non-ambulatory references to EU legislation which were not up to date.

An example may serve to illustrate. The Financial Conduct Authority had a duty to consult on guidance under the Short Selling Regulation pursuant to s 139A(4) of the Financial Services and Markets Act 2000 (FSMA). That reference was likely to be interpreted as non-ambulatory, which meant that the duty to consult would not apply to provisions of the regulation which were added after the date of the making of the statutory reference. This presented an issue that without a specific fix or rules of interpretation the duty to consult would apply only to guidance about the EU version of the regulation, and as it applies to EU27 firms. The analogue duty to consult would not apply to the guidance on the retained EU law version of the Short Selling Regulation, as applicable to UK firms. The EU(W)A 18 therefore reflects specific provisions on ambulatory and non-ambulatory references to aid with these interpretative intricacies.

These examples serve to illustrate the complexity of the domestic legal framework that has been inherited. Moreover, these measures were only aimed to preserve the status quo and did not involve the more fundamental normative design choices over what is to be retained on a more sustainable basis and which is now the exercise contemplated in the FSM Bill.

REVOCATION OF EU LAW IN OUTLINE

The FSM Bill will establish the legislative framework for the revocation of all retained EU law relating to financial services and a transition to new requirements under the FSMA regime. The Treasury's aim is to transfer this retained EU law to the regulators' own rules, or to legislation, as appropriate. The regulators' own rules are not within the scope of the power of revocation as they do not require a primary legislative basis to change their own rules. The FSM Bill's measures relating to the revocation of retained EU law are set out at cls 1 to 7 of the Bill and mainly Sch 1. While the changes foreshadowed are potentially significant, from consultations published so far, including the Wholesale Markets Review, it appears that the emphasis will be on tailoring and, in some cases, replicating the existing regulatory framework rather than substantial regulatory divergence overnight. That said, there are a number of uncertainties.

Scope of revocation

Schedule 1 sets out a list of the legislative instruments that will be repealed under the framework pursuant to s 1. These include all the main onshored EU regulations, statutory instruments that reflect the implementation of EU law, provisions made under EU directives and specified provisions in FSMA.

The potentially broad reach of repeal is indicated in Pt 5 of Sch 1 which revokes any EU legislation and UK subordinate legislation implementing EU legislation not previously

mentioned in the schedule "relating to" financial services or markets. Such EU-derived legislation is to be taken as "relating to" financial services or markets if its purpose, or one of its main purposes, is for or in connection with the imposition of requirements on the provision of financial services or the operation of financial markets or exchanges.

Depending on how this provision is interpreted, it could give rise to interesting questions as to the status of retained EU law that has a bearing on financial services, for example in the sphere of consumer protection.

There are a number of EU measures that deal with consumer protection in the financial services sector. These include Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products and Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features. These instruments are already listed in Sch 1 as one might expect. However, the fate of more horizontal (sector-neutral) measures that could be treated as "relating to" financial services but which have a broader application is less clear. Directive 2002/65/EC concerning the distance marketing of consumer financial services is specifically mentioned in Sch 1. Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market is not. The latter could potentially fall foul of the Sch 1 Pt 5 revocation net depending on how wide that is cast.

Timing

Clause 1(3) provides that "any rights, powers, liabilities, obligations, restrictions, remedies and procedures which – (a) continue to be recognised and available in domestic law by virtue of section 4 of the EU(W)A 18, and (b) are derived from any provision of legislation referred to in Schedule 1, cease to be so recognised and available in domestic law".

The Treasury has stated that it does not expect to commence the revocation of individual parts of Schedule 1 unless the regulators have drafted and consulted on rules that are ready to be enforced. It expects that it will take a number of years to complete the process of unravelling retained EU law and this will be done by statutory instrument. While this appears to envisage that there will not be a hiatus between revocation and replacement rules, it is not stated on the face of the legislation whether cl 1(3) takes effect at the end of the revocation and rule-making process or earlier.

Accrued rights and obligations and ongoing proceedings

Questions have been asked in the legal community about what cl 1(3) means for accrued rights and obligations.

Section 16 of the Interpretation Act 1978 is critical to understanding accrued EU law rights. That section provides that where an Act repeals an earlier enactment, "unless the contrary intention appears", the repeal does not (amongst other things): (i) "affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment"; (ii) "affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment"; or (iii) "affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment".

In such circumstances, "any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed".

In brief, unless the contrary intention appears in the repealing legislation, a person can continue to enforce an accrued right even after the repeal. At first blush, this appears to provide some comfort that cl 1(3) will not have the effect of depriving parties of accrued rights and obligations emanating from EU-derived legislation. This makes sense against the expectation that any replacement rules will not, for the foreseeable future at least, introduce radically different regimes. However, this still leaves some uncertainty over when cl 1(3) takes effect as noted above.

A related issue concerns the status of proceedings and investigations that are underway at the point cl 1(3) takes effect such as in relation to ongoing enforcement action. Experience for example in the area of competition law investigations which straddled IP completion day suggests that it would be preferable to put the matter straight by legislating on which body of law governs these cross-over cases.

For now, at least, the following broad rules of thumb seem sensible. First, accrued retained EU law rights are still generally enforceable in domestic law after IP completion day and following revocation unless there is a provision expressing the contrary intention for the purposes of the Interpretation Act 1978, which removes or alters (retrospectively) that right. Second, revocation should not be applied retrospectively unless the clearest of statutory intention is demonstrated. Finally, to work out the governing law applicable to any fact pattern, it is essential to consider the date of the underlying facts. Liability for an unauthorised payment transaction where the underlying facts pre-dated the revocation of the governing legal instrument and its replacement with new rules should continue to attract sanction and remedy.

Preservation of revoked EU law

Clause 1(5) provides that the Treasury may by regulations provide for specified subordinate legislation, or for subordinate legislation of a specified description, otherwise falling within Pt 5 of Sch 1, not to fall within that Part. Clause 72(5) further provides that the Treasury may by regulations make transitional or saving provision in connection with the coming into force of any provision of this Act.

Section 4 provides a mechanism to restate retained EU law. The power under cl 72(5) to make saving provision in connection with the revocation of any legislation referred to in Sch 1 includes power to restate that legislation (as it has effect immediately before its revocation).

It appears that the power under cl 72(5) is designed to address only saving provisions in connection with the coming into force of the FSM Bill. This would seem similar to the mechanism used in relation to the ECA 72 during the period up to IP completion day which post-dated the UK's exit from the UK at the end of January 2020. A legal wrinkle arose as the Withdrawal Agreement provided for the continued application of EU law for the duration of the transition or implementation period. With Lazarus-type effect, the ECA 72 was repealed and then brought back to life, with some modifications, until IP completion day. The EU(W)A 18 was not drafted to deal with this transitional issue. Rather than change the definition of "exit day" the European Union (Withdrawal Agreement) Act 2020 amended the EU(W)A 18 and saved

Spotlight

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certain parts of the repealed ECA 72 up to IP completion day. This ensured legal continuity by maintaining, so far as possible, the corpus of EU law that applied in the UK throughout the IP completion period and illustrates how saving provisions can apply in practice.

Transitional measures

Clauses 2 and 3 allow for transitional measures between the passing of the FSM Bill and revocation. Schedule 2 amends particular legislation referred to in Sch 1 in relation to the transitional period including the MiFIR, EMIR and the Securitisation Regulation. For these purposes "the transitional period", in relation to any legislation, means the period ending with the revocation of that legislation. The amendments in Sch 2 do not restrict the power in s 3 to modify legislation as amended by that Schedule. There are a number of constraints listed in s 3(2) where the power of modification is exercisable only where the Treasury considers it is necessary or desirable for or in connection with one or more of the stated purposes including: (i) protecting and enhancing the integrity or stability of the financial system operating in the UK; (ii) promoting the safety and soundness of persons providing financial services; (iii) promoting effectiveness in the functioning of financial markets, amongst others.

Effect on other legislative provisions

One of the peculiarities of English law statutory development is the phenomenon of iterative legislative amendment to primary enactments through successive legislation yet without a restatement of the amended text. As a result, it can be complex to piece together the current legal position at any given time.

Clause 1(4) seeks to achieve overall coherence in the legislative framework by providing that the revocation of any legislation in accordance with this provision does not affect the continued effect of any amendments to other legislation made by that revoked legislation (as those amendments had effect immediately before the revocation). A case in point is the specified investments and activities set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (RAO). The RAO is part of the architecture of the UK financial services regulatory regime which establishes if a firm is carrying on a regulated activity as, if it is, it will need to be authorised by the FCA or the PRA. It is not expected that the RAO will be revoked but it is likely to require some close attention to ensure that it works holistically within the new and evolving regulatory regime.

Notwithstanding the principle enshrined in cl 1(4) to seek to avoid revocation by the back-door, it needs to be read in conjunction with cl 1(3). If what is envisaged is a staggered process whereby revocation does not take effect until replacement rules are operative it will be important to ensure that any existing rights and obligations in related legislation (which were not intended to be revoked) are not left stranded because of incomplete amendments to other instruments but on whose efficacy they depend.

This risk of an unintended mis-match between the stated intention and the legal mechanism needed for legal continuity is not hypothetical. As an historic aside, s 2(2) ECA 72 did not enable ambulatory references to EU legislation as noted above. This is why para (1A) of Sch 2 to the ECA 72 was enacted, to enable such ambulatory references. However, the historic position was that if para (1A) was not cited in the preamble to subordinate legislation, it could not be relied upon. Strikingly, in most cases it was not so cited. This presented a risk that cross-references in regulations made under s 2(2) ECA 72 which did not also cite para (1A) would be interpreted as non-ambulatory. The rest is history, and any anomalies were probably cured through purposive interpretation. However, in a purely domestic context there are limits to such a purposive approach. As a result, there may need to be express provision on a case-by-case basis to ensure that revocation does not go further than intended.

It is hoped, therefore, that as each EU-derived instrument is revoked, restated or modified, the related "family" instruments are reviewed for overall coherence. The UK authorities tasked with similar exercises in the context of Brexit have shown great agility in delivering the resulting body of legislation that has allowed for a period of continuity. The task ahead is less time pressured. But it is rendered more complex by what could be a "stop start" process on a more staggered timeline. Unless there is clarity on the effective date of cl 1(3) this could leave some orphan provisions if the choreography of revocation and replacement is not seamless.

CONCLUSION

Whilst the concept of retained EU law as a snapshot of EU law as it stood at IP completion day is alluring in its simplicity, this label conceals a much more complex picture. EU law retained as at IP completion day is effectively on borrowed time with many exceptions and caveats.

At this stage of progress of the FSM Bill, it may be asked what key principles can be discerned to help navigate the years ahead. We are told this is not a case of wholescale jettison of the existing financial services rulebook. If one matter is certain, though, it is that the coming years will be characterised by at least some incremental development. The direction of travel is apparent, even if the end-point is not. Avid followers of the twists and turns on the passage of the EU(W)A 18, its amendment in the EU(W)A 20 and the multiple statutory instruments that the process spawned will appreciate a complex legal picture where there is no substitute for a detailed and granular assessment. Therefore, while most retained EU law may resemble its parent the two will necessarily diverge in some respects as they drift over time except where the Withdrawal Agreement and relevant separation agreement law provides to the contrary.

For the financial services sector the FSM Bill represents the next chapter in that evolutionary process. It can be anticipated that a fertile area of scrutiny will be in relation to the sequencing of cl 1(3) and the resulting regulatory rules as well as modifications to EU-derived law made using the powers conferred by cl 3.

The denouement of this process is perhaps hard to predict at this juncture. It will require firms and their advisors to keep a close watch on the forthcoming rounds of consultation on the FSM Bill itself and derived regulatory rules. ■

Further Reading:

- The tide has gone out: the structure of UK financial services legislation post-Brexit – Pt 5 (2021) 3 JIBFL 163.
- Wholesale Markets Review: an enhanced, tailor-made regime for UK markets (2021) 11 JIBFL 777.
- LexisPSL: Banking & Finance: News: FSM Bill sets out post-Brexit framework for UK financial services.