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How EU law survives (or not) in the UK post-Brexit: the Financial Services and Markets Bill and the 'Brexit Freedoms Bill'

Brexit raised a number of significant and unprecedented legal issues. One key issue was which laws of the European Union in force in the United Kingdom prior to Brexit should remain in force, and which should not. This was largely addressed in the European Union (Withdrawal) Act 2018 although principally in general terms – an exhaustive list of laws and statutory instruments was not a practical solution. Therefore, the practical consequences of Brexit will continue to be discovered for some years, in particular as the UK Parliament introduces new legislation such as the Financial Services and Markets Bill 2022-23 (the FSM Bill) and the Retained EU Law (Revocation and Reform) Bill 2022 dubbed the 'Brexit Freedoms Bill'.

The FSM Bill was laid before Parliament on 20 July 2022 and had a second reading on 7 September 2022[1]. The FSM Bill is intended 'to create the conditions for the United Kingdom to roll back or reform all European Union legislation for financial services that remains on [our] statute book'[2].

The FSM Bill's ambition is no less than assuring the place of London among the world's financial centres and acting on its divergence from the EU regulatory framework. The FSM Bill has been referred by some as a second 'Big Bang', by reference to the 1986 overhaul of the rules of the London Stock Exchange which kick-started the deregulation of the City of London. But the FSM Bill is more than that as a major piece of legislation aimed at reshaping the UK rule book post-Brexit i.e. to replace what has become known as retained EU law.

EU law ceased to apply in the UK[3] with effect from 11pm on 31 December 2020[4] (hereinafter, the IPCD). For practical reasons, some of the EU law in force in the UK immediately prior to the IPCD had to continue to apply, with amendments if necessary: this is the so-called 'retained EU law', including EU-derived UK legislation (such as legislation having implemented EU directives) and EU regulations[5]. The former was made to continue either unchanged or with self-evident changes designed to adapt to the new situation (e.g. removing the concept of 'passporting' of financial services or replacing references to EU supervisory institutions with references to their UK equivalent[6]), whereas the latter (regulations apply without transposition into national legislation) were either brought across into UK legislation where the Government wished them to continue to apply for the time being (such as MiFIR, the AIFMD Regulation and EMIR[7]) or simply dropped.

Nevertheless, retained EU law is a temporary solution intended to be replaced over time by way of (1) new specific legislation (and/ or statutory instruments) such as the FSM Bill: wide and varied in scope (from niche topics[8] to the overall reform of the UK's financial services industry framework[9]), but ultimately targeted to one industry. Or (2) all-encompassing laws, such as the Retained EU Law (Revocation and Reform) Bill 2022 introduced to Parliament on 22 September, designed to end the special legal status of all retained EU law by 31 December 2023 by giving the Government new secondary powers to amend, replace or repeal any retained EU law, and thereby dramatically reducing the amount of parliamentary time that would be required to introduce new sector-by-sector legislation. Inevitably, this will be at the cost of parliamentary review and might turn out to be at the cost of protective rights (employment, environment, etc.) in a possible rush for competitiveness (UK vs the world).

In any case, it is now apparent that the UK Government wishes the parenthesis of EU retained law to be closed as soon as possible.

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1. As of 23 September 2022, the FSM Bill was at Committee stage.
2. Richard Fuller, Economic Secretary to HM Treasury in Parliament on 7 September 2022.
3. With the notable exception of the provisions listed in the Northern Ireland Protocol to the EU (Withdrawal) Act 2018, principally by reason of the continued free movement of goods to and from NI.
4. The 'implementation period completion day' ending the transition period during which the UK continued to be subject to EU law.

5. EU retained law also includes certain general principles of EU law, case law and decisions.
6. The Financial Conduct Authority, the Prudential Regulation Authority, the Bank of England, etc.
7. The Markets in Financial Instruments Regulation, the Alternative Investment Fund Managers Directive Regulation and the European Market Infrastructure Regulation.
8. Such as the use of stable coins, or the designation of unregulated financial services providers as critical, or the expansion of the resolution regime to central counterparties in financial difficulties, to name but a few.
9. Of particular significance: the new powers to be granted to the Financial Conduct Authority, the Prudential Regulation Authority and the Bank of England.

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27 September 2022