

Sovereignty

- o EU law takes effect within the UK by operation of the European Communities Act 1972 and any other specific implementing legislation: see s. 18 of the European Union Act 2011 and Pham [2015] UKSC 15 at §80
- o The UK retains sovereignty both through Parliament but also as a matter of democratic oversight through elections and referenda and in its prerogative over fundamental issues such as foreign and security policy.
- o The scope of EU law remains limited by the terms of the EU Treaties and the principles of conferral and subsidiarity.
- o Outside that scope, UK law is unaffected by EU law – for example, UK education, health and criminal policy are very largely unaffected by EU law.
- o Within the scope of EU law, the principles of supremacy and direct applicability of EU law were well established before the UK joined the European Communities.
- o Although each of the Member States, including the UK, can be outvoted on certain measures by a ‘qualified majority’ of the other Member States, this is relatively rare and the UK has the right to challenge the legality of such measures before the ECJ.

UK and ECJ

- o The role of the ECJ as the guardian of the rule of law within the EU was established by the Treaty of Rome in 1957 and is reflected under UK law by s. 3 of the 1972 Act.
- o The principles of supremacy, direct applicability and the protection of fundamental rights and general principles of EU law were fully established before the UK joined the European Communities.
- o Issues of, e.g., national health and security policy are matters for the Member States subject only to a supervisory jurisdiction of the ECJ, and only where they interfere with rights conferred by EU law, in accordance with its constitutional role.
- o While the ECJ has exclusive jurisdiction as to the interpretation and validity of EU law, it is for the national courts to determine issues of fact in cases brought before them, including issues of proportionality in balancing the rights of individuals under EU law with issues of public policy.

Leaving the EU

- o The EU Treaties provide for a specific mechanism for a Member State to leave the EU. The UK would remain subject to that procedure after a vote to leave the EU.
- o In the absence of earlier agreement with the EU institutions and the remaining Member States, the UK would remain subject to EU law for at least 2 years while the terms of its departure from the EU were negotiated, including the provisions in respect of the jurisdiction of the ECJ and the role of the EU in relation to international trade.
- o In the event that a negotiated agreement was not reached within 2 years, the remaining Member States would determine the terms on which the UK left the EU.
- o Were the UK Parliament to amend the 1972 Act in a way that purported to derogate from EU law during the period before the UK left the EU, that would be a potentially serious breach of international law.

Charter of Fundamental Rights

- o The protection of fundamental rights as a general principle of EU law was established long before the UK joined the European Communities.
- o The ECHR was recognised as a source of such rights both in the case law of the ECJ and in the Treaty on European Union agreed at Maastricht in 1991.
- o The Charter of Fundamental Rights incorporated into the TFEU is a codification of such rights.
- o The Charter does not expand the scope of EU law.
- o The protocol to the Treaty of Lisbon in respect of the UK and Poland is not an 'opt-out' from the Charter – it simply reinforces the fact that the Charter (unlike the ECHR) is not an instrument of general application against the Member States but only applies within the scope of EU law.

Migration

- The free movement of persons, including visa-free travel within the European Communities, was established by 1964, long before the UK joined the European Communities.
- The UK has never joined the Schengen Agreement providing for passport-free travel between its signatories.
- The UK retains full control over its borders, including in respect of EU citizens and UK nationals.
- The UK can restrict entry to its territory on grounds of public health and public security, subject to the principle of proportionality.
- The Settlement Agreement contains agreed restrictions on the rights of non-UK EU nationals to claim in work benefits within the UK for a period of up to 9 years.
- A broader restriction on the rights of EU nationals to enter the UK would be a significant derogation from principles of the EU Treaties that were in place long before the UK joined the European Communities.
- For so long as it remains a member of the EU, the UK has a veto over new members of the EU and the terms on which such members are permitted to join.

WTO

- o The substantive scope of the rights conferred by the WTO is significantly narrower than the rules of the single market – in particular, the rules of the WTO do not establish either a customs union or the fundamental freedoms and protections against discrimination on grounds of nationality that are conferred on UK nationals and businesses by EU law.
- o The rights conferred by WTO law, unless they are recognised under EU law itself, do not confer individual rights of action.
- o By contrast, EU law enables UK individuals and businesses directly affected by its operation to challenge inconsistent legislative and administrative action, both by the national authorities of the Member States and the EU institutions, and to claim damages where the breach of EU law is sufficiently serious and has caused them loss.

Single market & free movement of services

- o The free movement of services enables UK individuals and businesses to provide cross-border services and to establish branches in other Member States, subject only to non-discriminatory restrictions that can be justified on grounds of public policy.
- o Completion of the single market in services is a major economic priority of the UK Government, reflecting the fact that the UK is the leading Member State in relation to the provision of services, accounting for 80% of UK GDP.
- o The rights conferred by EU law apply only to individuals and businesses established within the territory of the EU – financial or legal services undertakings that wished to protect their EU law rights would therefore need to be established in one of the Member States.
- o Non EU Member States wishing to have access to the single market for services would need to negotiate such access on terms over which they would have no control, either at the time of agreement or thereafter.
- o In practice, non EU Member States who have obtained such access have been required by the EU to accept the free movement of persons.

Status of settlement

- The Settlement Agreement is a binding international agreement between the 28 Member States. § 3(ii) and (iii) of the Conclusions of the EU Council to which it is attached state that the Decision recording the Agreement is legally binding, compatible with the existing Treaties, and that it can only be amended or repealed by the common consent of the Member States, thus including the UK.
- The Agreement will come into effect when the UK decides to remain a Member State of the EU. The only express condition of the Conclusions and the annexed Decision of the Member States is that the United Kingdom should remain a member of the EU.
- In the event of a vote to leave the EU, the Agreement would cease to exist.
- The Agreement is not subject to the jurisdiction of the ECJ. As such, the ECJ could not pronounce on the validity of the Agreement otherwise than in the context of an action brought under EU law and after hearing full argument from Member States and the Institutions of the Union.
- The task of the ECJ is “to ensure that in the interpretation and application of the Treaties, the law is observed”. The Agreement between the Heads of State and Government is an international treaty. If and when it comes into effect, it will be part of “the law” to be observed.
- In so far as the Agreement provides for amendments to the EU Treaties, these are binding international commitments agreed unanimously by all the Member States. The ECJ is the creature of the Treaties and there is no basis on which it could rule that amendment to the Treaties is unlawful.
- The Agreement provides for the Commission to prepare secondary EU legislation to give effect to certain aspects of it. Such legislation would require to be passed by the normal procedure, and could be challenged by an individual or company only if it affected them individually and directly. This could happen only after the secondary legislation came into effect and was applied to them. Even if successful, that challenge could not invalidate the Agreement – only a specific provision of the secondary legislation.

Regulation

- The central purpose of regulation to create the single market is to give effect to the fundamental freedoms guaranteed by the EU Treaties, the free movement of goods, persons, services and capital, by replacing unnecessary national regulations by harmonised regulation at the EU level.
- EU legislative action is subject to the principles of conferral and subsidiarity. These principles have been restated and reinforced by the Settlement Agreement.
- Unnecessary legislation or unlawful administrative action can be challenged before the ECJ or the national courts by reference to the EU Treaties, the general principles of EU law and the fundamental rights protected by the Charter and by relevant principles of international law.
- The Commission has the responsibility for enforcing EU law, including a power, where necessary, to bring actions against the Member States for failure to give effect to their obligations in relation to the single market.