



# CHALLENGING RPM AND VERTICAL RESTRICTIONS

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# Familiar Territory

# Northern Ireland Protocol

- Protocol has direct effect in the UK (Art 4 WA)
- Arts 5-10 and Annexes preserve EU rights:
  - Annex 1 – equal treatment provisions for employees
  - Annex 2 – Technical regulations and standards for goods, environmental standards, energy efficiency, labelling & product safety requirements; food & agricultural requirements
  - Annex 5 – Treaty state aid prohibition and notices apply insofar as they “affect trade” between NI and the EU – low threshold

# NI Protocol - Interpretation

- NIP has direct effect and same legal effects
- Articles 4(4) &(5), Article 13(2) of the Protocol
- EU concepts will, in their implementation and application, be interpreted in conformity with relevant CJEU case law
- Both pre and post transition
- No time limits
- UK courts bound indefinitely including future CJEU rulings

# EU Retained Law

EUWA 2018 (as amended)

# Brexit Watershed

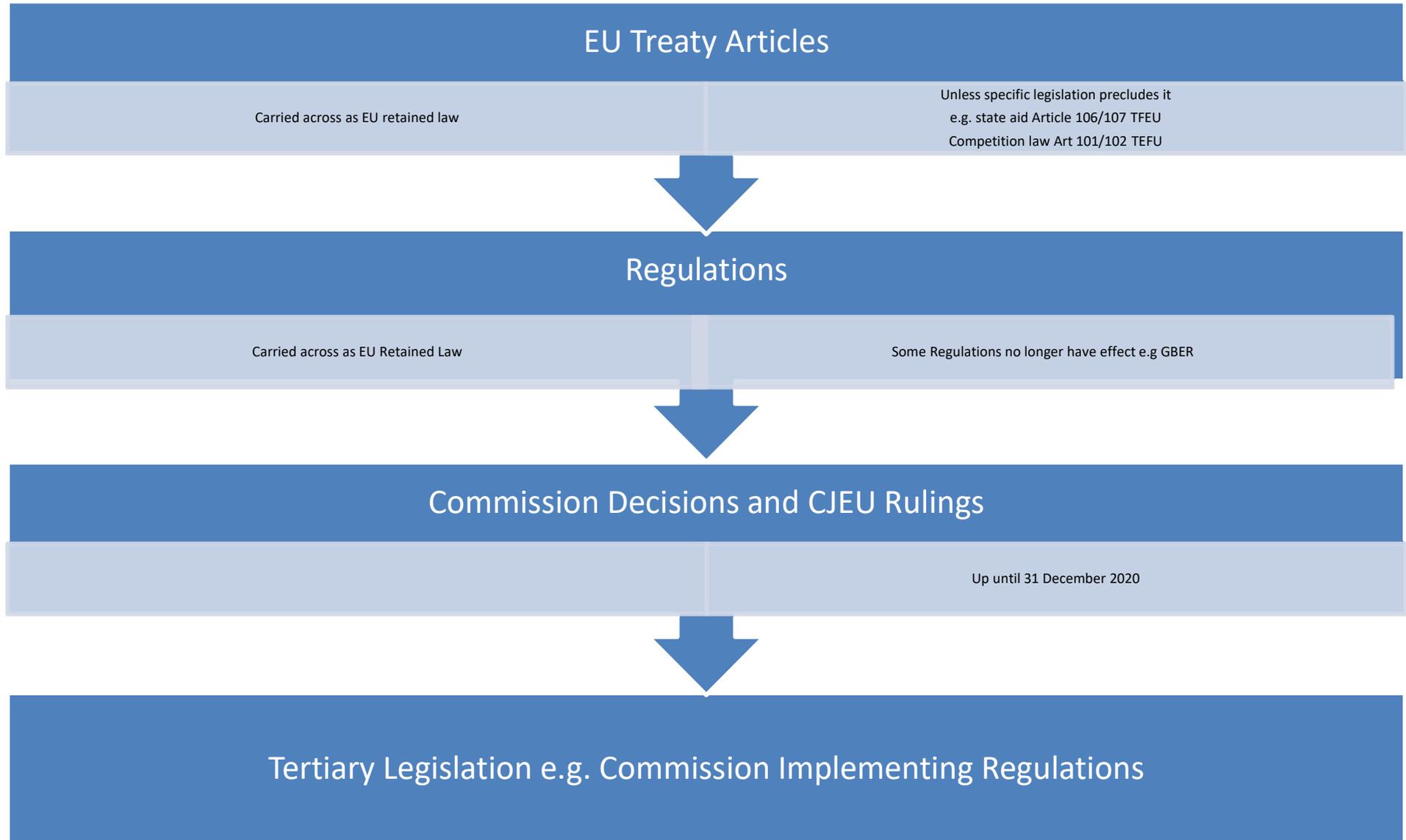
**31 Dec 2020**

**1 Jan 2021**



- EUWA 2018 replicates existing EU-derived rights into statute
- **“Exit Day watershed” - 31 December 2020:**  
**All EU-derived legislation cut and pasted into domestic law and regarded as binding precedent (ss.1B and 2 EUWA)**
- S.1B – In practice extends to all legislation during transition period up to end of 31 December 2020. with “interpretative glosses”
- *Lipton v City Flyer [2021] EWCA Civ 545*
  - Operative – in force and applies before exit day

# EU Retained Law



# The Uncertainties - (i) Carve Outs



- Rights from Directives not carried across – e.g. Unfair Commercial Practice Directive no longer source of directly effective rights
- Have to rely on domestic implementing legislation instead

- If implementation incorrect or if CJEU future case law develops rights in a certain way, then risk of divergence
- “In flight” provisions – some Directives may be in force but not operative as transposition deadline not expired e.g. Consumer Omnibus Directive
- Future Directives not binding

# The Uncertainties - (i) Exclusions

Other carve outs in s.5 and Schedule 1:

- Supremacy and duty of sincere cooperation for national courts
- Charter of Fundamental Rights;
- General principles – effectiveness & proportionality
- No Francovich damages actions v HMG

# The Uncertainties - (ii) EU Divergence



## Future EU developments:

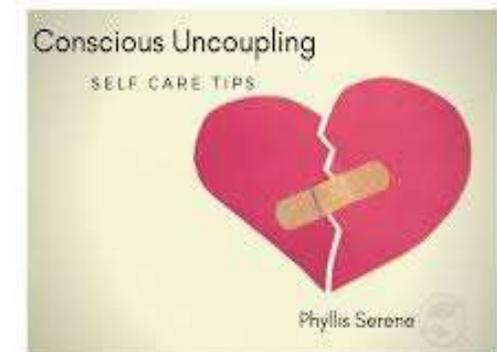
- New EU regulations/ directives  
e.g. New VBER or Digital Markets Act
- Preliminary References and Rulings will continue from EU27 on matters covered by EU Retained Law
- Future CJEU rulings not binding

Courts “may have regard” to “anything done...by the EU Courts, another EU entity or the EU” so far as relevant (s. 6(2) EUWA).

# The Uncertainties - (iii) UK Divergence

- **Brave New World:**
  - Digital Markets, state aid, mergers, procurement
  - Levelling up agenda – focus on consumers interests
  - Internal Market Act
- **Anti-fossilisation:**
  - High Court bound by CJEU case law
  - CoA and SC free to diverge
  - S.60 CA98 permit CMA divergence
- **Conscious uncoupling” –**

No EU internal market agenda – impact on policy development in certain areas e.g. competition law, e-commerce, parallel imports



# The Uncertainties - (iv) Investigations

- UK companies remain subject to EU antitrust
- CMA separate investigation – no suspension
  - Transitional regime: Live Commission investigations continue under Art 101/102
  - CMA investigate new cases under Chapter I and II
  - CMA investigate same conduct in parallel with Commission where there is an effect on UK trade
    - CMA [Guidance](#)
  - No protection from leniency applications in EU27
  - CMA workload – scope and admin resources

# The Uncertainties - (v) Litigation

- **Jurisdiction: :**
  - UK not adopted the Recast Brussels Regulation
  - Commission refused admission to Lugano
  - Contractual disputes covered by Hague Convention
  - Consumer claims proceed internally
  - Tortious claims more difficult
  - Lis alibi pendens more complicated
  - Recognition and enforcement of judgments difficult
- **Follow On Litigation:**
  - Transition regime for certain types of actions
  - New Commission Decisions no longer binding
  - Plead foreign law?
  - Read across from Commission statements, CJEU and DOJ/FTC/ Aus rulings

# Judicial Interpretation

# Judicial Interpretation

- Interpretation is a question of law not fact (unlike other foreign law) – Sch 5 – para 3
- Where “necessary” in legal proceedings
- Not bound by CJEU rulings post transition
- But courts “may have regard” to “anything done...by the EU Courts, another EU entity or the EU” so far as relevant (s. 6(2)).

NB Art 4 WA refers to “due regard”

- Judicial notice or admissibility (Sch 5 para 4)

# Judicial Interpretation

- S6(3): EU derived domestic legislation and EU retained law interpreted in light of:
  - retained case law (comprising retained domestic case law and retained EU case law)
  - retained principles
- Save where relevant “separation issues” - if conflict with terms of WA, WA provisions take precedence (s. 6(6A)).

## UNTIL:

1. Parliament enacts modifying legislation
2. Supreme Court or Court of Appeal departs (s.6(4) and 5A)

# Test for Departure

- EUWA (Relevant Court) Regulations 2020
  - Reg.5: *“In deciding whether to depart from any retained EU case law by virtue of s6(4)(ba), a relevant court must apply the same test as [UKSC] when deciding whether to depart from [its own] case law”*
- 1966 Practice Statement [1996] 3 All ER 77 – “when it appears right to do so”
- *Used occasionally in last 40 years*
  - *Horton v Sadler* [2006] UKSC 27 at [29] – “with great caution”
- *Tune-In v Warner Music* [2021] EWCA Civ 441

# Thank you!

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