VAT focus

Hastings: how EU VAT law applies post-Brexit

Speed read

At the start of March, the FTT released a decision which considers the 'of a kind' gateway which EU VAT law provisions must pass through to remain relevant in UK law following Brexit. To date there has been very little case law of any sort on the meaning of 'of a kind'. *Hastings Insurance Services* is the first tax case to consider this issue in any material way. It envisages a simple and wide gateway, potentially oversimplifying in a significant way. The decision was a resounding win for the taxpayer, but there is real risk of an appeal by HMRC.

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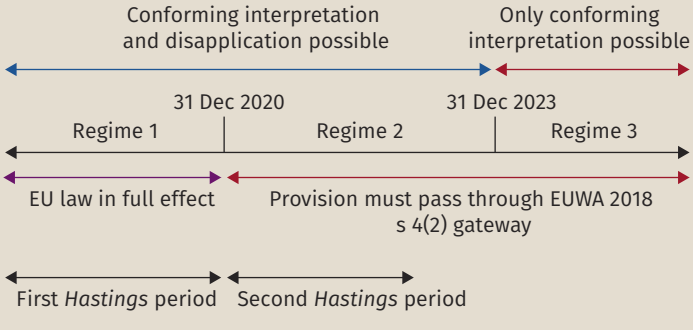
Following Brexit, the analysis of when EU VAT law remains relevant in the UK has become complex. A meaningful starting point is s 4(2) of the European Union Withdrawal Act 2018 (EUWA 2018). This provides a gateway that provisions of the EU directives, including the Principal VAT Directive (Directive 2006/112/EC) (PVD), together with the interpretation of it by the VAT Implementing Regulation 282/2011 and associated case law, must pass through in order to have effect in UK law. As explained below, despite changes made by the Retained EU Law (Revocation and Reform) Act 2023 (REULA 2023), EUWA 2018 s 4 continues to apply when interpreting UK VAT and excise legislation.

Application of provisions of PVD in UK law



Hastings Insurance Services Ltd v HMRC [2025] UKFTT 275 ('*Hastings*') (reported in *Tax Journal*, 14 March 2025) is the first case to give meaningful consideration to this gateway in a VAT context. It concerned whether UK VAT legislation combatting 'offshore looping' structures could be challenged by reference to the PVD following Brexit.

Facts

Hastings was an insurance intermediary established in the UK. It supplied insurance related services to Advantage Insurance Company Ltd ('Advantage'), a related party insurer established in Gibraltar. Advantage provided vehicle and home insurance to UK persons, as brokered by Hastings.

Article 169(c) PVD provides for the recovery of input tax related to insurance transactions and insurance related services where the customer is established outside of the EU. This was implemented into UK law by the Value Added Tax (Input Tax) (Specified Supplies) Order, SI 1999/3121 (the 'SSO'). However, in response to a ruling permitting Hastings to recover its input tax by virtue of supplies to Advantage (*Hastings Insurance Services Ltd v HMRC* [2018] UKFTT 27), a new Article 3A was added to the SSO (by SI 2018/1328). Article 3A states that for input tax to be recoverable, the services in question must relate to an insurance transaction where the party to be insured is a person who belongs outside the UK.

In *Hastings*, the taxpayer argued that this was incompatible with Article 169(c) of the PVD. HMRC argued that it was not, as 'customer' in Article 169(c) could mean the person who received the underlying service. The FTT agreed with Hastings on the basis that customer meant Advantage as the recipient of Hastings' supply. As *Hastings* partly considered post-Brexit periods, the FTT also analysed the 'of a kind' test.

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Application of the PVD in UK VAT law

In broad terms, there are three separate regimes depending on the period under consideration (see the figure, below left).

Until 31 December 2020, EU law had full effect in the UK (the 'first regime').

From then until 31 December 2023, EUWA 2018 s 4(1) preserved EU rights and obligations etc. available under UK law as at 31 December 2020 (the 'second regime'). However, EUWA 2018 s 4(2) provided that a right or obligation etc under a directive was not preserved unless it was 'of a kind' recognised by the CJEU or a UK court or tribunal before IP completion day (31 December 2020).

From 1 January 2024, a third regime is in place. Although EUWA 2018 s 4 was in principle repealed by REULA 2023 with effect from 1 January 2024, FA 2024 s 28(2) and (4) preserve the effect of EUWA 2018 s 4 for the purpose of interpreting, but not disapplying, UK VAT (and excise) law.

Accordingly, from 1 January 2024 onwards, EU VAT law is relevant subject to two conditions:

- it must pass through the 'of a kind' gateway; and
- if it does so, it can demand conforming interpretation of UK VAT law, under established interpretation principles relevant to EU law, but not disapplication of the UK rules.

The input tax claims made in *Hastings* related to:

- 1 January 2019 to 31 December 2020 (the 'first *Hastings* period'); and
- 1 January 2021 to 31 December 2022 (the 'second *Hastings* period').

During the first period, EU law had full effect in the UK. We focus on the reasoning in the second period, which considered when an EU law rule can pass through the EUWA 2018 s 4(2) gateway in order to take effect in UK law.

For completeness, there is some ongoing debate as to which regime should apply where events arising during one period are adjudicated during a later period. *Hastings* simply assumes that the relevant regime is the one in force when the events occurred. We do not discuss this further here. Nor do we discuss the prospect that, by reference to s6(6) EUWA 2018, the UK could now validly re-enact Article 3A, potentially with retrospective effect, on the basis that post-Brexit legislation is valid regardless of the EU law position if clearly intended to diverge from it.

Is it enough for the relevant PVD provision to be recognised *in principle* as having direct effect (or being of a kind with one which has been recognised)? Or must the specific effect of the provision have been recognised, or be of a kind with recognised effects?

FTT decision

The FTT's approach was to start with the first *Hastings* period. For this, it conducted an unrestricted interpretation of the meaning of 'customer' in Article 169(c) PVD, holding that the word should be given its ordinary and natural meaning, meaning that the customer of Hastings was Advantage, not the UK persons insured by Advantage. As such, it held that Article 3A was ineffective for this period.

The FTT then turned to the second *Hastings* period. Here, it considered EUWA 2018 s 4(2) (at [36]), treating s 4(2) as simply requiring evaluation of whether the direct effect of Article 169(c), whatever the effect of that Article might be, had been duly recognised or was of a kind with something which had been. This was arguably a natural approach in context, building on the analysis for the first *Hastings* period. It also appears consistent with the court's reasoning in an environmental law case cited by the FTT (*Harris v The Environment Agency* [2022] EWHC 2264 (Admin)).

On this approach, Judge Brooks said that it was implicit (or 'apparent') from *Polski Trawertyn* (Case C-280/10) that the CJEU had concluded that Article 169 had direct effect. Alternatively, he said that Article 168, the primary provision on entitlement to claim input tax credit, which Article 169 builds on, was recognised as having direct effect in *BP Supergas* (Case C-62/93), and following *Harris* the 'close relationship' between Articles 168 and 169 sufficed to make the direct effect of Article 169 'of a kind' with that of Article 168. As such, he held that Article 3A was ineffective for this period too.

Comment

However, we doubt that this grapples properly with the nuance of the s 4(2) gateway. Is it enough for the relevant PVD provision to be recognised *in principle* as having direct effect (or being of a kind with one which has been recognised)? Or must the specific effect of the provision have been recognised, or be of a kind with recognised effects?

Section 4(2) says that only rights and obligations etc which have been recognised, or are 'of a kind' with ones which have been recognised, continue to have effect. This strongly suggests the second approach. On this approach, HMRC might phrase the issue to pass through the s 4(2) gateway as 'in a non-*Halifax* avoidance situation, is the taxpayer entitled to a literal reading of the PVD to preserve its right to an input tax deduction'. However, the FTT took the arguably more straightforward first approach, which was sufficient in *Harris*, of looking only to the recognition *in principle* of the provision in question, or ones with which it is 'of a kind', as having direct effect.

In the context of Hastings' overall and long-running VAT dispute, it seems almost inevitable that HMRC will appeal. If they do, one model would be to argue, consistently with stated Government policy, that the specific *effect* sought from EU law – here, the contentious question of whether in avoidance circumstances a supplier making supplies to a customer who is not the end user has the benefit of Article 169(c) – must have been recognised or be of a kind with an effect which has been recognised. In particular, that appears to be the approach taken by the Explanatory Notes to EUWA 2018, which envisage only (at para 98) that 'rights arising under a particular directive that have been recognised … as having direct effect, could be relied upon by other individuals who are not parties to that case'.

In our article 'Using the Principal VAT Directive after Brexit' (Rupert Shiers and Adam Parry), *Tax Journal*, 6 May 2021, aiming to provide a structure for analysis of s 4(2), we outlined five ways in which a legal point could be 'of a kind'. The situation in *Hastings* would seem to fall into category 3 – a broad point that has been recognised (the right to deduct input tax under Article 168) but requires extension to cover the specific point (the right to deduct under Article 169(c)) – or more likely category 4, drawing together various points by way of analogy to reach a view on the rights of a supplier in what are said to be avoidance circumstances. If this sort of analysis is not needed on appeal in *Hastings*, it will wait for another case.

Application to periods covered by the third regime

Finally, if the effect of *Hastings* is that Article 3A is struck down up to the end of 2023, what about the 'third' period from 1 January 2024 onwards? As Robin Prince identifies (see the *Tax Journal* case report of 14 March 2025), this period is subject to a different regime, as FA 2024 s 28 preserves the effect of the PVD as regards the interpretation of UK legislation but no longer permits the 'disapplication' of legislation incompatible with the PVD.

The scope of EU law 'conforming interpretation' in the UK is authoritatively stated in *HMRC v Vodafone 2* [2009] EWCA Civ 446. It can go much further than UK law interpretation, but only to the extent that the proposed reading would 'go with the grain' and be 'compatible with the underlying thrust' of the legislation ([38]). The question is how much of the legislation must be scrutinised to find the grain.

The FTT's approach would go with the grain of the SSO as a whole as it would permit the recovery of input tax associated with the supply of insurance related services to relevant non-UK persons, but not with the grain of SI 2018/1328 which added the Article 3A requirement that the persons insured must not be in the UK. Further, if the focus

is narrowed to Article 3A alone the FTT outcome cannot be achieved by interpretation at all and therefore requires the disapplication of Article 3A. From 1 January 2024 onwards, this would be impermissible as under FA 2024 s 28 disapplication is no longer possible.

Obiter discussion in *Vodafone 2* (at [60]) does suggest that a narrow focus should be applied, meaning that the FTT's approach is reliant on disapplication rather than a conforming interpretation. This would indicate that if Article 3A is invalid during the second *Hastings* period, it springs back to life with effect from 1 January 2024. Of course, this remains open to debate.

The simple approach taken by the FTT would appear to mean that any post-Brexit CJEU decision, whenever issued, remains determinative in UK law if it interprets a PVD provision which generally passes through a wide s 4(2) gateway [provided three conditions are met] .... On the other hand, the more nuanced approach proposed here would go much further in freezing CJEU case law as at Brexit

Conclusion

The issue addressed here is pivotal to understanding how EU VAT law remains relevant post-Brexit. The simple approach taken by the FTT would appear to mean that any post-Brexit CJEU decision, whenever issued, remains determinative in UK law if it interprets a PVD provision which generally passes through a wide s 4(2) gateway provided:

(i) it can be implemented by *Vodafone 2* interpretation rather than disapplication of UK legislation;
(ii) it is not confronted with post-Brexit legislation clearly intended to diverge from the PVD rules; and
(iii) the UK courts are not willing to say that the CJEU has misconstrued the PVD.

On the other hand, the more nuanced approach proposed here would go much further in freezing CJEU case law as at Brexit. This would be subject only to extension for decisions which develop an analysis 'of a kind' with pre-Brexit decisions.

The final determination of which approach prevails may be years away. It may involve consideration of which of the two approaches more faithfully implements Parliament's intention in passing the Brexit legislation. For now, taxpayers looking to rely on the PVD or faced with HMRC arguments based on the PVD will be well advised to consider and properly analyse both. ■

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- Revocation/reform of retained EU (VAT) law (E Wong, 9.11.23)
- Using the Principal VAT Directive after Brexit (R Shiers & A Parry, 6.5.21)
- *Yorkshire Agricultural Society*, consistent interpretation and the continued relevance of EU law (E Thompson, 26.2.25)
- Is direct effect in VAT still alive in 2024? (F Barth, 16.10.24)
- Leave means leave, or does it? (J Woolf, 28.2.24)