A new post-Brexit legal framework is now in force. On implementation period (‘IP’) completion day—i.e. 31 December 2020 at 11pm—UK laws implementing EU law as well as directly effective provisions of EU law became a new category of domestic law: ‘retained EU law’. Defined by the EU (Withdrawal) Act 2018 (‘EUWA’) as amended, retained EU law is essentially a snapshot of all EU(-related) law in force on IP completion day and aims at ensuring legal continuity. Creating additional layers in the framework, the Withdrawal Agreement and the Trade and Cooperation Agreement (‘TCA’) are given domestic effects by the EU (Withdrawal Agreement) Act 2020 and the EU (Future Relationship) Act 2020 (‘EUFRA’). Two recent Court of Appeal judgments—Lipton v BA Cityflyer [2021] EWCA Civ 454 and TuneIn v Warner [2021] EWCA Civ 441—offer a helpful starting point in deciphering this complex legislative framework. Taken together, the cases make clear the important and continuing role of past and future CJEU case law in the UK as well as the breadth of the section 29 EUFRA power granted to courts to implement the TCA.

Lipton concerned compensation for a flight cancellation; the flight’s captain called in sick shortly before the appellants were due to fly from Milan to London City Airport in 2018. Under Regulation 261/2004 (OJ L 46, p. 1)—as applicable at the time—passengers are entitled to compensation for flight cancellations unless the operating air carrier can show ‘extraordinary circumstances’ (Article 5). The case was not decided as it would have been in 2018 when the UK was a Member State; Green L.J. held at the outset that in 2021 ‘a new set of legal arrangements are in place’ and so the Court ‘must apply the new approach’ (at [53]).

A prior issue was the domestic status of Regulation 261/2004. Retained EU law encompasses ‘EU-derived domestic legislation’ (section 2 EUWA), ‘direct EU legislation’ (section 3 EUWA) and any other directly effective ‘rights, powers, liabilities, obligations, restrictions, remedies and procedures’ (section 4 EUWA). Direct EU legislation includes ‘any EU regulation … as it has effect in EU law immediately before [31 December 2020]’ (section 3(2)(a)). Regulation 261/2004 fell within this last category; Green L.J. noted that Regulation 261/2004 as ‘a typical “regulation” … was operative prior to IP completion day and therefore continues to have force’ as retained EU law (at [57], [60]).

The Air Passenger Rights and Air Travel Organisers’ Licencing (Amendment) (EU Exit) Regulations 2019 had made some changes to the UK version of Regulation 261/2004. Retained EU law can lose its status if modifications to the EU text are considerable (see section 5(3), 6(6) EUWA), but the Court of Appeal glossed over this point in Lipton (see [71]-[72]). This is most likely because the modifications were not extensive; the amending Regulations replaced references to EU legislation with domestic counterparts and the terminology of
'Member State' with that of 'United Kingdom' while also converting compensation sums in euros to sterling

Once categorised as retained EU law, a consequence was that 'the doctrine of supremacy applies' and Regulation 261/2004 'takes precedence over any other measure of domestic law which might be inconsistent' with it (at [62]). Section 5(2) EUWA specifies that 'the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.' The judgment offers little analysis on the nature of the supremacy principle, but there is much to unpack. The supremacy principle found in the EUWA is not the EU principle; according to CJEU case law, supremacy affects past and future domestic enactments (Van Gend en Loos, Case 26/62, EU:C:1963:1). Regardless, the supremacy principle never explained the effects of EU law in the UK; the majority of the Supreme Court in Miller [2017] UKSC 5 held that ‘EU law enjoys its automatic and overriding effect only by virtue of the 1972 [European Communities] Act (at [61]). It is thus perhaps simplistic to refer to the supremacy principle as 'applying'.

Framing supremacy as meaning retained EU law ‘takes precedence’ is also rather narrow and overlooks the more wide-ranging implications of the principle. In Popławski, Case C-573/17, EU:C:2019:530 the CJEU referred to the supremacy principle as requiring 'courts to interpret, to the greatest extent possible, their national law in conformity with EU law and to afford individuals the possibility of obtaining redress where their rights have been impaired by a breach of EU law attributable to a Member State' (para. 57). The latter possibility for redress—commonly known as Francovich damages—was abolished by paragraph 4 to Schedule 1 of the EUWA. What is still unclear is whether the requirement of consistent interpretation—the so-called Marleasing principle—remains (as suggested in the Explanatory Notes). If so, what must be interpreted consistently with what? Must domestic courts interpret non-retained domestic law consistently with EU-derived domestic legislation (potentially incorrectly implementing a directive) or the EU directive itself?

As there was no CJEU 'authority at all dealing with staff illness' (at [24]), the Court of Appeal in Lipton had to interpret Regulation 261/2004 in accordance with 'retained case law' i.e. domestic and CJEU decisions pre-IP completion day (section 6(3) EUWA). Lipton demonstrates how this interpretative obligation does not just entail the application of specific interpretations of EU measures, but also requires UK courts to emulate the reasoning style of the CJEU. Coulson L.J. in Lipton began by outlining the CJEU’s interpretative method: ‘the meaning and scope of terms … must be determined by considering their usual meaning in
everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part’ (at [13] citing Wallentin-Hermann v Alitalia, Case C-549/07, EU:C:2008:771, para. 17). He then proceeded to go through each stage—literal, contextual, purposive—before concluding that ‘the captain’s non-attendance for work due to illness was inherent in the air carrier’s activity’ (at [50]).

Coulson L.J.’s approach shows how difficult it will be for UK courts to replicate the CJEU’s reasoning style. The CJEU in fact rarely follows such a regimented analysis: literal arguments are far less conclusive and purposive criteria are frequently employed (see Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart, 2013)). There are also aspects of CJEU reasoning which UK courts are ill-equipped to emulate. In *Greenaway v Parrish & Ors* [2021] EWHC 1506 (QB), Spencer J. referred to the ‘nightmare’ for domestic courts of having to apply ‘the EU principle whereby the correct interpretation incorporates and encompasses all the various language versions of the directive’ without the resources of the CJEU (at [44]). Furthermore, the meta-teleological aspects of CJEU reasoning that draw on the EU’s overall goals (as in e.g., *Van Gend en Loos*) no longer seem appropriate in a former Member State.

The requirement to disapply national procedural rules to secure the effectiveness of (retained) EU rights (*Factortame*, Case C-213/89, EU:C:1990:257) may offer an illustration. Divergence is thus likely to emerge between the retained EU law and EU law despite the aims of continuity.

*Lipton* also concerned the relationship between the retained Regulation 261/2004 and the TCA. Article AIRTRN.22 of the TCA refers to the need to ‘ensure that effective and non-discriminatory measures are taken to protect the interests of consumers in air transport’ including ‘compensation in case of denied boarding, cancellation or delays’. This provision lacks direct effect (Article COMPROV.16(1) TCA) and the EUFRA does not specifically implement the provision. However, this does not ‘mean that it is not implemented’ (at [77]). According to section 29(1) EUFRA, ‘[e]xisting domestic law has effect on and after the relevant day with such modifications as are required’ to comply with the TCA. Section 29 is available when domestic law leaves an ‘inconsistency, daylight or a lacuna’ when compared with the TCA (at [82]). The ‘process of modification is automatic i.e. it occurs without the need for further intervention by Parliament’ and includes the ‘amendment, repeal or revocation’ of domestic law (at [78]). Green L.J. notes that the mechanism ‘does not lay down a principle of purposive interpretation (such as is found in section 3 Human Rights Act) but amounts to a generic mechanism to achieve full implementation’ such that ‘domestic law on a particular issue now means what the TCA says it means, regardless of the language used’ (at [78]). The implication is that there is no limit on what courts can do to secure compliance with the TCA.
This is unlike the rule that domestic courts cannot contradict a ‘fundamental feature’ of legislation when attempting to interpret it compatibly with the Human Rights Act (Ghaidan v Godin-Mendoza [2004] UKHL 30).

The decision in TuneIn [2021] EWCA Civ 441 complements Lipton as it focuses the new statutory criteria governing when UK courts may depart from CJEU case law as well as on the relevance of new and future CJEU decisions. TuneIn is a website and app that aggregates and curates links to radio stations worldwide. Warner Music and Sony Music alleged that TuneIn’s service infringed their copyright as it amounted to a ‘communication to the public’ contrary to the section 20 Copyright, Designs and Patents Act 1988 (‘CDPA’). As section 20 implements Article 3 of the Information Society Directive (Directive 2001/29, OJ L 167, p. 10) it is EU-derived domestic legislation (section 2(1) EUWA) and forms part of retained EU law.

Following the Regulation 3(b) of the EU Withdrawal Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, the Court of Appeal (alongside the Supreme Court and other higher courts) has the power to depart from retained EU case law. In doing so, the Court of Appeal ‘must apply the same test as the Supreme Court would apply in deciding whether to depart from the case law of the Supreme Court’ (section 6(5) EUWA) i.e. ‘when it appears right to do so’ (1966 Practice Statement [1996] 3 All ER 77). The main argument put forward by TuneIn—and unanimously rejected—was that the Court of Appeal should depart from CJEU case law on the meaning of communication to the public or at least from the case law on hyperlinking (at [76]).

Arnold L.J. set out eight reasons for not departing. First, the domestic law remained unchanged (at [78]). Second, there is a need for consistency given that an international legislative framework—including the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty and the Berne Convention—underlies the Information Society Directive and the CDPA (at [79]). Third, he pointed to the ‘difficult task’ of interpreting the concept of a ‘communication to the public’ and the CJEU’s ‘unrivalled experience in confronting this issue in a variety of factual scenarios’ (at [80]). Fourth, academic criticism goes both ways (at [81]). Fifth, comparative analysis of the approach in other jurisdictions (Australia, Canada and the USA) is unhelpful as ‘the statutory framework differs in those countries and the case law cannot be said to offer settled or consistent guidance (at [82]). Sixth, the danger of legal uncertainty caused by a ‘return to the drawing board’ (at [83]). The final two reasons concerned the narrower argument to depart from specific cases. Arnold L.J. did not consider this option sensible since TuneIn would still be liable (at [87]). Sir Geoffrey Vos M.R. offered just two reasons. First, he also emphasised that copyright law derives from international treaties and
'courts of the states that accede to such treaties should, wherever possible, be striving to achieve harmonious interpretation of them, not individualistic disharmony’ (at [198]). Second, he commented on the high threshold for departing from earlier decisions found. It is not enough that the court would decide the case differently. When the CJEU’s approach ‘is neither impeding nor restricting the proper development of the law, nor is it leading to results which are unjust or contrary to public policy’ (at [201]), departure ‘would create legal uncertainty for no good reason’ (at [202]).

The implication is that the Court of Appeal will exercise the power to depart from CJEU case law cautiously. Both judgments stress the importance of legal certainty, but the Master of the Roles perhaps set a more stringent test. In referring to academic literature and the practice of other jurisdictions, Arnold L.J. suggests that policy arguments may have some sway in areas less embedded in an international framework or where domestic courts have greater experience. There is not necessarily a tension in the reasoning, but when a decision of the CJEU can be said to be contrary to ‘public policy’ or ‘restricting the proper development of the law’ is likely to become an important threshold in future litigation.

Having concluded that departure from CJEU case law was inappropriate, there was a question over the relevance of a 2021 CJEU decision. Section 6(2) EUWA permits all courts to ‘have regard’ to decisions of the CJEU handed down after IP completion day. Arnold L.J. considered the new case should be treated as ‘highly persuasive’ as—not only was it relevant to the case—it was a Grand Chamber decision closely related to and refining an extensive body of retained EU case law from which the Court of Appeal has decided not to depart (at [91]). New CJEU decisions are thus likely to remain influential.

Importantly, the EUWA does not upset the domestic judicial hierarchy as membership of the EU did. All courts can have regard to new CJEU decisions, but lower courts will remain bound by decisions of the Court of Appeal. Returning to Lipton briefly, in any future litigation the High Court will be bound to treat staff illness as an inherent risk in an air carrier’s activity (see on a related point Varano v Air Canada [2021] EWHC 1336 (QB)). In this regard, Rose L.J raised a concern about the comprehensive statement of CJEU case law by Arnold L.J. Her concern was that the ability of lower courts ‘to have regard to such future CJEU judgments should not be hindered by the fact that the pre-existing, retained law has been described in a judgment of this court, even though a decision of this court would, in general, be binding on that court or tribunal’ (at [183]).

Where Lipton and TuneIn are perhaps in tension is as regards the appropriate legal regime for cases where the facts arose before IP completion day. In Lipton, the cancellation
occurred in 2018 but the Court of Appeal decided the case as one of retained EU law. Whereas in *TuneIn* the copyright breach was ongoing for several years—from while the UK was a member of the EU, during the transitional period and after IP completion day—but the judgment proceeds on the basis that departure from CJEU jurisprudence was only possible from 1 January 2021 and as such would not affect any financial penalties accrued prior to that date. ([?6].)