BAR COUNCIL WRITTEN SUBMISSION TO THE HOUSE OF LORDS EU JUSTICE SUB-COMMITTEE INQUIRY

BREXIT: ENFORCEMENT AND DISPUTE RESOLUTION

1. This is the written submission of the General Council of the Bar of England and Wales (the Bar Council) to the House of Lords EU Justice Sub-Committee call for evidence on Brexit: enforcement and dispute resolution.

2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of Criminal and Civil Courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Q1. Whether there could be a role for the CJEU in the UK post-Brexit.

4. The 'red line' stated by the Government, of ending the 'direct jurisdiction' of the CJEU in the UK does not reflect the judicial structure of the EU or the fundamental principle of subsidiarity which governs the relationship between the CJEU and national courts. The CJEU has a direct appellate and supervisory role in relation to the EU institutions such as the Commission, but it does not exercise any general or direct jurisdiction in the Member States. The national courts and administrative bodies are the primary enforcement mechanisms under EU law, with the EU Commission exercising a supervisory jurisdiction to ensure that the Member States comply with their obligations under the EU Treaties.

5. Since *Van Gend en Loos*, it has been a fundamental feature of EU law that there are two systems of enforcement of EU law against the Member States and their institutions: actions brought in the national courts; and administrative enforcement action by the EU Commission:

   - The national courts control the former, with the possibility of references for preliminary rulings to the CJEU only where they deem it necessary. Moreover, the CJEU's jurisdiction, when asked for such clarification by a national court, is restricted to interpreting the point of EU law, after which the matter returns to the national court for determination on the facts.

   - The EU Commission controls the latter, with the possibility of a matter coming before the CJEU only where the Member State and Commission cannot resolve the issue between them.

   After the UK ceases to be a Member State, both these possibilities will come to an end as a matter of EU law, which will no longer apply to the UK.

6. A Member State is subject to the direct jurisdiction of the CJEU only in relatively rare cases, such as where the Commission brings a case against a Member State before the CJEU for non-compliance, for example where a Member State has implemented an unlawful State aid or has failed to implement an EU directive; or where the Member State itself brings an application before the CJEU. Subject to contrary agreement, those cases would also lapse automatically when the UK ceases to be a Member State.

7. As such, it is necessary to distinguish two points:

   - ***If and when the UK ceases to be a Member State of the EU, the territorial scope of EU law, and therefore the territorial jurisdiction of the CJEU, will no longer include the UK***. The UK will no longer have the obligations or rights of a Member State; UK courts will have no jurisdiction over claims in EU law; UK nationals and businesses will have no rights under EU law in any of the Member States; the UK will have no right to intervene in CJEU proceedings or to appoint judges or advocates general to participate in deliberations of the CJEU; and rulings of the CJEU will, except to the extent that Parliament decrees otherwise, no longer be binding on the UK either under EU or UK law.

   - ***However, the substantive scope of the CJEU's jurisdiction, and its role under EU law, will be unchanged.*** The CJEU will remain the supreme court of the EU in accordance with the EU Treaties, whose rulings are determinative of the meaning of EU law and the validity of acts taken pursuant to EU law, including EU secondary legislation. It follows that, even if EU law will, strictly speaking, become "foreign law" after UK withdrawal, rulings of the CJEU will remain of relevance to UK domestic law if and in so far as the UK decides, via the Withdrawal Bill or otherwise, to incorporate provisions of EU law into UK law. EU concepts (for example "worker", "economic unit"

or "discrimination") have an autonomous meaning as interpreted by the CJEU, so that meaning would continue to apply if they are "incorporated by reference" into a UK statute. UK courts will therefore be able to take account of CJEU rulings in interpreting such provisions of UK domestic law. We deal with the effect of this as a matter of English law in paragraph 11 below. So far as EU law in itself is concerned, it would be no more appropriate for the UK courts to interpret EU law in a way that differed from the CJEU than for them to interpret US federal law in a way that differed from the US Supreme Court. The Treaty-based system of law comprising EU law itself vests the ultimate power of interpretation in the CJEU. The UK, as a non-Member State, will not be able to alter that central aspect of EU law.

Q2. The most appropriate method of enforcement and dispute resolution in respect of the Withdrawal Agreement and subsequent partnership arrangements with the EU.

8. Given the above points, it is unavoidable that, subject to contrary agreement or provision by the individual Member States offering equivalent guarantees of enforceable rights, there will be a very significant loss of rights for UK nationals and businesses throughout the Member States. They will no longer have directly applicable rights protected by the procedures and effective remedies available from national courts under EU law. They will no longer be able to invoke and enforce those rights before the national courts of any of the 28 Member States against the State or against other private individuals (e.g. businesses established in other Member States). Similarly, EU nationals and businesses will suffer such a loss of enforceable rights in the UK courts. In addition, the UK itself will lose significant influence over the future development of EU law, at each of the legislative, administrative and judicial phases.

9. The fundamental question for enforcement and dispute resolution in respect of any withdrawal agreement or partnership agreement is therefore whether it will seek to replicate the characteristic features of EU law described above, i.e. the ability of individuals and businesses to assert their rights under such agreements directly in the national courts, or whether the UK and other remaining EU Member States will revert to a conventional model of international law, with disputes between them resolved exclusively at the international level. In that scenario, the sole actors are states and international institutions; individuals and businesses can only access their rights by political lobbying to seek to persuade their state to act.

10. From the perspective of the rule of law and the protection of accrued rights, retaining the direct enforceability of the new agreements by individuals and businesses would be strongly preferable. Abandoning that approach in favour of rights created by international law would lead to a massive loss of enforceable rights for UK individuals and businesses compared to those established in Member States. It would also place inordinate administrative

burden on the UK Government to respond to lobbying to raise trade disputes on their behalf.

11. Whichever model is adopted, there will still be a potential role for the CJEU – realistically, UK courts will be bound to take account of rulings of the CJEU on points of EU law, in so far as they bear on issues arising under the new arrangements. As noted above, the substantive role of the CJEU will not change after the UK ceases to be a Member State; and courts in other Member States will continue to refer questions for preliminary rulings involving the very same provisions embodied in UK law. It is difficult to see the UK Courts seeking to create some sort of alternative system of EU law based on its own interpretation of a Treaty to which the UK was no longer a signatory.

12. So far as interpretation of any new agreement between the UK and the EU is concerned, the system of preliminary rulings under the control of the national courts has been accepted by the Member States for over 60 years as a coherent mechanism to ensure the consistent application of international legal norms derived from EU law in different national legal systems. The loss of such a mechanism in relation to any new arrangements between the UK and the EU would again have negative implications for the rule of law and legal certainty, in that the same provisions might have different legal effects in different national jurisdictions.[1]

Q3. How the Government can deal with questions relating to EU law in the domestic courts post-Brexit and during any period of transition (including the potential for divergence between UK law and EU law).

13. As noted above, the CJEU will remain the court of final recourse on issues of interpretation of EU law, so that it would be inappropriate for the UK courts to diverge from rulings of the CJEU on issues of EU law itself. That does not of course mean that the UK will not be able to make different rules by legislation if it so desires, subject to any agreement to the contrary that may be entered into between the UK and EU after it ceases to be a Member State.

14. The approach adopted by the Withdrawal Bill, which imports EU law wholesale into UK domestic law as 'retained EU law', gives rise to potential confusion on this issue. Under this statutory approach, provisions of UK

[1] While the protection of individual rights under EU law and the preliminary ruling procedure are highly developed examples of such a mechanism, other examples of such systems include (i) The Economic Community of West African States (ECOWAS) has a Court of Justice where reference can be made for an interpretation of the law and "advisory opinions": see http://www.ijrcenter.org/regional-communities/economic-community-of-west-african-states-court-of-justice/; and (ii) Mercosur, although it does not have preliminary rulings as such, provides for arbitral procedure between states; and individuals can raise complaints against states which are referred to the Common Market Group: see Arts. 25-30 of the Protocol of Brasilia for the Solution of Controversies, http://english.dipublico.org/641/protocol-of-brasilia-1991/.

domestic law will be created, verbally identical to EU law and originally derived from EU law, but subject to amendment or repeal by UK legislation. Notwithstanding the wording and provenance of such legislation in EU law, the UK courts would be free to find that, as UK domestic legislation, it is to be interpreted differently from the identical provisions of EU law as interpreted by the CJEU. The only effective solution to this novel problem, which has the potential to create considerable legal uncertainty over a wide area of law,[2] which could in turn quickly undermine any notions of regulatory or other equivalence that may underpin the future relationship, appears to be clear legislative provisions specifying the meaning and status of UK law modelled on EU law. It would not assist in that complex process for the UK Courts to be invited to challenge the status of the CJEU as the ultimate interpreter of EU law itself, which existed before the UK became a Member State and will not be altered by UK withdrawal.

Q4. Whether anything can be learned from the EFTA Court model, or other alternative models for dispute resolution.

15. Although this appears to be the Government's favoured option, the creation of a third dispute resolution body, in addition to the EFTA Court and the CJEU, to address issues arising under future agreements between the UK and the EU (or EEA), would be wasteful of resources and would lead to complications and uncertainty from a legal perspective.

16. As noted above, from the perspective of the rule of law and protection of individual rights, the essential structure of EU law, identified by the CJEU in *Van Gend en Loos*, is manifestly superior to a system whose only or primary enforcement mechanisms are at the international level. It would therefore be desirable to give careful consideration to the retention of that essential characteristic for rights conferred by any future agreement, with the primary enforcement role resting with the ***national courts*** under agreed terms, and with a mechanism for references to a common referral body from the national courts on points of difficulty. While a third institution could be created for such disputes, there seems little to gain from a legal perspective in creating a third such body rather than using either the EFTA Court or the CJEU for this purpose.

17. Given that the UK would no longer be a Member State, the nature of any obligation of a national court to give effect to the agreement between the

[2] These problems will be particularly acute in regulated sectors such as environmental regulation, merger control, competition law, and in major industrial sectors such as the telecoms, broadcasting, air transport, international rail and maritime services, and the automotive, energy, chemical and pharmaceutical industries, where international companies supply goods and services across multiple states within the EU in accordance with common standards. Consistency is necessary to ensure a level playing field and undistorted competition or barriers to trade. Otherwise the UK could be left behind if it is excluded from new developments and common regulatory standards.

parties, whether in the UK or in the remaining 27 Member States of the EU, would need to be carefully defined. In addition, to address the concerns that have been expressed over any ongoing role for the CJEU within the UK, the agreement would need to specify how the status of a ruling of the CJEU (or EFTA Court) on a matter arising under a future agreement between the UK and the EU, was to be different from a ruling that applied to a case arising under EU law itself, i.e. the extent to which such a ruling was to be legally binding on the national court making the reference. As a matter of UK domestic law, a different formula might then be needed from the current wording of section 3 of the European Communities Act 1972 to reflect this.

18. If this approach were pursued, it would also be necessary to address the correct procedural approach to adopt, and in particular the rights of UK judges and the UK itself to participate in proceedings falling within the scope of the new arrangements. In addition, one would need to consider a possible right to intervene on other cases where the UK took the view that they had a bearing on issues that had arisen or might arise under those arrangements.

19. There would also need to be agreement on how conformity to the terms agreed between the parties was to be monitored and whether the EU Commission[3] could continue to perform this role in respect of the UK or, if not, how the EU could ensure that the UK was in practice discharging its obligations under the new arrangements (and *vice versa*). One possibility that could be considered would be for the Commission (or the EFTA Surveillance Authority) to have a right of action in the UK courts rather than the CJEU (or EFTA Court) for breaches of the agreement between the parties (if, for example, it considered that the UK had granted a State aid in breach of its obligations under the new agreement with the EU, or was in breach of agreed environmental standards); and for the UK to have an equivalent right of action in the CJEU (or EFTA Court) if it contended that the other Member States, or the EU institutions, were failing to meet their equivalent obligations.

20. An alternative idea floated by some, of creating a new bilateral enforcement body, would again be wasteful and duplicative of the mechanisms that already exist within the EU (and the EEA) without any clear legal advantages over the existing bodies. A further disadvantage of creating a third international court or tribunal to determine issues arising under the new arrangements would be that the relationship of this body to the EFTA Court and the CJEU would need to be addressed in so far as issues falling within the scope of the EU Treaties or EEA agreement arose – that would be both administratively complex to manage and likely to create further legal uncertainty.

[3] An alternative possibility could be to extend the monitoring jurisdiction of the EFTA Surveillance Authority to the UK.

Q5. The impact Brexit will have on the UK's ability to influence the development of the law in other jurisdictions including the EU and the United States.

21. The direct and indirect impact of the UK ceasing to be a Member State seems inevitably to weaken the international standing of the UK as a source of EU law. The direct impact is obvious: the loss of UK judges and advocates general in the CJEU; the detachment from the preliminary ruling procedure; and the lack of any right to participate in cases before the CJEU, one of the most powerful and influential international courts. It is widely recognised that British barristers, advocates and judges have made an outstanding contribution and have wielded very significant influence in the CJEU since UK accession in 1973.

22. This loss of any direct input into the judicial processes of EU law would compound the loss of UK influence on the content of the law itself, both during the legislative phase – formally in the Council, Commission and European Parliament, and also through more informal channels, such as stakeholder lobbying, participation as experts in working groups – and in the administration of EU legal regimes, such as those for competition law, medicines and financial services.

23. The indirect impact will also be potentially significant, in that the UK courts no longer have any particular standing as against other national supreme courts; parties may be deterred from selecting English law as their applicable law for contracts or the English Courts as their choice of forum for dispute resolution if judgments will not be automatically recognised and enforced in other Member States. In addition, issues arising from the incorporation and amendment of 'retained EU law' as part of UK law will inevitably create considerable legal uncertainty that will divert scarce judicial resources for a period of years;[4] and it is already apparent that there may be knock-on effects on the position of UK judges more generally – as observers have noted in the recent failure of the UK judge at the International Court of Justice to obtain a renewed appointment.[5]

24. The UK legal system has an outstanding reputation that will not be immediately undermined by the UK ceasing to be a Member State. However, as in other sectors, there is no reason to be complacent. It appears likely that other systems of law, notably US law, and other EU jurisdictions, for example,

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[4] An issue of particular concern to the UK judiciary, given their central role in the interpretation of "retained EU law" after UK withdrawal, and the absence of any ongoing international mechanism to ensure consistency, is that there is no clear guidance as to the status of rulings of the CJEU on issues of EU law in the interpretation of equivalent provisions of "retained EU law". In particular, the current wording of Clause 6(2) of the Withdrawal Bill uses the novel formula "need not" but "may", which would create considerable uncertainty if it is retained, given the points made above about the explicit and entrenched role of the CJEU as the ultimate authority on the validity and interpretation of EU law under the EU Treaty based system.

[5] See, e.g., Times editorial for 22nd November 2017.

Ireland, Germany, France and the Netherlands, will see this as an opportunity to gain comparative advantage over the UK.[6]

Q6. If UK citizens should have a direct right of access to any new enforcement or dispute resolution procedures (or whether there should be a reference procedure, as currently exists with the CJEU).

25. As indicated above, rights to bring proceedings in the national courts of the UK and the remaining Member States would be strongly preferable from the perspective of rights protection and the rule of law, and it would be undesirable and wasteful of resources from a legal perspective to create a third body to exercise a distinct but parallel jurisdiction to the CJEU and EFTA Court. If direct rights of action are not retained, that would constitute a very significant transfer of legal rights away from UK nationals and businesses throughout the 28 Member States, each of which is currently obliged to uphold rights conferred by EU law, and away from EU nationals and businesses in the UK, which will no longer be obliged to uphold such internationally agreed and protected rights.

26. Likewise, some form of reference procedure would be desirable to promote legal certainty and to ensure consistency of interpretation and application as between the UK and the EU. And it would be equally important to design some form of effective monitoring mechanism, including agreed judicial procedures for supervision and appeal (see § 16 above).

Q7. The potential impact of excluding the jurisdiction of the CJEU, both on UK domestic law and on securing a workable Withdrawal Agreement and any transitional arrangements under Article 50.

27. Given the above considerations, it appears likely that the maintenance of the UK 'red line' in respect of the CJEU will have a serious negative impact on the negotiations. In particular, nothing approximating to the existing rights conferred on UK nationals and businesses by EU law will be available under an ongoing future agreement, whether on a transitional or permanent basis, if the UK retains a discretion not only for its legislature to alter the rules but for its courts to interpret those rules without reference to the EU or its Member States.

28. Finally, this would create a strange asymmetry under the approach adopted in the Withdrawal Bill, whereby 'retained EU law' is imported wholesale into UK law as at the date of withdrawal. If the UK maintains its stance that (i) this

[6] For example, we understand that some parties are already selecting Irish law in preference so that they can continue to have continuity and legal certainty as to their rights and obligations across the internal market and know that their goods/services will be governed by one set of standards. And it has been widely reported that there are plans to establish English-language courts and tribunals in other Member States to enable cases to be determined within the EU after UK withdrawal.

statutory approach can at any time be altered by the UK legislature (including by the exercise of extensive delegated powers) and (ii) there will be no guarantee that the UK courts will respect the rulings of the CJEU as to the ongoing interpretation of EU law, then it seems highly unlikely that the EU will be prepared to guarantee any reciprocal UK rights in the remaining Member States. This would potentially raise the very troubling prospect that the Bill would in practice prove to be ineffective in its primary objectives, to avoid a 'cliff edge' both in respect of the UK's statutory regime and in respect of future trade with the EU.

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