The Bar Council

Response of the Bar Council of England & Wales

BEIS Consultation on Reforming the Framework for Better Regulation

1. This is the response by the General Council of the Bar of England and Wales ("the Bar Council") to the Department for Business, Energy and Industrial Strategy (BEIS) Consultation on Reforming the Framework for Better Regulation[1] ("the consultation"). The Bar Council has also had sight of the statement made by the Lord Frost to the House of Lords on 16 September[2] ("Lord Frost's statement"), as well as the paper[3] published by way of follow-up to that statement, which sets out phase 2 to the Regulatory reform process, the present consultation being referred to as phase 1. The two combined form part of the Government's response to the report of the Taskforce on Innovation, Growth and Regulatory Reform ('TIGRR Report') published in May 2021[4]

2. The Bar Council represents approximately 17,000 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. The Bar Council is also the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB). A strong and independent Bar exists to serve the public and is crucial to the administration of justice.

Preliminary remarks

3. Whilst the title and introduction to the consultation indicate that it is focussed on the already broad topic of regulatory reform, the content and wider context in which it appears to sit, mentioned in paragraph 1 above, imply an even broader scope and ambition. This appears to include, but not be limited to, a wholesale review of Retained EU Law.

4. With that in mind, the Bar Council considered approaching this response wearing two different hats – as experts on law reform and as the approved Regulator for the Bar. For now, we have elected to focus on the law reform aspects, specifically in the context of retained EU Law and the proposed approach to the revision of regulations. We will not be engaging with the questions posed per se, but rather take this opportunity to make points of a principled nature. If necessary, we may return to the issues from a regulator's perspective at a later date.

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[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005119/reforming-the-framework-for-better-regulation.pdf

[2] https://www.gov.uk/government/speeches/lord-frost-statement-to-the-house-of-lords-16-september-2021

[3] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018386/Brexit_opportunities-_regulatory_reforms.pdf

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994125/FINAL_TIGRR_REPORT__1_.pdf

5. The Bar Council is mindful that the TIGRR (which did not carry out a public consultation but focussed on engagements with invited industry and interest groups) proceeded on the premise that a great deal of regulatory Retained EU Law should be viewed as "unnecessary" (TIGRR Report para 5) and which needed to be shed and replaced with a different approach in order to boost future UK productivity, competition and stimulate innovation.

6. Not having had the opportunity to comment upon or assist the TIGRR's work, the Bar Council sees this consultation as a first chance to address some of the matters raised in its Report. We have significant reservations about that underlying premise.

7. In particular, we have difficulty in understanding what is meant by a 'common law approach to regulation' (§3.1.1 of the consultation) and would make the following observations:

(i) It is difficult to generalise, given the number of measures potentially affected by this proposed approach, but it seems inevitable that many areas currently governed by retained EU law (as amended by UK legislation) will need to be the subject of statutory regulation (rather than by the common law) on an ongoing basis;

(ii) much domestic regulation in common law countries – including much existing 'home grown' UK regulation, for example in the privatised utility sector – is in reality highly prescriptive, involving detailed statutory regimes governing the conduct of UK regulators; and

(iii) much EU regulation – for example in medicines and aircraft safety – was introduced to *reduce* the regulatory burden imposed by unduly prescriptive and inconsistent national regimes and relies heavily on guidance and codes produced by national regulators, within an agreed regulatory framework, rather than on detailed primary or secondary legislation.

We therefore caution against any presumption that retained EU law is in some way 'over-prescriptive' or intrinsically inappropriate for a common law jurisdiction such as England and Wales, or that replacement of retained EU law with a different UK regime will in reality reduce the regulatory burden on UK business. Please see further discussion at paragraph 27 et seq below.

8. Accordingly, and if it is correct to view this consultation and its proposals as part of a broader review of Retained EU Law, the central message that the Bar Council wishes to convey, in the interests of our clients and of legal certainty, is one of caution.

9. So soon after the end of transition, and with Covid19 still a present danger, we urge the government to place emphasis on the need to consolidate, that is to give time for the new legal, regulatory and business environments to settle, focus on the teething problems that are emerging and then, and only then, assess what is and is not working, based on real stakeholder experience. If so justified, targeted legislative changes could then be pursued. A blanket revision of domestic rules for the sake of divergence would only serve to undermine legal certainty and weaken confidence at an already vulnerable time.

10. Whilst this advice may not accord with the Government's ambitions to proceed at pace, it is unfortunate in the Bar Council's view that the profession was not more widely consulted or engaged with by the TIGRR and indeed that this subsequent consultation was published over the Summer with an end date for responses of 1 October. The Bar Council raises the issue of the reasonableness, adequacy and fairness of the Government's public consultations especially on an issue as important and fundamental as the review of Retained EU Law, whether in the context of regulatory reform, or more broadly, given the legal as well as practical implications thereof.

What is retained EU law?

11. Sections 2 – 4 of the European Union Withdrawal Act 2018[5] (the 2018 Act), established three categories of retained EU law, that is EU law as it applied in the UK on 31 December 2020:

- Domestic law (regulations, statutory instruments) which implemented or related to former EU obligations (notably directives);
- EU legislation which was directly applicable in the UK e.g. the General Data Protection Regulation 2016;
- Other rights and principles in EU law that had direct effect in the UK.

In the two years leading up to December 2020, the Government passed hundreds of pieces of domestic secondary legislation, making around 80,000 amendments to the body of onshored EU law that is now "retained", largely technical (e.g. geographical designations), though occasionally substantive in nature. Thus, several thousand pieces of EU legislation, some duly amended, were onshored on that date and continue to apply in the UK.

12. The Bar Council examined in anticipation[6] the fundamental change to the status of EU law within the UK that eventually took place on 1 January 2021 following the end of the transition period. From that date, EU law ceased to be a source of directly applicable rights that override inconsistent provisions of UK law. Retained EU law can now be revoked or amended by Parliament, or in accordance with statutory powers conferred by Parliament, whether or not such changes are consistent with EU law.

13. We noted then, as a matter of EU law, the Court of Justice of the European Union (CJEU) remains the international court designated by the EU Treaties as the final source of legal authority as to the validity and interpretation of EU law. The UK's departure does not change that.

The future status of Retained EU Law

14. We are concerned that Lord Frost's statement contains remarks about the future status of retained EU law that go further than the current UK legislation onshoring it and are worryingly unclear, in addition to being at odds with the current consultation. There is an obvious risk of confusion and legal uncertainty if all UK Courts were to be allowed to interpret its meaning or validity in a way that differs from the CJEU itself, which as we have noted, is and will remain the

[5] https://www.legislation.gov.uk/ukpga/2018/16/contents/enacted

[6] https://www.barcouncil.org.uk/uploads/assets/ba2a17ef-b5ef-47c1-8bfc4e804360ffde/Bar-Council-response-to-the-MOJ-consultation-on-Departure-from-retained-EU-case-law-by-UK-courts-and-tribunals.pdf

ultimate arbiter of EU law, or of other courts applying EU law in accordance with principles derived from the case law of the CJEU under the EU Treaties. This would be a litigator's dream but would wreak havoc with legal (and thus business and consumer) certainty and confidence, as well as with the rules of precedent. Moreover, that broader risk is made more acute by the difficulty in identifying the principles the courts might apply in determining their approach.

15. Specifically, we note with concern the apparent intention, as set out in Lord Frost's statement, to alter the 'special status' of retained EU law. We take it that that is in part a reference to the position that, under section 5(1) and (2) of the 2018 Act, the principle of supremacy of EU law applies to the relationship between retained EU law and any domestic legislation passed *before* 31 December 2020. There are principle objections as well as practical dangers to changing that. First, as a matter of principle, we note that any legislation now passed (or passed at any time after 31 December 2020) *can* modify retained EU law: the proposed change would therefore only affect the relationship between retained EU law and legislation passed *before* the end of transition. But before the end of transition it was generally understood, and can be taken to have been the legislative intention, that any domestic law gave way to inconsistent EU law, whenever enacted. Retrospectively to alter that position alters the effect of domestic legislation in a way that could not have been foreseen by the domestic legislator at the time. That is wrong in principle. Secondly, the proposal seems to us to be dangerous and unpredictable in its effect. As far as we are aware, no analysis has been done as to the precise legal consequences of retrospectively altering the relationship between retained EU law and pre-31 December 2020 domestic legislation, and absent such a detailed analysis the effect of such a change on the many important areas covered by retained EU law (ranging from tax to detailed technical regulation) is unpredictable and will give rise to considerable uncertainty and litigation.

16. In the interests of legal certainty therefore, the Bar Council recommended in its August 2020 paper, and continues to do so, that there should be a strong presumption that changes to retained EU law, assuming they are objectively justified, should be made by statutory rather than judicial means, and then by primary legislation rather than by statutory instrument. Moreover, we now add that, if retained EU law is to be so revised, those changes should not have retrospective effect. In any event, if Government does decide to move forward with such a legislative programme of revision, we urge caution as to both process and substance.

The issue of Democratic legitimacy

17. Before examining the approach to be taken, we repeat that our view is founded on the need for legal certainty and not in any concerns such as those asserted in Lord Frost's statement, that EU law as it applied in the UK while still a Member State lacked democratic legitimacy and had been subject to "very limited genuine democratic scrutiny."

18. We imagine that many members of the relevant former House of Lords and Commons EU Scrutiny Committees, who were so assiduous in their task over the years of UK membership, would take issue with that. But even more fundamentally, the EU legislative process itself, whilst no doubt capable of improvement, contains democratic checks and balances: for the vast bulk of

EU subordinate legislation, the co-legislators, both of whom must adopt the final text by (normally weighted) majority, are the Council, comprised of elected ministers from the Member States, and the European Parliament, elected by universal suffrage, and whose membership included democratically elected UK representatives until last year.

19. Moreover, if it is the Government's intention to ensure the democratic legitimacy of any revision of retained EU law, it should be, and be seen to be, achieved through a transparent, democratic process, ideally preceded by time spent gathering evidence in support thereof in individual areas, including through ample stakeholder consultation and impact assessments, followed by adequate parliamentary scrutiny throughout the legislative process itself.

20. In this context too therefore, and as noted at paragraph 10 above, we consider it unfortunate that the Government chose to launch this public consultation during the summer break, and with such a short deadline.

The need to adapt to the new (regulatory) environment

21. Members of the Bar have spent much of the past few years advising clients on the likely impact of the end of the transition period on their business, professional and family lives, consumer rights etc. Now, in autumn 2021, clients continue to seek advice and representation regarding the actual situation on the ground now that the transition period is over. Clients may have had to completely adapt their business model, and sometimes legal relationships and structures, to the new rules and regulatory requirements. Much of this cost and administrative adaptation has already occurred, but much is ongoing. Having just gone through such a major upheaval, exacerbated by Covid19, if the government were now to launch a wholesale revision of retained EU law, including sweeping regulatory changes, that would place a further, avoidable, burden on clients and industry that are already struggling to adapt.

22. Our primary call, therefore, is for Government to proceed slowly, allowing ample time for full targeted consultation with relevant experts and stakeholders; full impact assessments; and then making only those changes to retained EU Law that are shown to be both necessary and proportionate to the objective to be achieved. Aside from the impact in the regulatory field, the focus of this consultation, we are mindful that the approach taken here could serve as a template in other areas.

A two-pronged approach

23. We recommend that Government develops, in consultation with stakeholders, clear and transparent rules and principles governing its approach to the two parallel elements necessary for effective review of retained EU law, being substance and process.

Substance

24. This would include, but not be limited to:

- The need to thoroughly assess, on an evidence basis, the rules that we now have in place (e.g. on the regulatory side, data protection, financial services, environmental protection,

competition, public procurement, etc), what is working and why; what is not working and why; what is their objective; if they are not, how can they be made fit for purpose, applying rules of proportionality; etc. If the equivalent to a piece of retained EU law is seen to be working on the EU side, what is it that is different since it was onshored into the UK, and what if anything, can be learned from that?

- Paying due regard, including as appropriate, modelling UK-wide changes thereon, to relevant changes already in train at the level of devolved government. By way of example, we note the Welsh Government's current proposals for changes to the retained EU public procurement regime as set out in the *Wales Procurement Policy Statement* and the *Social Partnership and Public Procurement (Wales) Bill 2021*.

In any event, while we accept that some changes to retained EU law may prove to be necessary, we would not support moves to effect these, whether in the regulatory field or any other, merely in order to diverge on principle from EU law.

25. By way of constructive suggestion as to changes that might be needed, we accept, for example, that there may be some limited circumstances where, now that the source of EU retained law has ceased to be EU law itself, supported by the legislative and administrative context of the EU Treaties and the obligations and rights of the Member States and EU institutions, then the meaning of the provision in question is altered, and a statutory change may be needed to identify same. Two obvious examples would be:

(i) measures that have been interpreted by the CJEU in the light of the wider objectives of the EU Treaties, such as completion of the EU internal market, or

(ii) where the measure in question refers to EU administrative bodies or the impact on inter-State trade, which do not apply in an internal UK context.

Process

26. This would include, but not be limited to:

- Clear delineation of the role of central government; parliament; devolved government; regulators; stakeholders etc
- The need for Transparency in all aspects.
- Adequate and timely processes – Impact assessments, full stakeholder consultations, legislative scrutiny, etc.

Codification vs. a common law approach to regulation

27. Finally, whilst the Bar Council is not, as noted in our preliminary remarks, intending to respond to individual questions posed in the consultation, we take this opportunity to comment further on the context and question the presumptions apparently informing the approach to regulatory reform that the Government is commending therein.

28. The consultation seeks views as to the following (questions 1 and 3):

(1) What areas of law (particularly retained EU law) would benefit from reform to adopt a less codified, more common law-focused approach?

(3) Are there any areas of law where the Government should be cautious about adopting this approach?

29 In the TIGRR Report the authors express the following view (paragraph 41):
"Much of the restrictive nature of today's regulatory environment is due to the influence of the EU's approach to regulation over the last forty years. Nowhere is this clearer than the shift from the UK's traditional uncodified systems of common law and Scots law to a more Napoleonic, code-based, civil law approach traditionally seen on the Continent."

30. This forms the basis of criticism of the so-called EU approach to regulation, and consultees of this subsequent consultation are now invited to identify areas where a common law-focused approach is preferable. However, and as noted earlier, we are not convinced that the premise is sound. If one takes the example of consumer credit, the UK has had a domestic system which is largely based on a prescriptive code since 1985[7], and the impact of the (then) EC Directive on consumer credit[8] arguably represented a relaxation of the level of prescription, certainly in the context of documentary requirements for regulated agreements[9]. Similarly, the UK had highly prescriptive regulatory systems for food safety and animal health in place prior to EU regulation of the same. A shift to a "more common law" approach in these areas would therefore mark not simply a shift away from a European mode of regulation; it would also represent a departure from the manner in which the UK has previously regulated these areas.

31. We would suggest that this previous experience must be factored in to consideration of the appropriate mode of regulation in the future. For example, a move to an outcome/principles based mode of regulation may have benefits for some sectors, but it seems unlikely to be appropriate in others, particularly where safety is the primary concern. Previous experience would appear to suggest that there is no sensible way to avoid a prescriptive approach where safety is concerned, and it is also far from clear that one can avoid a proliferation of regulatory rules even in areas which do not concern safety.

32. The Financial Conduct Authority (FCA)[10] is an example of a UK regulator which operates on the basis of high level principles. However, it also regulates via a system of highly prescriptive mandatory rules, further backed up with guidance. The FCA Handbook, if it were ever printed, would extend to many thousands of pages. The laudable hope that simplification can be achieved by adopting a different approach to regulation may be illusory. We make this point because a move away from a prescriptive approach may adversely impact on legal certainty, which is vital

[7] The date on which the statutory instruments which gave effect to the majority of the provisions of the Consumer Credit Act 1974 came into force.

[8] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers

[9] A comparison of the documentary requirements of the Consumer Credit (Agreements) Regulations 1983 (as amended) and the Consumer Credit (Agreements) Regulations 2010 (which gave effect to the changes made by the Directive) bears this point out.

[10] We understand that Financial Services are the subject of separate consultation but cite this by way of illustrative example.

in most if not all regulated sectors. Businesses have to make decisions with some degree of comfort that they are compliant and the prospect of having to wait for appellate authority to clarify the position is unlikely to be attractive to them, nor is it likely to encourage innovation.

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