House of Commons' European Scrutiny Committee Inquiry into retained EU law – where next?
Bar Council written evidence

About us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Scope of response

This submission addresses the questions on which the Committee has sought evidence in its January 2022 call entitled "Retained EU Law: Where next?"[1]. The Bar Council also responded to both the Ministry of Justice's August 2020 consultation entitled "Departure from retained EU case law by UK courts and tribunals"[2] (hereafter "the 2020 MoJ consultation") and the Department for Business, Energy and Industrial Strategy's September 2021 consultation on "Reforming the Framework for Better Regulation[3] (hereafter "the 2021 BEIS consultation"). Both responses dealt with issues around the status and substance of retained EU law and set out the Bar Council's preliminary views on those issues. We respectfully commend both papers and repeat and as necessary, develop and update the points that we made therein where relevant to the present call for evidence.

Preliminary remarks - What is retained EU law?

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

    a. Domestic law (regulations, statutory instruments) which implemented or related to former EU obligations (notably directives);

    b. EU legislation which was directly applicable in the UK e.g. the General Data Protection Regulation 2016;

[1] https://committees.parliament.uk/call-for-evidence/713/
[2] https://bit.ly/3L1R60K
[3] https://bit.ly/3AdX1KZ
[4] https://www.legislation.gov.uk/ukpga/2018/16/contents/enacted

c. Other rights and principles in EU law that had direct effect in the UK.

2. In the two years leading up to December 2020, the Government made hundreds of pieces of secondary domestic 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 (and in some cases profoundly significant, such as the removal of EU law relating to the "four freedoms" or State aid). Thus, several thousand pieces of EU legislation, some duly amended, were on-shored on that date and continue to apply in the UK.

Executive Summary

3. As mentioned above, the Bar Council took the opportunity, provided by the 2020 MoJ consultation, to examine the fundamental change to the status of EU law within the UK that was to take place on 31 December 2020 following the end of the transition period provided for in the Withdrawal Agreement Act 2019. From that date, EU law ceased to be a source of directly applicable rights that override inconsistent provisions of UK law. By the terms of the 2018 Act, Retained EU law (REUL) 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.

4. REUL now forms part of the UK legal order. Its status and interpretation are now governed by UK legislation under the control of the UK Parliament.

5. REUL now forms the bulk or a significant part of the governing law in many areas of commercial and general life, in areas such as consumer rights, data protection, safety regulation, VAT, employment law, and financial services. It is a matter of great public interest that, where it applies, REUL should be as certain as possible. It is also important as a matter of democratic principle – as well as ensuring that replacement legislation in areas of great importance to business and the wider public is effective in achieving its goals – that replacement legislation be carefully considered and properly scrutinised before it is enacted.

6. The mere fact that REUL has EU law as its origin and is (in general) to be interpreted as EU law, does not mean that its content is either unacceptable or uncertain. As to acceptability, EU law is, generally, subject to thorough scrutiny before it is made (in processes that are often superior in transparency and democratic scrutiny to the processes that govern the approval of UK secondary legislation by Parliament – legislation that it is universally agreed should be given effect to by the courts, if valid, whatever its degree of scrutiny by Parliament). In most cases, the EU legislation was supported, and even promoted, by the UK government of the day: in our experience, assertions to the effect

that the United Kingdom was in anything other than a small minority of cases "outvoted", or abstained because it would lose, are wide of the mark[5]. As to certainty, the principles of interpretation of EU law, with which UK lawyers and courts are deeply familiar, are as well-settled as principles of interpretation of UK statutes, and EU legislation is, in general, no more subject to issues of uncertain interpretation than UK legislation.

7. Any urge to replace REUL merely because it is "EU" in origin should be resisted: rather, the question should be in each case whether alternative UK regulation would achieve different and preferable goals, whether it would be better or more cost-effective in achieving its goals, or whether it would be more certain in its application. Broad assertions as to the supposed superiority of "common law" over "EU" or "civil law" approaches to regulation are generally without foundation, ignore the way in which much EU law that is now REUL was shaped by UK influence and precedents, and provide no basis for any presumption that REUL should be replaced.

8. It will also be important – as and when replacing REUL is considered – carefully to examine the implications of such changes for the United Kingdom's trade, and wider relationship, with the EU. For example, changes to the UK data protection regime – particularly if they can be seen as weakening that regime – are likely to have implications for the EU's recognition of the adequacy of the UK's data protection regime. If that recognition is removed, that will have significant adverse implications for UK trade in goods and services with the EU (which is still by far the largest UK trading partner in both goods and services). It will also be necessary to consider the implications of changes to REUL for the "level playing field" provisions of Title XI of Heading One of the Trade and Cooperation Agreement. In addition, in many cases it will be right, when considering the replacement of REUL, also to take account of, and to reflect, changes in the equivalent EU regulation since Brexit, particularly in the many cases where UK businesses are likely for commercial reasons to want to comply with EU as well as UK regulation in order to simplify their exports to the EU. All these are good reasons why careful scrutiny by Parliament of such changes will be desirable, and why Parliament should be wary of conferring any broad power on Ministers to legislate without detailed scrutiny and accountability.

9. Similarly, any proposal to change the status or effect of REUL should be judged on whether it makes REUL clearer or more effective, rather than on the basis that any change in its status or effect that can be presented as "domesticating" it must necessarily be a good thing. As far as we can see, proposals to change its status are likely to make it considerably less clear and less effective, to the benefit of no one and with entirely uncertain results.

[5] See, for example, the assertion by the Minister of State for Brexit Opportunities and Government Efficiency on 22 March 2022 that that happened in "very many cases", a claim that he did not attempt to evidence or quantify. (https://committees.parliament.uk/oralevidence/9967/html/ at Q.9)

10. That said, there are legitimate concerns about the transparency and accessibility of REUL (that is, following its onshoring), and a number of uncertainties as to the approach that the UK courts will take to its interpretation (for example, as to the approach to post-2020 ECJ case-law, the application of fundamental principles of EU law and as to the use of their powers to depart from pre-2021 case-law of the Court of Justice of the EU ("CJEU"); some of which we explore where relevant to the questions below.

Question 1: In what ways is retained EU law a distinct category of domestic law? To what extent does this affect the clarity and coherence of the statute book?

11. It is important to bear in mind when examining this issue that EU law is not "foreign" to UK law and courts. For 47 years, the UK was an EU Member State, actively taking part in the policy discussions, legislative procedures and indeed court proceedings that lead to the adoption and development of EU law. EU law has been part of the UK 's corpus of law throughout this period. It has been incorporated into the domestic legislation of the UK, initially as a result of a transposition obligation but recently as a result of the "onshoring" exercise that has led to the concept of REUL. Whilst practitioners, academics and those in government may be aware of the source of a legal right or obligation, those subject to the law do not typically distinguish (and do not need to distinguish) between rights and obligations that have an EU or international as opposed to wholly domestic source. Thus, whilst retained EU law may be a distinct category of domestic law for some, most natural and legal persons to whom that law applies are unlikely to make any such distinction.

12. Nor can REUL be regarded as lacking legitimacy compared to legislation passed by Parliament or made by UK ministers. The EU legislative process, whilst certainly 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 2020. Important Commission legislative proposals are preceded by impact assessments and so-called roadmaps, and often accompanied by Staff Working Documents, all publicly available and setting out the policy intent. In addition, public consultations and stakeholder meetings are frequent features of the process, whether concerning binding or non-binding measures. Lobbyists who take part in these activities must be registered on the EU's public institutional register created for the purpose. As we noted above, it is universally accepted that the courts must give effect to domestic law statutory instruments, if validly made by Ministers, or to complex legislation such as Finance Acts, whatever their degree of scrutiny by Parliament (which in both cases is often deplorably minimal or nonexistent): we do not see any sound basis for assertions that REUL is, intrinsically, less "democratic" or "legitimate" than those examples.

13. Any proposal for the replacement of REUL should be on the basis that the replacement legislation would receive at least as effective democratic scrutiny – and its quality and legitimacy is likely to suffer if it does not.

14. We also point to the very valuable work of the predecessors to the committee that is conducting this inquiry, as well as to their equivalents in the House of Lords, in subjecting huge volumes of proposed EU legislation to careful scrutiny over the many years of UK membership. Thus, UK ministers, politicians and officials, stakeholders and policy makers had ample opportunity to, and did, exert influence on the development of EU policy and secondary legislation over the years of UK EU membership.

15. Moreover, the UK had a hand in the development of EU primary law too. It was present at the table when each of the five major treaties that marked the evolution of the original European Economic Community (EEC) to the current European Union, were negotiated and adopted, each with the unanimous approval of the then EEC/EC/EU membership: The Single European Act 1986; The Treaty of Maastricht 1992; The Treaty of Amsterdam, 1997; The Treaty of Nice, 2001 and most recently, The Treaty of Lisbon, 2007.

16. We also note that the UK prided itself as a prime mover in the development of several areas of EU law and policy during its 47 years of membership, notably in regulatory fields, in the development of the concept of mutual recognition and other EU Single Market principles; significant aspects of the EU consumer, financial services, employment, environmental and justice and home affairs acquis to mention but a few.

17. Thus, for those 47 years EU law was an integral part of UK domestic law and for some purposes (e.g. in the field of competition law) UK courts were an integral part of the EU's judicial system. Accordingly, the Bar Council does not consider REUL to be a distinct category of domestic law that should be put into a category deserving particular scrutiny or suspicion. Rather, it is part of the fabric of UK law, and in many fields is crucial to its clarity and coherence. The principles that underpin EU law, such as that of proportionality, or approaches to legislative interpretation, have long since become second nature to domestic UK lawyers and the judiciary, and in the main, comfortable bed fellows with home grown legal concepts.

18. We do, however, have concerns as to the transparency and accessibility of REUL. The "onshoring" of EU law has inevitably affected the clarity and coherence of the statute book. The onshoring of EU regulations has been particularly cumbersome, involving a "snapshot" being taken of the EU law that applied as of 31 December 2020, which "snapshot" then has effect subject to the plethora of statutory instruments drafted over the previous two years that amended the "snapshot". In some instances, multiple statutory instruments amended the same "snapshot", with later versions overriding changes that would have been made by earlier ones. To take an example from the onshoring of EU financial services regulations, a regulation known as EMIR[6] (European Markets Infrastructure Regulation which has already been amended multiple times at EU

[6] Regulation (EU) No 648/2021 of the European Parliament and Council

level) was amended by 14 statutory instruments plus primary legislation. Even experienced practitioners find making sense of such legislation daunting – and this is but one of hundreds of pieces of retained EU law in financial services, many of which are several hundred pages long. And in making sense of such legislation, practitioners are assisted by unofficial consolidated versions of the legislation available on commercial websites – a resource not available to the general public. The complexity of REUL in financial services was such that the financial services regulators were given, and exercised broadly, a statutory power to make temporary transitional provisions to give regulated entities until 31 March 2022 to comply with changes in the law. There is thus a strong case

for legislative consolidation, in the form of a Consolidation Bill, in the area of financial services and potentially in other areas.

19. Accessibility of the law is essential so that: natural and legal persons are aware of their rights and obligations; regulators can enforce those rights and obligations; practitioners can advise on the law; and so that the judiciary can apply the law. The complexity and, on occasion, inaccessibility of REUL is therefore a serious problem.

Question 2: Is retained EU law a sustainable concept and should it be kept at all?

20. For the sake of clarity, we draw a distinction here between retaining the *categorisation* of swathes of domestic law that have their origins in EU law, as REUL, and retaining the substance of the law itself. It may be helpful going forward, once REUL has been thoroughly reviewed and amended if and to the extent objectively justified in order to be fit for purpose in the domestic scenario, for the categorisation itself to be discontinued. For reasons of legal certainty and clarity explored elsewhere in this response, it would be premature to do so now.

Question 3: Do the principles and concepts of EU law continue to provide an acceptable and suitable basis for legislation in post-Brexit UK?

21. As noted in our reply to question 1, the principles and concepts of EU law have long since been absorbed into UK domestic law such that many of them can properly be said to be part of its fabric. We note Sir Stephen Laws' view, expressed in oral evidence to this Committee on 2 March 2022, that at some point UK courts and lawyers will cease to be familiar with EU law concepts and approaches[7] – but that time, if it comes at all (which will depend in part on choices made by future governments and Parliaments as to alignment with the EU), is a long way off. Moreover, and as discussed in greater depth in our response to question 5 below, there are areas of domestic law which, if they diverge materially from EU law principles and concepts, will create legal uncertainty, confusion and cost for UK citizens and businesses alike. Our answer is thus a qualified "yes", with

[7] Oral evidence, 2 March 2022, Q39.

the proviso that the continuing suitability of the principles and concepts of EU law as the basis for legislation in post-Brexit UK will vary according to the field of law concerned, and the extent to which, e.g. its continuing interoperability with EU law and procedure is central to its fitness for purpose and/or to legal certainty for UK citizens and businesses. It will therefore be essential to examine each field separately.

22. We note, however, that there is a difference between principles and concepts of law and policy objectives. Whilst maintaining the same basic principles and concepts of law, the UK and EU could pursue different policy objectives. This remained possible in many areas of the law[8] even when the UK was a member of the EU.

23. We also refer to the points made at paragraphs 7 and 7 above as to (a) the lack of any sustainable basis for claims that a "UK" or "common law" approach to regulation necessarily has advantages over the "EU" approach (and we should note that, in any event, as practitioners we find it hard to understand what is meant by a "common law" approach to regulation); and (b) the need to consider in each case the wider implications for the UK's trade with the EU (by far its largest export market for both goods and services) of moving away from the EU law approach.

Question 4: How has the concept of retained EU law worked in practice since it came into effect and what uncertainties or anomalies have arisen, or may yet arise in the future?

24. Due to the inevitable time lag between issues arising and the resolution of those issues reaching the courts, there have as yet been few cases where the courts have had to consider the application of REUL to facts that occurred after the end of the transition period on 31 December 2020. Indeed, even though the Court of Appeal gave useful guidance a couple of months into 2021 as to the approach that the courts should take to questions involving REUL in *Lipton v BA City Flyer Limited* [2021] EWCA Civ 454, that case itself concerned facts that arose before the end of the transition period (and the apparent assumption that that case was governed by REUL as amended by statutory instruments rather than by the EU legislation in force at the time is questionable – see *Chelluri v Air India* [2021] EWCA Civ 1953 at §16). Other courts have simply – and in our view correctly – applied EU law to pre-2021 facts without reference to REUL: see e.g. *Wilson v McNamara* [2022] EWHC 243 (Ch) and *Fratila v Secretary of State for Work and Pensions* [2021] UKSC 53.

25. One set of uncertainties surrounds the extent to which the courts should use the power to depart from pre-2021 CJEU case-law in interpreting REUL (a power now conferred on the Court of Appeal as well as on certain other UK courts below Supreme Court level). The Court of Appeal has to date declined to exercise that power (see *Chelluri*, cited above, at §§62ff, and *TuneIn v Warner Music* [2021] EWCA Civ 441 at §§73ff), largely because of the absence of any relevant change in domestic law or of academic consensus that the CJEU

[8] Where the EU does not have exclusive competence, individual Member States remain free to exercise their own competence.

case-law was problematic; problems of inconsistency with the approach being taken by the EU in areas with a strong international component; and concerns about creating legal uncertainty. However, it is certain that further attempts will be made at that level by parties in whose interests it is to depart from CJEU case-law that stands in the way of their case, with potential implications for delay and costs.

26. Other areas of uncertainty yet to be addressed by the courts include the impact of the application of general principles of EU law to the interpretation of REUL while excluding the application of the Charter of Fundamental Rights (which incorporates several of those principles) and the weight to be given to post-2020 CJEU case-law.

27. The courts have – in our view correctly – been prepared to apply general principles of interpretation of EU law to REUL. A recent example is the case of *re Allied Wallet* [2022] EWHC 402 (Ch), where the court accepted that the EU principle of conforming interpretation (as set out in Case C-106/89 *Marleasing* [1990] ECR I-4135) continued to apply to regulations made under section 2(2) of the European Communities Act 1972 and still operating as REUL, so that those regulations had to be interpreted so as to be consistent with the directive that they sought to implement. Any other result would (a) mean that the meaning and effect of such regulations changed (sometimes dramatically) on 31 December 2020; (b) fail to implement what has to be presumed to be the intention of Parliament in making or approving the domestic implementing legislation, namely to implement the directive; and (c) give rise to considerable uncertainty as to how such domestic implementing legislation should be interpreted, including re-opening areas where domestic case-law has already settled the meaning of such domestic implementing legislation by reference to the relevant directive (see, for example, the area of VAT, where there is a considerable volume of such case-law).

Question 5(a): In light of the doctrine of parliamentary sovereignty, what was the rationale for retaining the principle of the 'supremacy of EU law'?

28. By section 5(2) of the 2018 Act, the principle of the supremacy of EU law continues to apply "so far as relevant to the interpretation, disapplication or quashing of any enactment… passed or made *before exit day*" (our emphasis). What this means is explained in paragraph 103 of the Explanatory Notes:

> "Where … a conflict arises between pre-exit domestic legislation and retained EU law, subsection (2) provides that the principle of the supremacy of EU law will, where relevant, continue to apply as it did before exit. So, for example, a retained EU regulation would take precedence over pre-exit domestic legislation that is inconsistent with it."

29. In our response to the 2021 BEIS consultation, we explored this further in the context of an apparent suggestion by Her Majesty's Government (HMG) that it wanted to change the effect of those provisions retrospectively:

> "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."

30. We then went on to explain that:

> "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. [ ]. 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."

31. The rationale for retaining the principle is, therefore, legal certainty. That principle is not to be lightly cast aside: individuals and businesses will have taken decisions, sometimes far-reaching and involving significant investment, based on the law as it was, and was understood to be, in the UK at that time. The effect of removing the principle would be to give priority to any subsequent domestic legislation that was inconsistent with the EU legislation that became REUL. In the absence of any detailed survey of such legislation, it is impossible to say whether the consequences of removing the principle in any particular case would reduce the clarity of the law or change its effect, but the overall effect could only be to reduce certainty and to lead to unpredicted (and perhaps entirely undesirable) consequences.

32. But retaining the principle also preserves what must be assumed to be the intent of any Parliament passing legislation in the period of the UK's EU membership, namely that the legislation that it passed would not qualify the effect of previously enacted EU legislation. That rationale – preserving the hierarchy of legislation as Parliament understood it to be – is entirely consistent with the concept of Parliamentary sovereignty. So the principle that (until Parliament decides otherwise) REUL retains its supremacy over conflicting domestic law passed before Brexit is less startling than it might initially seem. The principle of supremacy operates only in the context of conflicts between domestic law passed after the EU legislation that now forms part of REUL and before Brexit. And it reflects the point that, pre-Brexit, Parliament can be taken to have intended that its legislation was subject to any inconsistent EU law.

33. We have considered the view propounded by Sir Stephen Laws in his oral evidence to this Committee on 2 March, at Q21. We note that he accepts that in principle pre-Brexit Parliaments could have legislated in the hope or expectation that their legislation was not incompatible with existing EU law, and that effect should be given to that hope or expectation. With all due respect, however, we can see no practical or principled basis –

and he articulates none – on which such cases are to be distinguished from cases where Parliament did not have that intent. The reality is that pre-Brexit Parliaments are likely simply not to have considered the question at all – and to the extent that legislators did think about it, the answer that they would have been given would have been "this legislation will be subject to pre-existing EU law". Sir Stephen's suggestion that cases could be sought in which such intention was in some (unexplained) way made manifest (either on the face of the legislation or in records of debates) is no more likely to find anything than the proverbial hunt for the Snark.

34. Further, we disagree with his claim that changing the priority of REUL over subsequent pre-Brexit Westminster legislation would not in itself cause any injustice or uncertainty: the problem – which he does not attempt to grapple with – is that without an in depth analysis of all REUL and of all subsequent pre-Brexit Westminster legislation (an exercise that as far as we are aware has not been done) it is simply impossible to say what the effect would be of such a general change on individuals' and businesses' rights and obligations

    in particular cases. Making sweeping changes without any proper understanding of their consequences is in itself a recipe for injustice and uncertainty. Nor does Sir Stephen offer any basis for distinguishing between the cases (that he accepts exist) where the existing hierarchy should be retained and cases where it should not.

35. We further note the comments made by Martin Howe QC on 2 March, QQ18-20. In particular, we note that Mr Howe puts forward a couple of examples from within his area of expertise where he agrees that it was appropriate and necessary to retain the position of REUL in the hierarchy of domestic law. We underline, however, that he produced no example where he would be confident that the position of REUL in the hierarchy of law could be modified without risk of uncertainty or anomalous or undesirable results. We also consider that the difficulty with Mr Howe's claim that "that the principle of supremacy within retained EU law can be modified and restricted to cases where it really is appropriate and necessary" is that, as far as we can see, there is no satisfactory general basis, capable of being turned into a legal rule, on which it is to be decided whether it "really is appropriate and necessary" in one case rather than another (and Mr Howe did not put any such basis forward).

Question 5(b): What is the most effective way of removing the 'supremacy of EU law' and other incidents of EU law from the statute book?

36. It will be clear from our response to Question 5a that the Bar Council does not consider that "removing the 'supremacy of EU law'" is a coherent or sensible objective, or one that is dictated by any principle deriving from Parliamentary sovereignty, as long as REUL remains in effect at all. As to "other incidents of EU law", it is not clear what the committee means by that, though the question in relation to that may be answered in response to question 6 below.

37. That said, we accept that there may be some perceived oddity in retaining a principle labelled "supremacy of EU law" after Brexit, and there may be an argument for removing

the principle with that name – what matters, however, is that the existing hierarchy of law is not disturbed in a way which will have unpredictable and quite possibly anomalous or harmful effects, and which will certainly generate litigation and uncertainty, with no obvious rationale.

38. To the extent that this question is asking for comments on how REUL should be reviewed over time, the Bar Council notes that HM Treasury ("HMT") is conducting a Financial Services Future Regulatory Framework Review. HMT recognises that the onshoring exercise has resulted in detailed regulatory requirements being found in primary legislation, secondary legislation and regulators' rules. HMT intends to develop a model whereby the detailed requirements with which regulated entities must comply are determined by regulator but with the framework within which the entities operate being determined by Parliament and HM Government (in primary and secondary legislation). This will require a significant overhaul of the current financial services legislative landscape but is required after the onshoring exercise. Similar considerations, including

    the need for Consolidation Bills, should be applied to other sectors where it is desired to review REUL.

39. We disagree with Martin Howe QC's suggestion (at Q26 of the session on 2 March) that there should be a "sunset clause" on REUL. We do not consider that it is right to seek to tie future governments and Parliaments to a timetable which they might well consider to be a wholly inappropriate one given their legislative priorities: and nor is such a tie democratic, in that it seeks to prioritise the priorities of today's legislator over the priorities of future politicians elected by future voters.

Question 6: Should retained EU law be interpreted in the same way as other domestic law? Should the case law of the Court of Justice of the European Union have any relevance in the interpretation of retained EU law?

40. As to the first question, we see no justification for, and huge dangers in, any general change in the rules of interpretation of REUL. EU law (and hence REUL) is not written in the same way as UK legislation, uses different terminology, and has different principles of interpretation, albeit, as noted above, long-since familiar to UK courts and lawyers. To provide that it had to be interpreted in the same way as UK legislation would have enormous, and almost certainly undesirable, effects: and it would produce law that no legislator (either EU or UK) ever intended to have the effect that it did.

41. As to the question of whether the case law of the CJEU should have any relevance in the interpretation of retained EU law, it may be helpful to refer to the Bar Council's February 2018 briefing for The Committee Of The Whole House On The European Union (Withdrawal) Bill (as it then was)[9] in which we reproduced an extract from the judgment of Lord Bingham in *Customs and Excise v ApS Samex* [1983] 1 All ER 1042, 1055, which

[9] https://bit.ly/3J8VQQ3

explained why the CJEU is best placed to interpret EU law, and in contrast the disadvantageous position of any national judge seeking to do likewise:

> *"[The ECJ] has a panoramic view of the Community and its institutions, a detailed knowledge of the treaties and of much subordinate legislation made under them, and an intimate familiarity with the functioning of the Community market which no national judge denied the collective experience of the Court of Justice could hope to achieve. Where questions of administrative intention and practice arise the Court of Justice can receive submissions from the Community institutions, as also where relations between the Community and non-member states are in issue. Where the interests of member states are affected they can intervene to make their views known. That is a material consideration in this case since there is some slight evidence that the practice of different member states is divergent. Where comparison falls to be made between Community texts in different languages, all texts being equally authentic, the multinational Court of Justice is equipped to carry out the task in a way which no national judge, whatever his linguistic skills, could*

> *rival. The interpretation of Community instruments involves very often not the process familiar to common lawyers of the laboriously extracting the meaning from words used but the more creative process of supplying flesh to a spare and loosely constructed skeleton. The choice between alternative submissions may turn not on purely legal considerations, but on a broader view of what the orderly development of the Community requires. These are matters which the Court of Justice is very much better placed to assess and determine than a national court."*

42. We went on to recognise that this principle had been diluted to a limited degree, even in the context of continuing UK EU membership, by subsequent rulings of the Supreme Court, for example in the judgment of Lord Mance in *Pham* [2015] UKSC 19 at §§ 76-80. However, that judgment gave no support to any suggestion that there might be circumstances where it would be appropriate for a judgment of the CJEU on a point of EU law to be ignored or treated as irrelevant.

43. The Bar Council considers – along with the Court of Appeal in both the *Chelluri* and *TuneIn* cases – that the advantages that the CJEU has in interpreting EU law remain powerful considerations when a court (with the power to do so) is considering whether to depart from CJEU case-law. The advantages of the CJEU over a national court described by Bingham J (as he then was) remain valid, even after UK withdrawal, unless the case can be distinguished because, e.g. the point of law turned on a specific feature of the EU Single Market which is no longer relevant in a UK context. But in such a case, both Counsel before the UK court, and the court itself, will be well placed to distinguish the REUL accordingly.

44. Finally, a widespread practice of departing from the CJEU's pre-Brexit interpretation of EU law would inevitably lead to considerable uncertainty, especially in fields (such as VAT) where there is extensive case-law putting flesh on sometimes skeletal legislative provisions. Uncertainty in such areas will give rise to considerable difficulty in applying,

enforcing, and litigating the law (and, in the field of VAT, would risk prejudicing tax revenues if new interpretations are reached that favour taxpayers over HMRC). Though criticism of individual CJEU judgments is inevitable in a complex legal system such as the EU's, we detect no pressure whatsoever from practitioners or clients to throw complex and important areas of our law – such as VAT, among many others – into uncertainty by making general changes in the way in which REUL is to be interpreted or by jettisoning existing CJEU case-law applicable to REUL that remains in force.

Question 7: Should a wider range of courts and tribunals have the ability to depart from retained EU case law and should it be binding at all?

45. The Bar Council provided a detailed analysis of the issues to be considered in response to just this question in its 2020 MoJ consultation response, with which we still agree. Rather than reproduce that in full, we highlight the main points of principle and the key arguments in support of the position taken. However, we refer you to our 2020 response (again, lined above) for more detail as necessary.

46. In summary, the Bar Council considers that it would undermine overriding principles of legal certainty for a Court that was subject to further appeal to be able to depart from established interpretation of EU law as long-since integrated into the fabric of UK domestic law. That would have a knock-on negative impact on the reputation of the United Kingdom as a jurisdiction of choice.

47. The multiple elements to be considered include:

    a. The risk to legal certainty, which will be particularly acute if any judicial departure from the established interpretation of provisions of EU law, in relation to a provision of retained EU law that has not been amended or qualified by UK legislation, is made by a UK court that is subject to appeal. In all but the most exceptional cases, it would provide an obvious ground of appeal from the decision of the lower court.

    b. Moreover, since, pending any such appeal, the law would be as declared by the lower court, there would be considerable legal uncertainty until the Supreme Court was able to decide the appeal. In contrast, if only the Supreme Court has the power to depart from the CJEU, existing precedent would continue to bind pending the decision of the Supreme Court, regardless of the view of the lower court(s).

    c. In addition, and again as noted in our 2020 MoJ consultation response, "it is critical to remember that, in contrast to legislative change – which applies only to situations after it is enacted – any judicial departure from CJEU case law will apply retrospectively: in areas such as VAT that could mean that the legal basis on which tax had been paid on certain classes of supplies over the previous few years became unsustainable, leading to potentially very large claims against HMRC and

creating the inevitable risk of extensive litigation to resolve the legal and commercial uncertainty that would be created."

48. Retained EU case law forms part of domestic case law. Its precedential status is therefore domestic, and upsetting that would have a profound effect:

    a. Over the 47 years of EU membership, UK courts have themselves extended and applied EU law as interpreted by the CJEU (what the 2020 MoJ consultation document referred to as "retained domestic case law"). A lower court invited to consider departure from a CJEU principle laid down in a particular case will frequently find that that principle has been applied or extended in subsequent decisions of UK courts whose decisions, by exercise of the common law system of precedent, are binding on it. In such a case, departing from the CJEU precedent is pointless unless the lower court also has power to depart from the domestic precedent as well. But a power to depart from precedents set by higher courts (or, in the case of the Court of Appeal, its own past judgments) would be a major disruption, indeed would undermine the very system of precedent on which legal certainty depends in our common-law system. And any attempt by the legislature to draw a distinction between such cases and those in which the higher court precedents merely repeated CJEU principles would seem to us to be a recipe for hopeless confusion and complexity.

49. In short, the Bar Council did not see any attractive or practical solution to this issue apart from reserving the power to depart from CJEU case law to the Supreme Court (which is not bound by any retained domestic case law). Though that view was in the end rejected, we consider that the very cautious approach adopted by the Court of Appeal to its power to depart from pre-2021 CJEU case-law is to be welcomed.

50. We note Martin Howe QC's claim at Q26 of the evidence session on 2 March that there is no need to worry about extending the power to depart from CJEU case-law to the lower courts because those courts would be very cautious about departing from established CJEU case-law: that, however, ignores the very real problem that giving first-instance courts and tribunals the power to depart from such case-law will permit, and even encourage, litigants seeking to use legal proceedings to delay the inevitable or to put pressure on the other side to settle, or (for example) to resist an otherwise irresistible demand for tax; to "have a go" at persuading the first-instance courts that they should do so – and dealing with such claims will take considerable time and legal resource, especially in the tribunals. Indeed, Mr Howe's point that the current inability of the lower courts to depart from CJEU case-law when interpreting REUL has a "deterrent effect" rather concedes the point that if the lower courts had that ability then there would be likely to be many more attempts to "have a go" (attempts which, as Mr Howe accepts, are likely in most cases to fail).

Question 8: To what extent has retained EU law affected devolved competence?

51. Since the Bar Council represents barristers in England and Wales, we confine our answers to the position in Wales.

52. Section 108A of and Schedule 7A to the Government of Wales Act 2006 (as amended) set out the legislative competence of the Senedd (Welsh Parliament). Section 108A(2) provides that a provision is outside the Senedd's competence insofar as it […] (c) relates to reserved matters (in Schedule 7A); (d) breaches any restrictions in Part 1 of Schedule 7B; or (e) is incompatible with the Convention (ECHR) rights. Schedule 7B paragraph 5(1) sets out a number of "protected enactments" which may not be modified by the Senedd or by Welsh Ministers.

53. As previously drafted (following amendment by the Wales Act 2017), section 108A(2)(e) provided that a provision was outside the legislative competence of the Senedd insofar as it was "incompatible with the Convention rights or with EU law" and Schedule 7B paragraph 5(1) included the European Communities Act 1972 (as well as the Human Rights Act 1998) as "protected enactments" which could not be modified. As further amended by the 2018 Act, section 108A(2)(e) now reads "it is incompatible with the Convention Rights or in breach of the restriction in section 109A(1)."

54. A new section 109A(1) (also added by the 2018 Act) and headed "Legislative competence: restriction relating to retained EU law" currently provides "An Act of the Senedd cannot modify, or confer a power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown" though section 109A(2) does then provide that the restriction in subsection (1) does not apply to any modification so far as it would, immediately before IP completion day, have been within the Senedd's legislative competence. No subordinate legislation made by a Minister has yet come into force, but regulations are proposed.

55. Schedule 7B paragraph 5(1) of the Government of Wales Act 2006 now also includes the European Union (Withdrawal) Act 2018 itself and the United Kingdom Internal Market Act 2020 (see further Q.9 below).

56. What was previously a restriction on the Senedd (and before it the Cynulliad/Assembly) not to legislate or act incompatibly with EU law, has now become a restriction not to legislate so as to modify REUL in areas set out in regulations (which are yet to be made) by a Minister of the Crown.

57. Under section 80(8), the Welsh Ministers likewise have no power to make, confirm or approve any subordinate legislation so far as it modifies retained EU law, again subject to regulations yet to be made.

58. REUL nevertheless covers a whole host of subject matter areas which are otherwise within the legislative competence of the Senedd, notably in the fields of agriculture, fisheries, forestry and rural development, culture, economic development, education, the environment, health, highways and transport, housing, social welfare, tourism and water and flood defence, and in which the Senedd is currently unable to take action so as to modify REUL save to the extent that it is not limited by regulations under section 109A(1).

Question 9: Are there issues specific to the devolved administrations and legislatures that should be taken into account as part of the Government's reviews into retained EU law?

59. The draft subordinate legislation in the form of the European Union (Withdrawal) Act 2018 (Repeal of EU Restrictions in Devolution Legislation, etc.) Regulations 2022, which, if made, were due to come into force on 31st March 2022 and which seek to repeal the limitations on devolved legislative and executive competence which were introduced by the 2018 Act, notably in sections 80 and 109A of the Government of Wales Act 2006, are to be welcomed. The 2018 legislation was aimed at preventing the devolved legislatures from legislating and the devolved administrations from exercising functions, in ways which would be contrary to restrictions specified in UK subordinate legislation made by Ministers. No such regulations, however, have been made in the period between 26th June 2018 (the day the 2018 Act came into force) and 28th February 2022. It is only to be regretted that the removal of these restrictions has been achieved in such a complex and piecemeal fashion, making the legislation in force extraordinarily difficult to follow.

60. Nevertheless, HMG's propensity to amend paragraph 5(1) to Schedule 7B of the Government of Wales Act 2006, so as to add to the list of protected enactments that may not be modified by Act of the Senedd or by subordinate legislation made by Welsh Ministers, and without seeking and/or gaining the legislative consent of the Senedd before doing so, continues to create considerable confusion as to the status of the legislative competence of the Senedd and the Welsh Ministers.

61. This potential was amply demonstrated in the recent case of *R (Counsel General for Wales)v-Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 118, where the Counsel General for Wales attempted to challenge certain provisions of the United Kingdom Internal Market Act 2020 (UKIMA 2020) on the basis that an amendment to paragraph 5(1) of Schedule7B of the Government of Wales Act 2006 by section 54(2) of UKIMA 2020, so as to add the 2020 Act to the list of protected enactments, was unlawful as an implied repeal of the constitutional legislation establishing the devolution settlement in Wales and that thus it did not properly amount to a reservation so as to prevent the Senedd from legislating on devolved matters in a way that was inconsistent with the mutual recognition principle in the 2020 Act. The Court of Appeal dismissed an appeal from the Divisional Court against the refusal to grant permission to bring a claim for judicial review. However, this was not on the basis that the challenge was unarguable, but rather on the basis that it was premature and should await a possible reference under section 112 Government of Wales Act 2006 in relation to a specific piece of proposed devolved legislation, in the form of a future Senedd Bill.

62. The substantive issue remains, therefore, to be decided and, in the meantime, considerable uncertainty continues to exist as to the full extent of the Senedd's legislative competence.

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