Bar Council response to the Ministry of Justice's Departure from retained EU case law by UK courts and tribunals consultation

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice's Departure from retained EU case law by UK courts and tribunals consultation.[1]

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.

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 (BSB).

Preliminary points

4. There are two fundamental and preliminary points that need to be taken into account in addition to the points made in the consultation document:

[1] Available here https://www.gov.uk/government/consultations/departure-from-retained-eu-case-law-by-uk-courts-and-tribunals

1) First, the status of EU law within the UK will alter fundamentally on 1 January 2021 with the end of the transition period, in that it will no longer be a source of directly applicable rights that override inconsistent provisions of UK law. Although retained EU law will in many instances replicate the substance of EU law, its status within the UK legal system will be fundamentally different, in that it can 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. As such, EU law will no longer be a free-standing or overriding source of rights under UK law.

2) Secondly, the status of the judgments of the Court of Justice of the European Union (CJEU) under EU law will ***not*** change. This is a matter of EU not UK law: the CJEU will remain 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 departure of the UK will have no effect on that issue.

5. The Bar Council considers that it necessarily follows from those two points that there should be a strong presumption that changes to retained EU law, i.e. UK law that is based on pre-existing EU law, should be made by statutory rather than judicial means. Parliament will have unfettered powers to revoke or amend retained EU law and/or to replace or supplement it by provisions of UK law that specify its meaning or status. By contrast, if no such legislative measures are adopted, so that retained EU law remains exactly as it was when it derived directly from the EU Treaties, there is an obvious risk of confusion and legal uncertainty if the UK Courts interpret its meaning or validity in a way that differs from the CJEU itself, which is and will remain the 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.

6. 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.

7. We entirely accept that as the United Kingdom develops its own law in areas currently covered by EU law, there will be a need to modify retained EU law.

But it seems to us that the speed and extent to which UK and EU law should diverge is essentially a question of public policy that should be determined by the legislature (including, where necessary and appropriate, by Ministers using their wide delegated powers under the various Acts that have already been passed or will be passed) rather than by judges. In most if not all circumstances, Government and Parliament are better equipped to consider all the detailed policy implications of changing established law in often complex and interlocking areas of law.

8. There may be some limited circumstances where, once the source of EU retained law ceases 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 – however, the Bar Council considers that the natural way to address such issues would be for a statutory change to be made to identify the relevant difference. 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, which is presumably not an objective of the UK now that it has ceased to be a Member State of the EU, 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. The Bar Council considers that such examples would naturally be addressed by legislative changes rather than by judicial interpretation of unchanged EU texts – as, indeed, has been and is being done by the large volume of statutory instruments under the EU Withdrawal Act 2018 that are amending EU instruments that will remain part of retained EU law precisely so as to deal with such issues.

9. It is also important to bear in mind, in relation to the consultation document's concern that without power to depart from CJEU case law that the law might become "fossilised" (last paragraph on page 7), that the UK courts – and the common law – are well-used to interpreting and applying past judgments in a flexible and sometimes creative way so as to adapt the principles expressed in them to current conditions. There are many judgments (in a domestic and in an international context) where it has been well-arguable that the court has departed from previous case law even though the court has claimed to be following it, or where the UK domestic courts have found a way to qualify or accommodate CJEU case law whose scope they find uncertain or inconsistent with broader constitutional principles.[2] Given that inherent pragmatism and flexibility of the

[2] See, e.g., *Pham v. SS for Home Department* [2015] UKSC 19, and *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324.

common law and of the system of precedent, we consider that concerns about the "fossilisation" of the law if lower courts are not given power to depart from CJEU case law are wide of the mark.

10. The Bar Council considers that the risks to legal certainty 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. It would be an obvious ground of appeal that the lower court had departed from the meaning of EU law established by the CJEU in accordance with its statutory role under the EU Treaties (or by a domestic court applying such an interpretation). It would be only in the most exceptional circumstances that the interpretation of EU law by the CJEU, adopted in accordance with its role under the EU Treaties, could be regarded as so obviously mistaken that the issue did not even warrant reconsideration on appeal (indeed, that possibility might be said to be incoherent as a matter of international law, analogous to a UK Court finding that the US Supreme Court had obviously misinterpreted provisions of US federal law). Since, pending any such appeal, the law would be as declared by the lower court, there would be considerable legal uncertainty[3] until the Supreme Court was able to decide the appeal (whereas if the power to depart from the CJEU is reserved to the Supreme Court, an appeal to the Supreme Court, even where the Court of Appeal expressed the view that CJEU case law should be departed from, would maintain the status quo and consistency with existing precedent, pending consideration of the case by the UK Supreme Court).

11. A further issue with giving the power to lower courts to depart from pre-existing CJEU case law on matters of retained EU law is that – as is recognised in the second paragraph of page 6 of the consultation document – the UK courts have themselves, over the 47 years of EU membership - extended and applied EU law as interpreted by the CJEU (what the document refers to as "retained domestic case law"). A lower court invited to consider departure from a CJEU principle laid down in a particular case may well find – indeed will frequently find – that that principle has been applied or extended in subsequent decisions of UK courts whose decisions are binding on it.[4] In such a case, departing from the CJEU

[3] For example, in a case where the lower court's departure from a CJEU judgment led to VAT previously due not being due, taxpayers would properly cease to account for that VAT during the appeal period and HMRC would be liable to claims for overpaid VAT, which would have to be met.

[4] An example is the case of passengers' rights to compensation from airlines for delayed flights under Regulation 261/2004. That right – which is not clearly stated in the Regulation – was

precedent is pointless unless the lower court 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 of the system of precedent on which legal certainty depends in a common-law system. Any attempt to draw a statutory distinction that would allow lower courts to depart from higher court precedents that merely repeated CJEU principles but not from ones that were purely domestic elaborations of or additions to those principles would seem to us to be a recipe for hopeless confusion and complexity, as UK judgments were closely dissected in order to try to separate out purely CJEU aspects from aspects which involved development of, or addition to, CJEU principles. Nor would it be attractive to limit the power to depart from CJEU case law to cases where the CJEU judgment had not been applied by a higher domestic court – since whether or not that has happened depends on the vagaries of subsequent litigation. We cannot 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).

12. The consultation document states, in the first paragraph on page 8, that the Government believes that the Supreme Court would be assisted if there were a judgment of the Court of Appeal (or opinion of the Inner House) deciding the question of whether there should be a departure from CJEU case law. We do not consider that that is an important consideration, not least because it is entirely open for those courts to explain in detail why they find the existing binding case law to be unsatisfactory even where they are unable to depart from it. It should also be borne in mind that where the Court of Appeal or Inner House are convinced that the law that binds them is unsatisfactory, they are likely themselves to grant permission to appeal to the Supreme Court, so that we would not agree that there are likely to be cases where the Court of Appeal or Inner House considers that a departure should be made from CJEU precedent but which are then not heard by the Supreme Court.

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established by Case C-402/07 *Sturgeon* and Case C-581/10 *Nelson*. Subsequent UK cases have accepted that the Regulation creates the right to compensation and deal with issues such as limitation (*Dawson v Thomson Airways* [2014] EWCA Civ 845), the application of the "extraordinary circumstances" exemption in art. 5(3) (*Jet2.com Ltd v Huzar* [2014] EWCA Civ 791), and the application of the compensation provisions to a journey which comprises more than one leg, part of which is outside the EU (*Gahan v Emirates* [2017] EWCA Civ 1530). If the Court of Appeal or High Court were given power to depart from the *Sturgeon* and *Nelson* cases, would they also be given power (contrary to the normal rules of precedent binding those Courts) to depart from the Court of Appeal's rulings in the UK cases cited?

13. The consultation expresses concern that the Supreme Court may not have the capacity to hear appeals where there is a real case for setting aside CJEU precedent. We do not consider that this is an important factor. First, it seems to us that any cases where lower courts expressed the view that there was a credible argument for departure from pre-existing EU case law (whether domestic or CJEU precedent) would almost certainly be appealed and the Supreme Court will want to hear those appeals (at least for several years). Second, we do not consider that there will be many cases where the power is arguably needed given (a) the ongoing process of legislative amendment to retained EU law and (b) the flexibility of the common-law approach to precedent (see paragraph 9 above).

14. There may a concern that there will be cases where it is wrong to force those arguing that CJEU case law to be departed from to appeal right up to the Supreme Court, via two or sometimes three successive appeals. To the extent that that is a concern, we consider that it could be dealt with by giving lower courts the power to refer to the Supreme Court (or grant permission to appeal to the Supreme Court directly in relation to) situations where it appeared that there was a good case for departing from CJEU jurisprudence. Concerns as to the effect that that might have on the Supreme Court's capacity can be dealt with by requiring that the Supreme Court agree any such references or leapfrog appeals (we do not see that the Supreme Court would be likely to refuse to take such an reference or appeal if there is a good case for departing from the CJEU's case law).

15. We also note, and agree with, the concerns expressed in the consultation document that allowing lower courts to depart from CJEU case law could lead to divergence between different UK jurisdictions. We would add that that danger is particularly serious given that the major subject-matter of EU law is the law of the internal market: and the Government's recent White Paper on the UK internal market rightly notes the danger that, without the underpinning of EU law, the smooth operation of the UK internal market may well become more difficult. It is an important part of the UK Supreme Court's role to resolve tensions that might otherwise arise between the case law of the different UK jurisdictions, including in respect of retained EU law.

16. We should draw attention to the provision that has been made in relation to UK competition law post-Brexit in section 60A of the Competition Act 1998 (inserted by the Competition (Amendment etc.) (EU Exit) Regulations 2019). That provision requires, by statute, UK courts and tribunals (and competition authorities) to follow EU law governing the key concepts of competition law, subject to a power not to do so in certain listed cases, which include differences

between EU and UK markets, developments in competition economics, changes in forms of economic activity, and developments in CJEU case law after the end of transition. However, that provision replaces a provision (section 60 of that Act) that provided for, in effect, voluntary alignment between concepts of UK competition law and concepts of EU competition law: and section 60 always allowed some scope for departure from EU case law where required by the different institutional and procedural setting of UK competition law. We do not think that this approach is a useful precedent for present purposes, for two reasons: first, the approach in section 60 was never ***required*** by EU law, in that there was never any obligation to align domestic and EU competition law; and, secondly, the new section 60A includes specific provisions relevant to competition law that could not simply be transposed or modified to make them of general application to all retained EU law.

17. Last but not least, the Bar Council considers that it would be a particularly unfortunate time for the UK to adopt an approach to judicial interpretation that would be likely to give rise to legal uncertainty and a proliferation of costly and time-consuming appeals on points of disputed interpretation of EU retained law, rather than to make considered changes to the statutory framework where Parliament considers that to be necessary or appropriate. The Government will be fully aware of the need to protect the important role that UK Courts and tribunals play in the resolution of international trade disputes, and the reputation of the UK legal profession internationally. In accordance with those objectives, the Government is currently seeking to accede to the Lugano Convention: this is considered to be an important priority to maintain the standing of the UK Courts in relation to international disputes. If it is perceived that the UK is casting doubt on the role of the CJEU in the interpretation of EU law within its Courts, whether directly or indirectly, that would in turn cast doubt on whether it is in reality committed to the principles underlying that Convention, Article 1(1) of which specifically refers to the obligation of the courts of signatories to take due account of the principles laid down in decisions of the CJEU.

Question 1: Do you consider that the power to depart from retained EU case law should be extended to other courts and tribunals beyond the UK Supreme Court and High Court of Justiciary. Please give reasons for your answer.

18. No, for the reasons set out above – it would be damaging to the reputation of the United Kingdom and 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.

Question 2: What do you consider would be the impacts of extending the power to depart from retained EU case law in each of the options below? Please give reasons for your answer. a. The Court of Appeal and equivalent level courts; b. The High Court and equivalent level courts and tribunals; c. All courts and tribunals.

19. Option 2(c) would be the most damaging, in that it would place lower courts and tribunals in a very difficult position and would inevitably lead to appeals were the power ever to be exercised. As noted above, it is hard to imagine that it could ever credibly be argued that the interpretation of the EU law by the CJEU (or by a domestic court applying such an interpretation) was so obviously incorrect that a lower court could depart from it without giving rise to a right of appeal.

20. In fields such as employment law or VAT, giving that power to employment or tax tribunals would create serious uncertainty in the large number of areas where UK employment and VAT law derives from principles laid down by the CJEU. Given that many parties in these cases are not legally represented, there is also a real and serious risk that litigants in person or lay representatives may well overstate their prospects of persuading the tribunal to depart from established CJEU principles, increasing the length and complexity of hearings to no useful purpose. In areas such as VAT, there will be cases where hundreds of millions of pounds or more will be at stake for taxpayers if they can succeed in persuading a tribunal to decline to follow CJEU precedent – and even if the chances of success are low, the huge potential rewards mean that bringing such cases will make business sense for large taxpayers and their advisers. Since EU law cases very often (and in VAT always) involve public authorities, that will have significant resource and expenditure implications for the public sector. Further, giving parties scope for raising additional and complex legal argument gives parties that wish to delay the resolution of cases the opportunity to do so (so, in the example of flight compensation – see footnote 4 to paragraph 11 above – airlines seeking to delay compensation claims would have every incentive, in the county court where compensation cases are usually heard, to take the point that the CJEU cases on which such claims are based should be departed from, delaying the swift resolution of these generally small-value, but often hard-fought, cases).

21. Option 2(b) would also be very likely to give rise to immediate appeals if it were ever exercised - departure from established precedent of the CJEU would be an obvious ground of appeal in all but the most exceptional circumstances. Even 2(a) would seem likely to generate a series of appeals to the Supreme Court were

the Court of Appeal to decide that it should exercise this power. In either case, (as we noted above) there would be considerable legal uncertainty pending such appeals.

22. Of course, if none of these lower courts or tribunals ever exercised the power, on the basis that it would inevitably give rise to an obvious right of appeal, then this would render the change futile.

23. We also note that option 2(b) (and 2(c)) would in effect give the power to amend retained EU law to a single judge (in most cases). We would question whether it is right for a power of that importance to be exercised by any judge sitting on their own.

Question 3: Which option do you consider achieves the best balance of enabling timely departure from retained EU case law whilst maintaining legal certainty across the UK. Please give reasons for your answer.

24. For the reasons set out above, this is an exceptional power in the absence of statutory change. As such, it raises issues of legal policy that should be reserved to the Supreme Court (or to Parliament by amending or revoking the relevant legislation).

Question 4: If the power to depart from retained EU case law is extended to the Court of Appeal and its equivalents, do you agree that the list below specifies the full range of courts in scope? i. Court of Appeal of England and Wales; ii. Court Martial Appeal Court; iii. Court of Appeal of Northern Ireland; iv. The High Court of Justiciary when sitting as a court of appeal in relation to a compatibility issue or a devolution issue; and v. The Inner House of the Court of Session in Scotland. Please give reasons for your answer.

25. Not applicable.

Question 5: If the power to depart from retained EU case law is to be extended to the High Court and its equivalents, do you agree that the list of courts below captures the full range of courts in scope? i. The High Court of England and Wales ii. Outer House of the Court of Session in Scotland; iii. The Sheriff Appeal Court in Scotland; iv. The High Court of Justiciary sitting at first instance; and v. The High Court in Northern Ireland. Please give reasons for your answer.

26. Not applicable.

Question 6: In respect of either option, are there other courts or tribunals to which the power to depart from retained EU case law should be extended? If yes, in what circumstances should this occur? Please give reasons for your answer.

27. Not applicable.

Question 7: Do you consider that the courts and tribunals to which the power to depart from retained EU case law is extended should be permitted to depart from retained domestic case law relating to retained EU case law? If yes, in what circumstances should this occur? Please give reasons for your answer.

28. We think that the interrelationship between retained EU case law and retained domestic law relating to that case law raises very difficult issues for the proposal that lower courts should be able to depart from CJEU case law: see paragraph 11 above. As we explain there, we do not see that there is any solution to that issue that is at all satisfactory. We do not see any justification for lower courts to have a wider power to depart from otherwise binding domestic case law in respect of retained EU case law than in relation to other issues involving international law.

Question 8: Do you agree that the relevant courts and tribunals to which the power is extended should be bound by decisions of the UK Supreme Court, High Court of Justiciary and Court of Appeal and its equivalents across the UK where it has already considered the question of whether to depart from retained EU case law after the end of the Transition Period, in the normal operation of precedent? Please give reasons for your answer.

29. Yes: we see no reason why the established rules of domestic precedent should not apply in such cases.

Question 9: Do you agree:

a. that the test that should be applied by additional courts or tribunals should be the test used by the UK Supreme Court in deciding whether to depart from its own case law?

b. that this test is capable of being easily understood and applied across the jurisdictions by reference to the relevant case law?

Please give reasons for your answers. If you do not agree, what alternative test do you consider should be applied? Please give reasons for your answer.

30. As noted above, the Bar Council considers that changes to retained EU law should in general be made by statutory changes rather than judicial interpretation. The principles on which it might be appropriate to depart from prior interpretations of retained EU law without such a statutory change are likely to be those applied by the Supreme Court but modified by the specific context in which they arise, namely the fact that interpretation of retained EU law after 1 January 2021 would no longer be informed by the legislative and administrative context of the EU Treaties and membership of the EU (for example in respect of the completion of the EU internal market). But we see no need to modify the established Supreme Court test, which is flexible enough to take full account of those considerations (and other relevant ones, such as the need to avoid, so far as possible, sudden and retrospective changes in the settled law, and the need to avoid accusations of the judiciary pre-empting decisions of the legislature).

Question 10: Are there any factors which you consider should be included in a list of considerations for the UK Supreme Court, High Court of Justiciary and other courts and tribunals to whom the power is extended to take into account when deciding whether to depart from retained EU case law? Please give reasons for your answer.

31. See the preliminary remarks and Q9 above: the overriding principle should be whether the relevant provision of EU retained law falls to be interpreted differently, given the principles applied by the UK Courts interpreting that law in accordance with UK domestic law and policy as against the principles applicable by the CJEU as the court vested with determining the validity and interpretation of EU law in the context of the provisions and objectives of the EU Treaties. But we see no need to modify the current test applied by the Supreme Court, for the reason given above.

Question 11: As part of this consultation process, we would also like to know your views on how these proposals are likely to impact the administration of justice and in particular the operation of our courts and tribunals.

a. Do you consider that the changes proposed would be likely to impact on the volume of litigation started in UK courts and tribunals? Please specify where, in your view, this would occur and why?

b. Do you consider that the changes proposed would be likely to impact on the

type of litigation started in UK courts and tribunals? Please specify where, in your view, this would occur and why?

c. Do you consider that the changes proposed would be likely to have more of an impact on particular parts of the justice system, or its users? Please specify where this might occur and why.

d. Do you consider that the changes proposed would have more of an impact on individuals with particular protected characteristics under the Equalities Act 2010? Please specify where this might occur and why.

32. It seems likely that there would be the following effects if a wide range of courts and tribunals were able to depart from the established interpretation of EU retained law:

- Although the lower courts would be likely to exercise any such power cautiously, there would be an obvious risk (as we have pointed out above in answer to Q2) that litigants would raise such points and that this would significantly complicate and delay the litigation process – obvious examples would be public law claims, VAT disputes, employment and discrimination claims, and immigration claims. At a time where HMCTS is already under severe pressure due to budget cuts and the effects of Covid-19, we find it very hard to see a good case for putting further pressure on its resources in this way: and, as we have already pointed out, since many EU law cases involve public authorities, further public resources would be involved in fighting these cases.

- There would be likely to be a proliferation of appeals and cross appeals if such powers were exercised, with litigants seeking to reopen issues on appeal to the Court of Appeal and/or the Supreme Court, particularly in the Administrative Court. Again, this would general legal uncertainty, delays and additional costs to all concerned.

- So far as issues under the Equalities Act 2010 are concerned, there are a number of such issues that are potentially impacted by EU retained law, so that it could be anticipated that a significant proportion of claims would raise such issues.

Question 12: Do you have any other comments that you wish us to consider in respect of this consultation.

33. Please see the above introductory remarks. As noted at introductory point 11 above, the Bar Council is particularly concerned that a proliferation of litigation and appeals on disputed points of retained EU law would be damaging to the international reputation of UK Courts and tribunals at a particularly sensitive time and that a measured approach of legislative change and guidance from the Supreme Court on issues of judge-made law would be its strong preference both from the perspective of UK self-interest and to safeguard legal certainty and the rule of law.

Bar Council

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