**RESPONSE ON BEHALF OF THE FACULTY OF ADVOCATES**

**TO CALL FOR EVIDENCE ON**

**'RETAINED EU LAW: WHERE NEXT?'**

The Faculty of Advocates is the independent body of lawyers admitted to practise as Advocates in Scottish courts. The Faculty welcomes the opportunity to provide this response to the European Scrutiny Committee's inquiry into retained EU law.

We are grateful to the Bar Council of England and Wales for drawing our attention to the consultation; it is a matter of regret that a copy of the Call for Evidence was not provided directly to the Faculty. We have had an opportunity to consider the response provided by the Bar Council and would, in all material terms, support the comments set out therein. This response is intended to provide comments from the perspective of the Faculty, particularly (but not exclusively) as practitioners north of the border.

We provide the following responses to the questions posed by the Committee:

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?**

Retained EU law is now law in the three legal systems of the United Kingdom (by means of the European Union (Withdrawal) Act 2018 sections 2 to 4). So far as form is concerned, section 2 of the 2018 Act is dealing with legislation which, technically, already is UK legislation. Likewise, sections 3 and 4 clothe legislation and other rules which were previously directly effective with the status of being UK law. So far as content is concerned, that a provision may originally have stemmed from the UK's membership of the EU does not affect clarity or coherence more than any other historical explanation for the existence of a rule. Whilst the sources of law may be of interest to legal historians, or as a teaching tool for undergraduate law students, in reality this is of little interest to consumers or commercial clients. They are interested only in knowing the content of the rules which affect their business, or daily life. Furthermore, while EU legislation (in terms of Regulations or Directives) which are retained by virtue of the 2018 Act may appear in a format which is somewhat different from the style used in Acts of Parliament or Acts of the Scottish Parliament, their style is far from unknown to UK lawyers. The vast majority of practitioners in the UK qualified during a period in which the UK was a member of the EU. As a result, they are used to considering and interpreting pieces of EU legislation and so any differences in style or format should pose no practical difficulties.

In the history of the United Kingdom (and the predecessor nations which came together to form the UK), there have been many significant constitutional events. It has not been suggested that on each such occasion there must be a total reset of the laws applicable in the

country. The absence of such an approach has given certainty and continuity to the citizens, and allowed the retention of pre-existing laws which have a benefit undiminished by the constitutional change. Thus, when the United Kingdom was created by the Union of the Parliaments in 1707, the pre-existing statutes of the old English and Scottish Parliaments were not repealed, but remained a legitimate source of law. Indeed, to this day, certain sections of the *Magna Carta* of 1297 remain a part of the law of England and Wales (sections 1, 9, 29 and 38). At the time of the Reformation in Scotland, the authority of the Pope was rejected but the Canon Law of the Roman Catholic church was retained for such matters as marriage, legitimacy of children and inheritance. Similarly, at the time of the devolution settlements, the corpus of law passed by or under the previous arrangements was retained at least unless and until the need for specific change to particular rules to meet circumstances in the devolved nation was identified. Any wholesale repeal would have resulted in gaps in provision which would have led – at best – to uncertainty as to the position on a specific issue, with significant potential for practical difficulty.

Indeed, although the question posed makes reference to the clarity and coherence of the statute book, it must be borne in mind that any area of domestic law will be derived from a patchwork of sources, such as primary legislation, secondary legislation, and decided cases. In certain areas of law, such as immigration, social security or taxation, gaining an understanding of the current position may require careful study of numerous statutory instruments, and their interaction with each other and the parent legislation. It would be wrong to imagine that a member of the public could always consult one readily-accessible and concise domestic statutory source in order to discover the legal rules on any given topic in the UK. Against that backdrop, the existence of a further source of law might not be thought to have a significant impact on the clarity and coherence of the statute book. So far as practitioners are concerned, Westlaw has a tab 'Retained EU legislation' which creates the same accessibility for legal professionals as they have to law from UK sources (the legislation.gov.uk website makes similar provision). Were it to be suggested that access is difficult for lay people, we are not convinced that this is any more true for EU-derived law than it is for the thousands of other pieces of legislation that apply to citizens of the UK.

Nor should it be thought that the statute book is necessarily compromised by the inclusion of legal instruments which were not passed by a UK legislature. As a dualist state, international conventions signed by the UK Government require to be incorporated into domestic law before they may take effect. However, in reality this is often done by stating in primary legislation that the conventions in question will have the force of law in the UK. Thus the Child Abduction and Custody Act 1985 provides in s. 1 that the Hague Convention on International Child Abduction "*shall have the force of law in the United Kingdom*" (subject only to any provisions of that Act), and the Convention is set out in Schedule 1 of the Act. Indeed, this has been the approach recently adopted by the UK to incorporate into domestic law the 2005 Hague Convention on Choice of Court Agreements, the 1996 Hague Convention in respect of Parental Responsibility etc., and the 2007 Hague Convention on the International Recovery of Child Support and other forms of Family Maintenance. Each convention is given the force of law in the UK by dint of (respectively) s. 3D(1), s. 3C(1), and s. 3E(1) of the Civil Jurisdiction and Judgments Act 1982, with the text of each convention set out in new schedules to that Act. Accordingly, these international Hague Conventions effectively become part of our law without any significant moderation, and are understood, and applied by our courts in that context. As the UK Supreme Court has observed (with regard to the Hague Convention on International Child Abduction):

> *Some terms and provisions in an international Treaty have an autonomous meaning, a meaning independent of that which they would be given in the domestic laws of any of the states parties. Those terms are meant to be interpreted and applied consistently among all the states parties. Where, as with the Convention, there is no supra-national body responsible for its interpretation, the task falls to the national court. But, as Lord Steyn explained in R v Secretary of State for the Home Department, Ex p Adan [2001] 2 AC 477, 517, 'in doing so, it must search, untrammelled by notions of its national legal culture, for the true, autonomous and international meaning of the Treaty. And there can be only one true meaning'.* (*In re K (A Child) (Reunite International Child Abduction Centre intervening)* [2014] AC 1401 *per* Baroness Hale of Richmond DPSC at 1428)

Such incorporation of international conventions, with the consequent need to interpret them in a manner appropriate to their international roots and application, has posed no difficulty for the legal systems of the UK, and has not been considered to constitute a threat to the legal order.

We have read the response of the Bar Council of England and Wales to this Call for Evidence, and we agree entirely with the comments made about the EU legislative process and the contribution made by the UK to the development of EU law throughout the 47 years of UK membership of the Union. We also agree that there are difficulties stemming from the transposition into UK law of instruments which themselves were already complex, and which were subject to serial amendments in the period leading up to 31 December 2020. Expression of the problem is easier than its remediation.

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

Retained EU law is a descriptor rather than a concept. Retained EU law is necessary law. To return to the analogy with retained Westminster law, Scotland needed the corpus of law as it stood on 1 July 1999 to underpin the organisation of personal rights and relationships and collective activities in this jurisdiction. Major areas of devolved competence – land law, family law, criminal law – needed to continue to be regulated by legislation passed at Westminster or by a Minister of the Crown. The alternative would have been a vacuum. In like manner, retained EU law must continue to operate to maintain an ordered position in the areas it affects. That there exists a corpus of law with the description 'retained EU law' does not diminish sovereignty; the question is of effect rather than derivation.

It should also be borne in mind that in particular areas not all EU law was retained. As at the end of the transition period on 31 December 2020, a number of EU instruments were immediately removed from the law of each part of the UK. For example, the Brussels I Regulation, and Brussels II *bis* Regulation were revoked for the UK (subject to run-off application) since the reciprocal nature of these instruments could not have been given effect to by their unilateral retention by the UK. Any particular rules derived from these instruments which were thought to be of continuing benefit were simply amended into UK domestic legislation.[1] In agriculture, where there existed a scheme to which farmers within the UK were accustomed, rules had to be refashioned in order to maintain the architecture of a support system. The Direct Payments to Farmers (Legislative Continuity) Act 2020 was required: without it, the UK Government and the devolved administrations would have been unable to

[1] See ss 15A – 15E of the Civil Jurisdiction and Judgments Act 1982 (jurisdiction in consumer and employment matters), and s. 5 of the Domicile and Matrimonial Proceedings Act 1973 (jurisdiction in divorce, judicial separation or nullity proceedings in the courts of England and Wales).

continue to make Direct Payments to farmers for the 2020 claim year, given that the scheme would have had no basis in law.

As rules which were created during the UK's membership of the EU are amended or replaced, the description 'retained EU law' will become inaccurate in those instances. Over a number of years, the quantity of law in the UK capable of characterisation as retained from the EU may reduce. At present, when many of the specific rules currently described as 'retained' govern an area of activity where regulation is needed, we do not understand how a binary decision to retain or jettison the corpus en bloc could be taken.

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

Yes. For over forty years the UK worked with its European partners to regulate matters as diverse as pharmaceuticals, judicial cooperation, choice of law, animal feed, herbicides, mutual recognition of qualifications for architects, lawyers, hairdressers and pilots, equal pay for women, arrest warrants, brake lights, emissions of goods vehicles and passenger cars, and so on. Although the process of drafting was conducted by expert committees in Brussels, the UK voice was almost always one of the most influential in setting the standard which emerged as the ultimately adopted rule. It frequently happened with contentious matters that it was the UK formulation which reconciled differing approaches. It was only very rarely that the UK was outvoted. Thus, encapsulated in the words 'retained EU law' is a body of material where, in every case, the UK participated in the setting of the rule.

The individual topics are of importance to health, safety, prosperity, and the rule of law, among many other substantial considerations. Departure from the EU offered and offers three choices to the UK: not to regulate a topic, to follow the existing rules, or to adopt different ones. As of the date of departure, the UK and the EU27 were aligned. The apparatus of directives and expert committees has continued to function in Brussels. For example, the Scientific Committee on Animal Nutrition meets regularly to consider new additions to the list of acceptable chemical additives to cattle feed, and removals from that list. Each meeting now has the potential to create divergences with UK lists. There are scores of other expert committees dealing with police cooperation, diplomas, transport licences and internet privacy. It is worth noting that UK manufacturers have generally resisted the idea that there should be an EU27 norm and a UK norm; industry prefers to operate by reference to a single standard. It would be wise to consult with industry to explore whether there is a desire to have wider and deeper regulatory gaps.

To answer the question in the affirmative at a general level does not, however, preclude the identification in a specific instance of a need for replacement. There may be a proposal for a legal rule which would better suit a particular context in the UK than its predecessor EU-derived measure. In such a situation, we would expect the principles of any replacement measure intended to apply throughout the UK to be developed using the Common Frameworks approach. As is recorded in the Cabinet Office explanation of the role of Common Frameworks on the UK Government website,

> *Frameworks ensure a common approach is taken where powers have returned from the EU which intersect with policy areas of devolved competence.*
>
> *Frameworks are being developed in line with the principles for Common Frameworks agreed at the Joint Ministerial Committee (EU Negotiations) JMC in October 2017*

*between the UK government and Scottish and Welsh Governments. Following the formation of the Northern Ireland Executive, its Executive Committee endorsed the JMC(EN) Common Frameworks principles on 15 June 2020.*

There is no reason in principle why Common Frameworks should be restricted to areas of devolved competence; the 'intersection' with devolved competence referred to above exists in many areas, including those which are in part reserved. During the UK's membership of the EU, all the jurisdictions within the UK required to implement EU rules developed by all member states working together. In the same manner, post-Brexit frameworks in any area previously regulated by the EU can be developed by all the constituent jurisdictions of the UK and then implemented by the respective legislatures and administrations.

Importantly, however, we echo the point made by the Bar Council that, in many areas of activity, any replacement measures will require to mesh with the position adopted in the EU, in order to maintain trading and other relationships with the Union, for the sake of businesses and individuals. For example, the EU Digital COVID Certificate Regulation entered into application on 1 July 2021. To facilitate movement of individuals between the UK and the EU, recognition of the UK's protective measures was required. Following the required authorisation process, this was effected by Commission Implementing Decision 2021/1895 of 28 October 2021 establishing the equivalence of COVID-19 certificates issued by the UK authorities to the certificates issued in accordance with the EU regulation.

It must be understood that many of the existing measures will be highly detailed in content and technical in effect.

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?**

Scottish courts have addressed questions of interpretation of retained EU law in, for example, *Trees for Life v NatureScot* [2021] CSOH 108. They have not encountered uncertainty or anomaly in doing so. We see no reason to differ from the answer to this question provided by the Bar Council.

5. **(a) In light of the doctrine of parliamentary sovereignty, what was the rationale for retaining the principle of the 'supremacy of EU law'? (b) What is the most effective way of removing the 'supremacy of EU law' and other incidents of EU law from the statute book?**

(a) It may be useful to consider what the concept of the 'supremacy of EU law' is at its core. The language used may be emotive, particularly following the UK's departure from the EU. However, at heart, the concept is no more than a rule of interpretation. It is a 'conflict rule' allowing lawyers to understand which of two competing statutory provisions should be applied when they are on their face irreconcilable. In that sense, it is substantially similar to (and in application sits alongside) the domestic law concept of implied repeal. All that the retained principle of the supremacy of EU law is designed to do in terms of the 2018 Act is to ensure that our interpretation of conflicting pieces of legislation which were passed prior to our departure from the EU remains consistent with the approach taken previously.

Since retention of the principle of the supremacy of EU law was a step taken for particular and specified purposes; the continued application of the principle is of limited reach. By virtue of section 5(1) of the 2018 Act, 'the principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day'. Its application to any pre-exit

enactment or rule of law is consistent with the necessary stance of maintaining the legal position as at 31 December 2020. Where interpretation of a pre-exit enactment or rule of law is required, a court will approach the task in the systematic manner required in the period before 31 December 2020; this avoids retrospective alteration of the context in which decisions were taken and actions implemented by businesses and individuals. To do otherwise could have significant unforeseen consequences and would pose very difficult issues with regards to legal certainty. Would, for example, any UK legislation which had previously been disregarded as incompatible with a piece of EU legislation suddenly be 'revived' notwithstanding the retention of that piece of EU legislation on the domestic statute book as retained EU law?

(b) We do not consider that there is a need to effect such removal. Moreover, we consider that to attempt to do so would introduce uncertainty by contravening the expectation that rules are not generally altered with retrospective effect. The applicability of a principle of supremacy of EU law will diminish with the effluxion of time.

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?**

To take the second question first, we consider that the case law of the European Court of Justice should continue to be relevant in the task of interpreting retained EU law. Where a particular word or phrase falls to be interpreted by any court or tribunal, it is potentially helpful to consider the decision of a court which has already interpreted that word or phrase. Post Brexit, the interpretation made by the CJEU would not be binding. Thus any considerations underpinning a submission that the interpretation should be distinguished could be considered and, if well-founded, sustained. Again, simply to disregard previous jurisprudence of the CJEU entirely would be to introduce unwelcome uncertainty into our understanding of the law. It may also, in that respect, render the UK a less desirable jurisdiction in which to operate commercially, if parties cannot fairly predict what their legal rights and obligations are likely to be.

In relation to the first question, we would not support a change to provide that retained EU law should be interpreted in the same way as other domestic law. For UK lawyers and judges, interpretation of EU law is a well-understood exercise. As we noted in our answer to question 5, where it requires to interpret a pre-exit enactment or rule of law forming part of retained EU law, a court will approach the task in the systematic manner adopted in the period before 31 December 2020; this avoids retrospective alteration of the context in which decisions were taken and actions implemented by businesses and individuals.

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?**

In August 2020, the Faculty responded to the consultation issued by the Ministry of Justice on the subject of departure from retained EU case law by UK Courts and Tribunals. We supported the extension of the power to depart to the Court of Appeal of England and Wales and equivalent courts in the other UK jurisdictions. We suggested that extension of the power to depart to lower courts would, however, create a significant risk of uncertainty as to the extent of divergence from retained EU case law across the UK. Moreover, we noted that 'encouraging timely departure from retained EU case law, where appropriate' was expressly identified as a policy aim of the UK Government. We thought that the appropriate 'balance'

to be struck between that policy aim and the wider interests of legal certainty would require to be identified by the Government itself. This need was illustrated by a statement in the consultation that the Government considered it 'important that UK courts and tribunals are not bound to retained EU case law for longer than is appropriate and in the interests of the UK and that potential litigants have sufficient ability to seek a change to retained EU case law where it adversely affects them'. The extent to which it may be in the interests of the UK to remain bound by retained EU case law (or, indeed, whether divergence from retained EU case law is 'appropriate to the UK's situation following its departure from the EU') appeared to us to be quintessentially a political question, upon which UK courts and tribunals were unable to adjudicate. Nor would it be appropriate for them to attempt to do so. The courts are familiar with determining when it may be appropriate, in a general sense, to develop the law by modifying or departing from a previous line of authority, but that is usually on the basis of some wider development in the law or generally accepted social conditions.

8. **To what extent has retained EU law affected devolved competence?**

So far as Scotland is concerned, devolved competence has been affected by the UK's departure from the EU in several different ways. The existence of retained EU law is not the most far-reaching of these effects; the existence of retained EU law is in itself analogous to the position prior to 31 December 2020, in that there was a body of EU law which applied in Scotland and which limited the ability of the Scottish Parliament to legislate.

This limit applied from the passage of the Scotland Act 1998 until 30 December 2020: one of the constraints on the ability of the Scottish Parliament to pass legislation was that any measure which was incompatible with EU (previously 'Community') law was outside legislative competence. A similar position operated (and continues to operate) in relation to subordinate legislation, since the restriction there is tethered to the restriction on primary legislative competence.

For the period 31 December 2020 until 30 March 2022, there was effectively a prohibition on the Scottish Parliament from modifying retained EU law, insofar as any such modification would have been outside legislative competence before 31 December 2020. That restriction has now been repealed. Restrictions on the legislative competence of the Scottish Parliament in areas formerly regulated by EU law, including in areas which, as between the Scottish and UK administrations, are devolved, are now contained in other statutes, primarily the United Kingdom Internal Market Act 2020.

That Act sets out 'the mutual recognition principle' and 'the principle of non-discrimination' which, together, disapply conditions which could limit the sale of goods in Scotland when those goods have been produced in another part of the UK and meet requirements for such goods in that part. Analogous restrictions apply in the provision of services, whereby authorisation or regulatory requirements are of no effect if they contravene the principles of mutual recognition or non-discrimination.

With its broad exemptions for public policy objectives, the 'single market' regime to which the Scottish administration was subject when the UK was a member of the EU had wider scope for divergence than is now the case under the Internal Market Act. In our response to the White Paper which preceded the Internal Market Act, we suggested that there was scope for inclusion of a further principle to protect the ability of the devolved administrations to pursue specific objectives for their territories. This would have been in line with the stated position of the UK Government that 'Every decision that a devolved administration could make before

exit day they can make afterwards',[2] and the recognition of the value of 'the same degree of flexibility for tailoring policies to the specific needs of each territory as was afforded by the EU rules'.[3] At present, no such additional principle exists within the UK Internal Market regime. This affects the capacity of the devolved administrations to adopt measures directed, for example, at improving the health of the population within their territory or the environment within which people there live and work.

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

We have nothing to add to our comments in response to question 8.

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[2] Department for International Trade website, Guidance dated 20 March 2020 https://www.gov.uk/government/publications/trade-bill/trade-bill
[3] Internal Market White Paper, 2020, paragraph 89