

# The Brexit Papers



**CJEU**  
**Jurisprudence**

**Paper 9**



Bar Council Brexit  
Working Group  
June 2017

**THIRD  
EDITION**



## Brexit Paper 9: CJEU Jurisprudence

### Repealing the European Communities Act

1. According to the foreword of the Government's White Paper, a key part of delivering on the outcome of the referendum will be to ensure that Parliament is "unquestionably sovereign" and that the English Courts will be "the ultimate arbiters of our laws".<sup>1</sup> A central policy of the Government's Brexit strategy is to "take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain".<sup>2</sup>

2. From the withdrawal date – currently set for 30 March 2019 – all EU Treaties will cease to apply in the UK and it will become a third country.<sup>3</sup> To that end, at the domestic level, the Great Repeal Bill will repeal the European Communities Act 1972 (the "1972 Act") on the day of the UK's departure. From that date, (assuming the 1972 Act is repealed without any other mechanisms being put into place and failing any extension or transitional regime), the English Courts will no longer have to recognise, give effect to or enforce "rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties".<sup>4</sup> There will be no concept of EU directly applicable rights which take effect without national implementing provisions. Nor will there be any concept of direct effect, whereby individuals can enforce those rights before national courts even in the absence of national legislation. If rights are to be conferred by agreement with the UK and the 27 member states, there must therefore be a mechanism to ensure they are enforceable.

3. Similarly, the effect of repeal of the 1972 Act will be that national courts will no longer be obliged to take judicial notice of the acts of EU institutions or afford supremacy to the judgments of the CJEU.<sup>5</sup> Judges will no longer be required to interpret EU legislation in accordance with the principles laid down by the CJEU in any relevant rulings<sup>6</sup> or override statutory language that is inconsistent with a prior or subsequent EU provision.<sup>7</sup> There will be no prospect of an Art 267 preliminary reference to the CJEU for a ruling on the

---

<sup>1</sup> White Paper, para 2.12.

<sup>2</sup> Prime Minister's Lancaster House Speech, 17 January 2017 and White Paper, para 2.13.

<sup>3</sup> Council Guidelines 29.4.2017 para 4 and Commission Explanatory Memorandum to its proposed Decision authorising the Commission to open negotiations for a withdrawal agreement (COM (2017) 218 final), published 3.5.2017, page 2.

<sup>4</sup> Section 2(1) of the European Communities Act 1972 (the "1972 Act").

<sup>5</sup> Section 3(2) of the 1972 Act.

<sup>6</sup> Section 3(1) of the 1972 Act.

<sup>7</sup> *Marleasing* and *von Colson*.

interpretation or validity of EU law; instead the Supreme Court will be ultimately responsible for the application and interpretation of our laws.

### **Consequences of absolute repeal**

4. There are a number of complications associated with such absolute repeal: It is estimated that approximately 14.3% of UK Acts enacted between 1980 and 2009 have incorporated EU provisions. Those Acts still form part of the UK statute book and will have to be applied and enforced after the UK's withdrawal.

- 4.1. The Great Repeal Bill intends to convert the entirety of the existing EU law into domestic law at the point of exit to maintain continuity of acquired rights and legal certainty. Those include up to 12,000 Regulations, 7,900 Directives and a number of self-standing rights in the Treaties. Those rights and obligations will also continue to be applied and enforced.
- 4.2. A number of domestic statutes refer to concepts of EU law, which have their own autonomous meaning laid down by the CJEU in over 50 years of jurisprudence. A few examples are the concepts of an "undertaking" or a "worker"; "vulnerable consumers" and "good faith" in consumer protection law; "cross border trade"; direct or indirect discrimination; the *Gebhard* requirements for objective justification; the requirements for necessity and proportionality and the precautionary principle in environmental law.
- 4.3. Domestic law has also evolved over the years to accommodate fundamental aspects of EU law as part of domestic principles; for example, the Administrative Court has recognised the principle of proportionality as a ground of judicial review<sup>8</sup>. Where we have pre-existing principles of common law which overlap with EU law principles (for example equal treatment, legal certainty and non-retroactivity of law), their scope, application and interpretation has been influenced by EU case-law developments.
- 4.4. A number of regulatory regimes in the UK are derived from common frameworks that are the subject of harmonisation or mutual recognition at EU level. Those sector-specific frameworks provide for rights and obligations and remedies that are dependent upon coordination with EU institutions or regulatory bodies in other Member States. For instance, in competition law, the UK's CMA, Competition Appeal Tribunal and the High Court must ensure that there is no inconsistency between the approach they adopt and the principles laid down by the CJEU<sup>9</sup>. They must also "have regard" to decisions or statements of the European Commission<sup>10</sup>; an infringement decision issued by the European Commission is binding on a court for the purpose of claims for damages or

---

<sup>8</sup> *Lumsdon*

<sup>9</sup> Section 60 of the Competition Act 1998 ("CA98").

<sup>10</sup> Section 60(2) CA98.

injunctive relief.<sup>11</sup> Similar coordination mechanisms exist in utility regulation, telecoms, pharmaceutical products, rail transport and aviation regulation.

5. Accordingly, notwithstanding the repeal of s.2(1) EC 1972, there will remain room for EU law to continue to apply within the domestic system. Parameters will need to be established for administrative bodies, regulators and judges to provide clarity and legal certainty.

### **Modified approach**

6. The White Paper recognises the need for legal certainty and business continuity whilst at the same time securing the political objectives of the UK taking back control of its own laws. It applies a pre- and post-Brexit “watershed”. There are a number of implications from this approach which are recognised in the White Paper:

6.1. Existing EU rights derived from the Treaties or EU secondary legislation will continue to apply and UK courts will be able to interpret those rights in line with the Treaty objectives and principles;<sup>12</sup>

6.2. Pre-Brexit CJEU rulings will have “binding precedent status” for the UK courts who will interpret existing EU-derived law by reference to the CJEU principles but only as they exist on the day that the UK leaves the EU;<sup>13</sup>

6.3. Any Parliamentary amendments to EU derived law post Brexit will take precedence over any existing or subsequent EU principles;<sup>14</sup> and

6.4. Any subsequent CJEU jurisprudence will not be binding on the UK courts – even for domestic legislation that is derived from the same regime; however, that does not mean that judges will be prohibited from taking it into account.

7. There are also further complications that are not addressed in the White Paper:

7.1. It is not clear what will happen to acquired rights that have been exercised by individuals and corporations in the UK or the EU27 pursuant to the rights granted by the Treaty. The European Council has highlighted the need for reciprocal guarantees to safeguard the status and rights of EU and UK citizens and their families, as a priority in the first phase of the Article 50 negotiation along with business continuity and legal certainty.<sup>15</sup> The Commission recommends that those EU-derived rights should continue to be protected for the life-time of the citizens concerned – the rights will be directly enforceable and will in substance mirror the rights conferred by Articles 21, 45 and 49 TFEU and the relevant Regulations and Directives<sup>16</sup>. Those rights will require

---

<sup>11</sup> Section 47A and B and 58A CA98.

<sup>12</sup> White Paper, paras 2.9-2.11.

<sup>13</sup> White Paper, para 2.12 – 2.17.

<sup>14</sup> White Paper, paras 2.17 and 2.19

<sup>15</sup> Final Council Guidelines 29.4.2017, paras 8 and 9.

<sup>16</sup> Annex to the Commission Recommendation 3.5.2017, paras 20-21

administrative bodies and national courts applying EU principles and concepts on an extended basis post withdrawal.

7.2. The UK government, UK companies and individuals may be subject to EU administrative procedures that are still ongoing at the withdrawal date and may be entitled to rights of appeal before the General Court and CJEU thereafter. The Commission recommends that such procedures remain governed by EU law until their completion.<sup>17</sup> National courts may be called upon to give effect to Commission decisions and CJEU rulings issued after March 2019, which relate to complaints or facts arising before the withdrawal date. For instance, they may need to award injunctive relief or damages in follow-on damages claims which rely on Commission infringement decisions or give effect to state aid approvals.

7.3. The White Paper is silent as to the interpretation of any new transitional arrangements or future trade agreement between the UK and the EU after 29 March 2019 and whether their provisions are to be applied consistently with CJEU rulings.<sup>18</sup> Any such agreement(s) are likely to incorporate concepts and principles of EU law which may require uniform interpretation. National courts may be called upon to interpret and/or apply the provisions of such agreement(s) in domestic judicial review proceedings<sup>19</sup> or even in private claims if the agreement(s) confer individual rights. The Agreement will count as an “act” of the EU institutions so there may also be requests for preliminary references under Article 267 TFEU (possibly from other Member States if not the UK) as to the interpretation or scope of particular clauses.

7.4. The White Paper addresses the incorporation of Treaty provisions and EU secondary legislation but does not deal with “soft law” mechanisms such as Commission Decisions, guidelines and notices. Examples of such delegated legislation include Commission Guidelines on Block Exemptions, Cooperation Notices for coordinating antitrust and regulatory investigations to avoid duplication and facilitate exchange of information; the Model Leniency Programme to ensure mutual recognition and disclosure protection of immunity applications throughout the EU<sup>27</sup>. Whilst the UK Government may not wish to continue all of those processes, it might be useful to continue some of their application at least on a transitional basis.

---

<sup>17</sup> Annex to Commission Recommendation, para 34. That period could last up to 10 years once the appeal periods are taken into account.

<sup>18</sup> Note that Section The Commission recommends (Annex, para 34) that such procedures remain governed by EU law until their completion The Commission recommends (Annex, para 34) that such procedures remain governed by EU law until their completion E of the EU “Non Paper” of draft negotiating guidelines envisages that the Trade Agreement will set up an institutional structure of its effective enforcement and settlement of disputes arising from (inter alia) the application and interpretation of its provisions. The EU proposes that the jurisdiction of the CJEU should be maintained and that concepts or provisions of EU law should be understood as including the case-law of the CJEU (whether pre-or post Brexit).

<sup>19</sup> See also Article 274 TFEU which provides that national courts may have jurisdiction over disputes involving the EU.

7.5. The Government may decide to enact subsequent domestic legislation which is a “copy-cat” of new EU laws. It is not clear whether those domestic provisions will be interpreted by reference to subsequent case law developments in the EU.

8. The White Paper is clear that the Great Repeal Bill will not require domestic courts to consider CJEU jurisprudence after the exit date. But it does not prohibit the judges from having regard to applicable Commission decisions and CJEU case law. In practice, the line between pre-and post-Brexit will be difficult to navigate, particularly for acquired rights vested some time ago which will take a number of years to come to fruition.<sup>20</sup> What principles can assist in navigating a balanced approach between the competing objectives of legal sovereignty and legal certainty? There are a number of potential jurisprudential tools at both domestic and international level.

### **Explicit statutory provisions in the GRB or sector-specific legislation**

9. One possibility could be for the GRB to modify ss.2(1) and 3 of the 1972 Act by repealing the obligation for national courts to apply and follow Commission decisions and/or rulings of the CJEU but leaving a simple obligation or discretion to take account of such rulings as they consider appropriate.

10. There are different statutory formulations, along a varied spectrum so far as judicial “weight” is concerned; they range from a mere obligation to “have regard” increasing to “reasonable regard” “due account”, “due regard”, “proper regard” and “taking judicial notice”. Each of those formulations has different connotations under international and equality law.

11. For example, as a matter of domestic law, there have been a number of cases which have assessed the requirement of “due regard” in the equality context. The main principles are: The duty to have ‘due regard’ must be ‘exercised in substance, with rigour, and with an open mind’. It is not a question of ‘ticking boxes’; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;<sup>21</sup>

11.1. The duty entails a proper regard for all the goals set out in the relevant legislation and, at the same time, the public authority must also pay regard to any countervailing factors which, in the context of the function being exercised, it is proper and reasonable for the public authority to consider. What the relevant countervailing factors are will depend on the function being exercised and all the circumstances that impinge upon it. Clearly, economic and practical factors will often be important. Moreover, the weight to be given to the countervailing factors is a matter for the public authority concerned.

---

<sup>20</sup> See the Bar Council Brexit Paper, *Brexit and Acquired Rights*. There may be particular complications with rights of long duration such as public works concessions, public service contracts, mortgage loans and pension rights.

<sup>21</sup> *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin); applied by the Court of Appeal in the context of the Equality Act 2010 in *Hackney LBC v Haque* [2017] EWCA Civ 4.

11.2. The concept of “due regard” is to be distinguished from a requirement to give certain considerations specific weight. It is not a duty to achieve a particular result; it is a duty to have “due regard” to the need to achieve the identified goals.<sup>22</sup>

11.3. The addition of the word “due” means that proper consideration must be given; it is not possible to be precise or prescriptive, given that the weight and extent of the duty are highly fact-sensitive and dependent on individual judgment.<sup>23</sup>

11.4. The concept of ‘due regard’ requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker.<sup>24</sup>

12. A statutory duty on public bodies and courts to “have regard” to relevant Commission decisions or CJEU rulings may be sufficient for dealing with the application of EU derived law in purely internal situations. That would leave the decision-maker with a margin of discretion to ascribe the weight it considers appropriate to the latest EU position and then provide reasons for its adoption or departure.

13. However, in certain cross-border sectors which require the maintenance of a level playing field between operators in different states, the GRB may need to go further and provide for a degree of consistency to avoid market distortions and unfair competitive advantage. The above formulations could be modified with additional criteria to assist judges in weighing up competing considerations – such as specifying the burden or standard of proof or imposing legal or evidential presumptions.

14. For sector-specific legislation, particularly in fields previously subject to EU common regulatory frameworks (such as transport, utilities or telecoms), it may also be appropriate to have specific statutory provisions to ensure consistent interpretation and/or even to ensure fair competition and equal treatment in cross border sectors. These provisions could be similar to those in s.60 CA98 to ensure consistency in regulation, legal certainty and a level playing field for operators.

## **Rules of judicial interpretation**

15. The common law canon of statutory interpretation (which exercise is also called “statutory construction”) provides that words in the statute should be given their natural or ordinary meaning. However that literal rule of construction does not mean that it is overriding. First, the ordinary meaning does not imply that the judge should attribute a meaning that is divorced from the context or the purpose of the statute<sup>25</sup>. As Lord Griffiths stated in *Pepper v Hart*:<sup>26</sup>

---

<sup>22</sup> *Brown*, per Aitkens LJ at [81]

<sup>23</sup> *Hotak v Southwark London Borough Council* [2015] UKSC 30, per Lord Neuberger at [ ].

<sup>24</sup> *Haque* at [23].

<sup>25</sup> Cross on Statutory Interpretation (3<sup>rd</sup> Edition), page 32.

<sup>26</sup> *Pepper v Hart* [1993] 1 All ER 42 at 50.

“The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of the legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted”.

16. More recently, in *Bloomsbury*<sup>27</sup>, Lord Mance observed:

“In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance. They represent the context in which individual words are to be understood. In this area as in the area of contractual construction, “the notion of words having a natural meaning” is not always very helpful ..., and certainly not as a starting point, before identifying the legislative purpose and scheme. In the case of a statute which has, like the 1981 Act, been the subject of amendment it is not lightly to be concluded that Parliament, when making the amendment, misunderstood the general scheme of the original legislation, with the effect of creating a palpable anomaly”.

17. Accordingly, this would suggest that the English Courts will take account of the legislative provenance of the statutory regime under consideration and will construe the provisions in accordance with their intended aims and legislative purpose. Where the court is dealing with a UK statute that is derived from an EU Regulation or Directive and which has not been modified by Parliament, that could include the wider objectives expressed in the EU legislation which the statute was designed to implement.

### **Judicial reference to preparatory and legislative materials**

18. Under the *Pepper v Hart* rule, the court may have regard to extraneous materials, such as legislative antecedents, pre-parliamentary materials, parliamentary materials and explanatory memoranda and Hansard debates in exceptional circumstances. Such material is only admissible where the wording of the enactment is ambiguous, obscure or leads to an absurdity which can be resolved by a clear statement that is directed to the specific matter in issue.<sup>28</sup>

19. Recourse to the wider EU context is used frequently to assist judges in understanding the context and purpose of UK implementing legislation. For example, in *Pickstone v Freemans plc*<sup>29</sup>, the House of Lords referred to Hansard materials to demonstrate that the Equal Pay Regulations at issue were intended to bring UK law into line with a CJEU ruling. Similarly in the more recent *Tobacco litigation*<sup>30</sup>, the Court of Appeal took account of the Treaty legal base and objectives in the recitals to TPD2 (including its legislative background as part of the World Health Organisation FCTC) in determining the relevant context and purpose of the Standardised Packaging Regulations. The English courts are adept at looking

---

<sup>27</sup> *Bloomsbury International Ltd and others v Sea Fish Industry Authority* [2011] UKSC 25 at [10].

<sup>28</sup> Lord Browne Wilkinson at 69 and Lord Oliver at 52.

<sup>30</sup> *British American Tobacco and others v SS for Health* [2016] EWCA Civ 1182



at EU recitals and EU travaux préparatoires to ascertain the purpose and objectives of the EU regime.

20. There is no reason why such approach could not be continued post Brexit – whether generally or as a specific modification of the *Pepper v Hart* rule for dealing with EU-derived law. That would enable judges to refer to EU legislative and preparatory materials as a legitimate external aid to construction when interpreting domestic provisions.

### **International law**

21. As a matter of international law, the courts will consult international treaties and their travaux préparatoires to clarify an ambiguity in a domestic statute which is intended to implement the UK's international obligations<sup>31</sup>. They will resolve the obscurity in favour of the meaning that is consistent with the provisions of the treaty.

22. That outcome is also consistent with Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which provide that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, where the ordinary meaning creates ambiguity, obscurity or absurdity. Article 31 also provides that in interpreting the text of the provisions, account is to be taken of “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. That conceivably, could extend to Commission decisional practice as well as CJEU rulings.

23. The UK will no longer be party to the TEU or TFEU post Brexit but it may, as part of transitional arrangements or as part any future trade agreement, continue its participation in certain international agreements concluded with the EU or other Member States. For example, it may sign up to the Lugano Convention or the Common Transport Area Agreement. For those international agreements, Articles 31 and 32 will continue to apply to their construction even after Brexit.

### **Future Reliance on EU materials as evidence of foreign law**

24. The Supreme Court has made clear in *Miller v SSEU*<sup>32</sup> that, once the UK departs, EU law will no longer form part of the domestic legal system. However, as the White Paper recognises, businesses that continue to trade in other Member States will need to comply with EU standards, rules and regulations. There will be contractual and regulatory disputes that raise issues regarding their scope and application. Moreover, in specialist fields that are derived from EU law, litigants are likely to formulate their legal arguments by reference to the original EU provenance of the domestic statute or refer to the latest CJEU or Commission practice as a comparator in support of their legal arguments as to how the UK regime should develop in parallel. Parties will be able to adduce expert evidence of EU law and CJEU rulings as “foreign law”. As factual evidence, it will not be binding on the Court but will, in the

---

<sup>31</sup> *James Buchanan v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, *Quazi v Quazi* [1980] AC 958 at p. 186 per Lord Diplock and *Fothergill v Monarch Airlines* [1981] AC 251.

<sup>32</sup> [ref]

exercise of their discretion, be evaluated and taken into account as the individual judge considers appropriate.

## **Judicial comity**

25. There are established principles under international law for national courts to recognise the legislative, executive, and judicial acts of other legal systems. For instance, according to the US Supreme Court:<sup>33</sup>

“comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons as are under the protection of its laws”

26. There are various techniques that can be used as part of judicial comity, ranging from simply referring to decisions and judgments from another legal system; regarding them as “persuasive”; acceding to foreign judgments and integrating them into the domestic system. Some systems will include a “reciprocity principle” which allows the judge to apply and/or enforce the decision of a foreign judge on a mutual recognition basis. Others permit judges to give effect to foreign decisions or judges when they have effects within the domestic territory. These jurisprudential techniques are voluntary and, in the absence of legislation, involve a margin of judicial discretion<sup>34</sup>. Although flexible, that may not provide the necessary degree of legal certainty and consistency for certain sectors.

## **Duty of consistency**

27. Another option would be for the GRB or the relevant transitional arrangement or free trade agreement to include an explicit provision regarding the relationship between domestic law, EU law and the interpretation of the UK/EU27 Agreement. There are several models which could be used, covering a range of solutions, for-negative “no-conflict” requirement to a positive duty of conformity:

27.1. Article 27 of the Vienna Convention provides that a party to an international agreement cannot invoke its national law as a justification for its failure to comply with a treaty. That means that national law which is inconsistent with the terms of the new trade agreement would need to be disregarded.

27.2. Article XVI:4 of the WTO Agreement states that “Member States shall ensure the conformity of its law, regulation and administrative procedures with its obligations”.

27.3. Article XXIV:12 of GATT 1994 provides “Every Member shall take such reasonable measures as may be available to it to ensure observance of the provisions

---

<sup>33</sup> *Hilton v. Guyot*, 159, US 113 (1895). at 163 - 164

<sup>34</sup> For more details – see *From judicial comity to legal comity: A judicial solution to global disorder?* Elisa D’Alterio Int J Const Law (2011) 9 (2): 394-424.

of this Agreement by the regional and local governments and authorities within its territory”.

27.4. Although WTO provisions do not have direct effect, the CJEU and US Courts have held that they have primacy and domestic legislation should be interpreted in a manner that is consistent with its provisions<sup>35</sup>.

27.5. The EFTA/EEA model may serve as a useful analogy, given that it is a distinct legal regime to the EU which does not involve any transfer of sovereignty or legislative competence. The EEA Agreement itself does not contain any provisions on procedural homogeneity and rulings of the CJEU are not binding on national courts nor the EFTA Court. Article 3 of the Surveillance and Court Agreement (“SCA”) provides:

“Without prejudice to future developments of case law, the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to this Agreement, in so far as they are identical in substance to corresponding rules of the Treat[ies] ... and to acts adopted in application of these two Treaties, shall in their implementation and application be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of the EEA Agreement.

In the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the [Treaties] in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement.”

The EFTA Court has ruled that even though Article 3(1) SCA does not require it to follow the reasoning of the EU courts when interpreting the main part of the EEA Agreement, the reasoning of the EU Courts in reaching their interpretation of EU law concepts is relevant when identical expressions in substance fall to be interpreted by the Court. This is referred to as the principle of “procedural homogeneity”.<sup>36</sup>

28. It may be that a similar concept could be incorporated into the new UK/EU27 Trade Agreement. That would leave national courts free to adopt the construction established by the

---

<sup>35</sup> Case C-89/99 Schieving-Nijstad a.o. Robert Gruenveld [2001] ECR I-5851 and Murray v The Charming Betsy, 6 US (2 Cranch) 64 (1804).

<sup>36</sup> See The Handbook of EEA Law, Baudenbacker a.o. (Edn. Springer) 2016.

CJEU for concepts and principles of EU law but also, where appropriate, to depart from CJEU rulings when the court considers it appropriate in a given case.

## **Conclusion**

29. The UK Government is clear that a key policy of its Brexit agenda is to be free from the jurisdiction of the CJEU. However, there are important regulatory, economic and rights-based reasons in favour of continuity and legal certainty which underline the ongoing relevance of the CJEU case law post March 2019. Applying a pre- and post-Brexit watershed may not work in practice as EU rights and EU-derived laws are likely to straddle the exit date of 29 March 2019 and may continue to run for considerable time thereafter. There are a number of juridical tools that national courts can use to refer to EU principles, as they consider necessary and appropriate, in interpreting EU derived law. It may also be necessary to have explicit statutory provision in the GRB future UK/EU trade agreement and/or in sector-specific legislation to ensure consistency and a level playing field, particularly in cross-border markets.

## **Brexit Working Group**

June 2017

For further information please contact:

*Philip Robertson, Director of Policy or  
Luke Robins-Grace, Senior Public Affairs and Communications Adviser  
The General Council of the Bar of England and Wales  
289-293 High Holborn  
London WC1V 7HZ  
Direct line: 020 7242 0082  
Email: [PRobertson@BarCouncil.org.uk](mailto:PRobertson@BarCouncil.org.uk)  
[LRobins-Grace@BarCouncil.org.uk](mailto:LRobins-Grace@BarCouncil.org.uk)*