BRIEFING NOTE

by

THE FACULTY OF ADVOCATES

for

CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE

The Faculty of Advocates is pleased to have the opportunity to give evidence to the Committee at its evidence session on Retained EU Law. The Faculty should make it clear that it does not seek to comment upon issues of policy.

1. As a Member State of the EU, the UK was impacted by European legislation. In some cases, domestic legislation was passed in the UK to give effect to pan-European rules, and in other cases EU legal instruments took direct effect without any need for further legislation to be passed in the UK. Whichever process was used, such rules became a part of the law of the various parts of the UK. Such rules covered many subject-areas, and some involved great technical detail.

2. As is well-known, the UK currently comprises three separate legal systems: Scotland, England & Wales, and Northern Ireland. In addition to the UK Parliament (which has power to legislate for the whole of the UK), there are devolved legislatures in Scotland, Wales and Northern Ireland. The power of each devolved legislature is contained in a statute: in the case of Scotland, the Scotland Act 1998. As originally drafted, 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 in relation to subordinate legislation, since the restriction there was tethered to the restriction on primary legislative competence.

3. When the decision was taken by the UK Government that the UK should withdraw from the EU, this raised certain questions from the legal perspective:
    - would any new trading relationship between the EU and the UK require that certain laws derived from our EU membership would need to remain part of the law in the UK (as being necessary to the operation of any trade agreement reached)?
    - otherwise should the laws derived from our EU membership be retained within the UK, and continue to be part of the law in the UK?
    - if certain laws derived from our EU membership were not to be retained as part of the law in the UK, at what point should those rules be repealed?
    - what ought to be done with respect to the limitation on the devolved legislatures not to act incompatibly with EU law?

    In the history of the UK 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. At the time of the Reformation in Scotland, although the authority of the Pope was rejected, 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 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.

4. With regard to the UK's withdrawal from the EU, there was naturally a concern to avoid a sudden upheaval on the day of withdrawal, or the day upon which the transition period came to an end. Essentially a legislative device was adopted whereby laws derived from the UK's membership of the EU would be retained in the UK, save where a decision was taken to revoke, or amend, specific laws as at the end of the transition

period. Retained EU law is therefore now law in the three legal systems of the UK, 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.

5. Retained EU law is therefore a descriptor rather than a concept. It must be understood that as far as content is concerned, that a provision may originally have stemmed from the UK's membership of the EU is simply a historical explanation for the existence of the 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. Although 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. Indeed, it must be borne in mind that any area of domestic law in the UK 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.

6. Individual topics which have been the subject of EU legislation 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 legislatures of 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. 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. Clearly, however, this does not 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 Scotland, or the UK in general, than its predecessor EU-derived measure.

7. 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. 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. The 2020 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 2020 Act. In the Faculty's response to the White Paper which preceded the 2020 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',[1] and

[1] Department for International Trade website, Guidance dated 20 March 2020 https://www.gov.uk/government/publications/trade-bill/trade-bill

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'.[2] 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.

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[2] Internal Market White Paper, 2020, paragraph 89.