# Retained EU Law: Purposive Interpretation when the Constitutional Architecture Changes

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*Introduction*

I am grateful for the invitation from the Association to deliver the annual lecture at King's College London this evening. I have chosen as my topic purposive interpretation of retained EU law. This is a complex issue. Brexit has changed the constitutional architecture which applies to frame the approach to interpretation of this retained law. There is an important question as to how this change in the constitutional architecture will affect the construction of retained EU law, in light of the purposive approach to interpretation which has to be applied to it.

My lecture is structured as follows. First, I will discuss the way in which any practice of statutory interpretation is located within the framework of a jurisdiction's constitution which generates the legislation that falls to be construed. Second, I will explain the legislative framework for the UK's withdrawal from the EU. Third, I will examine the purposes of EU law as judged from the perspective of the EU, as explained by the institutions of the EU, and from the perspective of the UK, without ready access to information from those institutions. Fourth, I will examine how the purpose of retained EU law should be assessed in the post-Brexit period so as to inform its interpretation. Fifth, I will discuss the implications of the change in the constitutional architecture produced by Brexit for how the UK courts should take account of CJEU caselaw and when they should depart from it. In light of the change in the constitutional architecture, how far should the UK courts "aim off" from the CJEU's own purposive interpretations of EU law? I will finish by asking whether there are lessons to be learned from the jurisprudence of the Court of the European Free Trade Area – "the EFTA Court".

*1. Statutory interpretation as informed by the constitutional architecture*

In the United Kingdom the legal product of the democratic process is legislation. Legislation is everywhere and statutory interpretation makes up a large part of what judges do.

Ultimately, it is the politico-legal culture in a jurisdiction which constrains judges in how far they feel able to go in interpretation of legislation. That culture both reflects and helps constitute the constitutional environment of the jurisdiction. The ability of judges to give persuasive reasons for adopting one interpretation in preference to another is critical to the legitimacy of what they do.

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Moreover, the use of determinate interpretative limits and techniques are important for reasons of legal certainty.[1]

Exploration of the boundaries of permissible judicial interpretation of legislation is a way of tracing the practical implications of constitutional principles. Thus in the UK important norms exterior to a statute have to be brought into account, to produce rights-consistent interpretations which take account of specified human rights under section 3 of the Human Rights Act 1998 ("HRA"), common law rights and principles under the principle of legality[2] and EU rights. Under the *Marleasing*[3] principle interpretations are required to conform, so far as possible, with EU law. Each of these areas of impact on statutory interpretation reflect the constitutional architecture of the UK. By requiring departure from strict linguistic meaning, these various interpretative obligations operate in tension with the requirement to achieve legal certainty through interpretation of legislation. But if strict linguistic meaning is taken to govern, it would in many cases defeat the object of the legislation[4] and would undermine the wider legal values which are given recognition by virtue of constitutional architecture through such interpretative obligations.

Following the UK's integration within the EU legal order in 1973, statutory interpretation in the UK was perceived to become more constitutionalised. The simple statement of democratic will in the text of a statute has to be read through the prism of constitutional reason. Purposive interpretation in accordance with the mischief rule was always part of English law, but it has become more vigorous. This change was influenced by the UK courts becoming familiar with the teleological approach to statutory interpretation as applied by the Court of Justice of the European Union[5] and the need under *Marleasing* to give effect to the "purpose" of a directive.[6] It was also influenced by the growing use of extraneous materials as an aid to construction,[7] as casting light on the purpose of legislation, as well as familiarity from the 1990s with the interpretative techniques required under the principle of legality and the HRA.

Even before Brexit, however, there remained a divergence in approach to statutory interpretation which reflected differing constitutional contexts in the UK and the EU. In the UK the doctrine of the sovereignty of Parliament is, for historical and normative reasons, fundamental.[8] There is no equivalent doctrine in EU law. But Parliament's will is understood in the light of the UK being a constitutional state subject to the rule of law.[9] It is not for the courts to invent constitutional rights or principles. Rather, their function is to determine whether such rights or principles are declared in legislation or are so well-established that Parliament must be taken to have legislated with them in mind.

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[1] A. Barak, *Purposive Interpretation in Law* (2005, Princeton University Press), 40-41.
[2] *R v Secretary of State for the Home Department Ex p. Simms* [2000] 2 AC 115, 130.
[3] Case 106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135.
[4] *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [8] (Lord Bingham).
[5] See, e.g., *Quintavalle* (n 4), [21] (Lord Steyn).
[6] This was developed by the CJEU in Case 14/83 *von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, [26].
[7] See, e.g., *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12, 34 (Laws LJ).
[8] J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (1999); M. Loughlin, "Constituent Power Subverted: From English Constitutional Argument to English Constitutional Practice" in M. Loughlin and N. Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constituent* (2007).
[9] See, e.g., *R. (on the application of Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604. Lord Steyn held that there is a presumption that "a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected" (at [28]).

The need for a purposive approach, where the purposes include the upholding of important rights, is enhanced by certain styles of statutory drafting. It is particularly required where legislative instruments are drafted in broad terms rather than by using technical, detailed and precise language and concepts.[10] As a rough generalisation, EU legislative drafting tends to be general and UK legislative drafting tends to be more precise. It has been observed that "[t]here is an inevitable interaction between the methods of parliamentary drafting and the principles of judicial interpretation".[11]

Adoption of a purposive approach can both enhance and undermine legal certainty.[12] An understanding of the purpose for which a word or sentence is being used can help tell us where exactly within an open-textured potential range of meaning it is intended the precise meaning should be fixed.[13] But it is also true that the person applying the rule may have to construct, rather than simply discover, that purpose. H.L.A. Hart explains this in *The Concept of Law*: the inability of the legislator to anticipate every case in advance "brings with it a relative indeterminacy of aim … When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing issues in the way that best satisfies us. In doing so we shall have rendered more determinate our initial aim, and shall incidentally have settled a question as to the meaning, for the purposes of this rule, of a general word".[14] The process of interpretation inevitably gives a degree of decision-making power to the judges to identify and give effect to the public policy which appears to be promoted by a statute, and the more the approach adopted is purposive in character the greater the responsibility cast on the judges to construct the meaning to be given to it. Unlike where determinate language is used, there is no simple lexicon or method to identify the underlying purpose or rationale of a rule. Depending on whether one reads the purpose as wide or narrow, the range of cases it embraces and governs will be greater or less.

At the EU level, the founding and amending Treaties[15] are at the top of the Community law edifice, providing its constitutional architecture. These Treaties, however, provide no more than a framework, filled with general provisions and vague terms and expressions which are not defined. Furthermore, by its nature, the EU is a dynamic entity in which the meaning given to its Treaties is informed by the evolving telos of the EU itself. The Treaties set final objectives and intermediate goals, while additional recourse to general principles enables the Court of Justice to adopt an evolving interpretation and to be responsive to changes in the economic and political order. Those features that are peculiar to the EU's constitutional architecture go some way to explaining why the Court of Justice is more active in the practical formulation of policy through law than is generally the case for the national courts of the member states.[16]

The general principles of law identified by the Court of Justice have a gap-filling function, but in a more fundamental way they express constitutional standards underlying the EU legal order. Recourse to them is an integral part of the Court's interpretative methodology even in the absence

[10] M. Brenncke, *Judicial Law-Making in English and German Courts* (Intersentia, 2018), 40.
[11] *Cutler v Wandsworth Stadium Ltd* [1949] AC 398, 411 (Lord du Parcq).
[12] See *R (Kelly) v Secretary of State for Justice* [2008] EWCA Civ 177, [24] (Laws LJ).
[13] *R (PACCAR) v Competition Appeal Tribunal and others* [2023] UKSC 28, [41] (Lord Sales).
[14] H.L.A. Hart, *The Concept of Law* (2012, Clarendon, 3rd edn), 128-129.
[15] Including the Treaty on the Functioning of the European Union ("TFEU"), as a result of the Lisbon Treaty, and the Treaty on European Union ("TEU"), as put in place by the Treaty of Maastricht. The TEU itself was based on the Treaty establishing the European Economic Community, signed in Rome on 25 March 1957.
[16] T. Tridimas, *The General Principles of EU Law* (2006, Oxford EC Law Library, 2nd edn), 18.

of gaps.[17] Generally, preference must be given as far as possible to the interpretation of legislation which renders it compatible with the Treaties' objectives and with the general principles of law recognised by the Court.[18] This is an important aspect of the Court of Justice's teleological approach to interpretation.

Another important aspect derives from the open-textured form of EU legislation. This has the effect of casting responsibility onto the Court to identify the purposes underlying specific legislative regimes adopted by the EU institutions in order to give determinate meaning to the words enacted. When interpreting EU law, the UK courts had to try to mimic or anticipate what the Court of Justice would do. Where there was doubt about this, as there often was, the reference procedure had to be used so that the Court of Justice could authoritatively determine both purpose and, consequently, meaning and inform the national courts about this. Post Brexit, this procedure is no longer available (other than in very limited and marginal cases defined in the Withdrawal Agreement).

The question therefore arises how the UK courts should proceed when trying to interpret retained EU law without access to that authoritative source of meaning. That question is made more acute and difficult by the withdrawal of the UK from the constitutional architecture provided by the Treaties. That withdrawal means that certain guiding principles to which the Court of Justice accords weight are now not applicable in the same way for the UK. When interpreting retained EU law, to what extent can or should UK courts give weight to such "meta-purposes" of the EU legal order as the spirit of the Treaties, the mandatory effectiveness of EU law, the principle of ever closer Union or the uniformity of EU law[19]?

*2. The legislative framework for withdrawal from the EU*

When the UK was a member of the EU it was required to implement and comply with the Treaties and EU legislation. When it left, it needed to decide what to do with the existing body of EU law that was deeply interwoven into the fabric of UK law. It was always clear that after Brexit there would need to be continuity for at least some period of a large portion of EU law. The effect of the European Union (Withdrawal) Act 2018 (the "Withdrawal Act") was that on the implementation period ("IP") completion day, namely 31 December 2020 at 11 pm, UK laws implementing EU law as well as directly effective provisions of EU law became a new category of domestic law: "retained EU law".

A definition of "retained EU law" is provided in section 6(7) of the Act. It has three main components: EU-derived domestic legislation; direct EU legislation; and directly effective rights. EU directives do not, by themselves, fall within the scope of retained EU law. However, domestic legislation implementing EU directives forms part of EU-derived domestic legislation and is preserved in domestic law.

Section 6 draws a distinction between caselaw of courts (whether EU or UK) before and after IP completion day. It makes clear that no UK court or tribunal is bound by "any principles laid down, or any decisions made, on or after IP completion day by the European Court", though they may have regard to "anything done on or after IP completion day by the European Court, another EU

[17] Ibid., 19.
[18] See, e.g., Case 218/82 *Commission v Council* [1983] ECR 4063, [15].
[19] M. Brenncke, "Statutory interpretation and the role of the courts after Brexit" (2019) 25 European Public Law 637, 645.

entity or the EU so far as it is relevant to any matter before the court or tribunal".[20] The caselaw of the Court of Justice made on or after 1 January 2021 therefore retains significance for the interpretation of retained EU law. In fact, in the recent *TuneIn* decision,[21] Arnold LJ considered that a judgment of the Court of Justice made after IP completion day was "highly persuasive" in the context of that case.[22]

By contrast, the starting point as regards the caselaw already existing on IP completion day is, by virtue of section 6(3), that UK courts should interpret retained EU law in accordance with any retained caselaw and any retained general principles of EU law. And where retained EU law is modified by subsequent domestic enactments, section 6(6) provides that the general interpretative instruction under section 6(3) continues to apply in respect of a now-modified retained EU law norm "if doing so is consistent with the intention of the modifications".

One further preliminary point to be made is that the UK Supreme Court and the Court of Appeal[23] have the power to depart from retained EU caselaw. In so doing, the court must apply the same test as the Supreme Court would apply in deciding whether to depart from its own caselaw,[24] in other words "when it appears right to do so", subject to recognised constraints.[25] The UK's approach to retained EU law departs from a strict *stare decisis* doctrine.

When a UK court interprets retained EU law, which methods of statutory interpretation should it adopt: EU or domestic? It appears evident from the wording of section 6(3), in referring to the general principles of EU law, that the courts should preserve the Court of Justice's interpretative methods, which are conceived to be broadly purposive. While explanatory notes only play a secondary role in the interpretation of statutes[26] they can still provide assistance in determining the purpose of legislation or to resolve ambiguity.[27] For completeness, therefore, it is worth noting that paragraph 111 of the Explanatory Notes to the Withdrawal Act[28] confirms that the intention of section 6(3) is for the UK courts to take a purposive approach where the meaning of retained EU law is unclear.

However, how should this work in practice? The constitutional architecture has changed, as the UK peels away from the EU legal order. In the new constitutional environment, how should UK courts (i) identify the purposes of retained law without the EU's institutional assistance, (ii) determine which general EU purposes remain relevant to the UK in the post-Brexit landscape, and (iii) decide when it is appropriate to depart from the caselaw of the Court of Justice?

*3. The purposes of EU law as judged from the perspective of the EU and the UK*

A purposive interpretation of retained EU law requires UK courts to ensure that retained EU laws continue to serve the same or similar purposes for which they were initially designed within the EU. This is important to preserve legal continuity and certainty in a post-Brexit context.

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[20] Withdrawal Act, ss. 6(1) and (2).
[21] *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441.
[22] But cf. *TuneIn* (n 21), [183] (Rose LJ).
[23] Following Regulation 3(b) of the EU Withdrawal Act 2018 (Relevant Court) (Retained EU Caselaw) Regulations 2020.
[24] Withdrawal Act, s. 6(5).
[25] Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.
[26] *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [30] (Lord Hodge).
[27] *PACCAR* (n 13), [42] (Lord Sales).
[28] European Union (Withdrawal) Act 2018 – Explanatory Notes (accessible here).

The preliminary reference procedure was an important mechanism for ensuring the uniform interpretation of EU law across all member states.[29] On a reference the European Commission (the "Commission") usually makes submissions.[30] Its submissions are not binding on the Court of Justice, but they are influential as they reflect the Commission's understanding of EU law and its interpretation. The Commission provides well-informed insights into the EU legal framework, relevant EU policies, and the implications of different legal interpretations. Often, the Commission will have been involved in formulating the policy underlying the legislation to be interpreted.

The role of the Commission in explicating matters in difficult cases can be compared with that of expert agencies in the USA under the *Chevron* doctrine.[31] Under that doctrine, US courts give deference to agency interpretations of the law in complex areas. Commenting on this, Sunstein and Vermeule point to the problem of irreducible ambiguity in hard cases, which is exacerbated by the phenomenon of "old statutes, new problems" so that "it becomes less and less plausible to insist that statutes provide a single right answer, no matter what problems arise that were completely unforeseen by the statute's drafters".[32] The truth is that there is a "pragmatic impossibility of truly independent judicial analysis of highly complex modern statutes, whose interpretation carries enormous policy consequences, by judges laboring under realistic constraints of time and expertise". As Justice Stevens, the author of the *Chevron* judgment, remarked, "when I am confused, I go with the agency".[33] Sunstein and Vermuele observe: "This is an entirely rational decision-making strategy by generalist judges who face intricate, specialized regulatory statutes, who know the limits of their own knowledge, and who know the consequences of a judicial blunder may be extremely serious"; this form of deference is real and is difficult to control by any formal legal doctrine.[34]

In addition to the contribution to judicial understanding to be made by the Commission on a reference, the Court of Justice as a central institution embedded in the EU legal order has a better understanding than a national court of the EU constitutional architecture and of the purposes to be achieved in the light of that architecture.

When the answer comes back from a reference, the national court would then apply the law, as interpreted by the Court of Justice with the assistance of the Commission, to the case at hand.[35]

Other than in marginal areas, the Withdrawal Act eliminates the reference procedure.[36] UK courts therefore face the challenge of identifying the purposes of retained EU law without assistance from the EU institutions. This makes it likely that there will be a degree of divergence in interpretation of the same legal provisions. In cases where the UK courts cannot confidently identify the purposes underlying retained law, their familiar interpretative practices informed by the constitutional principle of parliamentary sovereignty that prevent the courts from departing from the clear words of a statute together with a concern to constrain excessive judicial discretion in

[29] Article 267 TFEU.
[30] Article 23(2) of the Statute of the Court of Justice of the European Union entitles the European Commission to intervene before the CJEU in preliminary rulings. See also Article 96(1)(c) of the Court's Rules of Procedure.
[31] *Chevron USA Inc v Nat. Res. Def. Council Inc.* 467 US 837 (1984)
[32] C. Sunstein and A. Vermeule, *Law & Leviathan: Redeeming the Administrative State* (2020), 110-111.
[33] Ibid., 113.
[34] Ibid., 113.
[35] See *Gibfibre Ltd (trading as GibFibreSpeed) v Gibraltar Regulatory Authority* [2021] UKPC 31, [68] (Lord Sales).
[36] Withdrawal Act, s. 6(1)(b). There are limited exceptions to this, for example: Article 158 of the Brexit Withdrawal Agreement (that entered into force on 1 February 2020) extends the availability of the preliminary ruling procedure for questions concerning the interpretation of Part Two of the Withdrawal Act for eight years after the end of the transition period.

identifying the purpose and meaning of a statute, where these are unclear, may result in a gradual shift back towards a more textual approach. The courts may find this more comfortable.

*4. Assessment of the purpose of retained EU law in the post-Brexit period*

Another challenge for UK judges is to ascertain which purposes remain relevant when interpreting retained EU law. Does retained EU law inherit all the purposes of EU law?

These purposes are partly inherited through preserving the general principles of EU law and the pre-exit caselaw of the Court of Justice. However, it might be going too far to suggest that the UK law should inherit all the purposes of EU law, especially where those purposes are associated with European integration. For example, the introduction of the EU VAT was driven more by the need to remove cross-border fiscal obstacles than the revenue-raising objective.[37]

The effectiveness of EU law partly relies on uniform application and interpretation in all member states. Requiring UK courts to interpret retained EU law, which is now solely UK domestic law, in a way that achieves the EU's common market objectives or ensures uniform application by the UK and its EU counterparts is not in itself obviously a purpose which is relevant in a post-Brexit legal system. With the change in the constitutional architecture wrought by Brexit, it is not unreasonable to expect that this will be another reason for divergence between the Court of Justice and UK courts in their interpretations, at least in areas of law that from an EU perspective are crucial to European integration.

However, there are a number of other purposes underlying EU law that may remain relevant to the UK after Brexit, especially those that were not unique to the EU framework and telos but which relate to broader common economic or social aims. This may be significant in areas such as consumer rights, workers' rights, environmental protection standards and data protection. In the latter area, the UK courts may identify a common interest in maintaining a high level of data protection in line with EU standards to allow data to flow efficiently across borders.

Another example relates to human rights and fundamental freedoms, but here the degree of correspondence is more difficult to gauge. It is necessary to consider the interplay between the interpretative effects of the Charter of Fundamental Rights ("CFR"), general principles of EU law, and human rights as set out in the European Convention on Human Rights ("ECHR" or the "Convention"). The CFR is not part of retained EU law[38] but general principles are.[39] But to a large degree the CFR was a codification of the general principles of respect for fundamental rights and equality before the law, and the CFR also reflects the ECHR to which the UK is party and which it has adopted into national law under the HRA. In addition, all EU member states are parties to the ECHR and the EU itself has started the ECHR accession process.

Under section 3(1) of the HRA, English courts are obliged to interpret national legislation compatibly with Convention rights "so far as it is possible to do so". In order to fulfil its function, section 3(1) "imposes a stronger and more radical obligation than to adopt a purposive

[37] Y. Zu, "Statutory interpretation after Brexit: implications from a case study of VAT" (2023) LS 43(2) 295, 305-306.
[38] Withdrawal Act, s. 5(4).
[39] But see the discussion below regarding the Retained EU Law (Revocation and Reform) Act 2023.

interpretation in the light of the ECHR".[40] As the qualifying word "possible" indicates, there are limits to the power to modify the meaning of legislation.

In the *Ghaidan* case, Lord Steyn highlighted that section 3(1) was modelled on the EU *Marleasing* duty of conforming interpretation.[41] He concluded that the strength of the interpretative obligation under EU law can serve as a signpost to the meaning of section 3(1). The two have been equiparated in subsequent caselaw.[42] Given the overlapping jurisdictions of the Strasbourg and Luxembourg courts in respect of fundamental rights, the two courts have adopted a relationship of cooperation and coordination to try to ensure consistency in the interpretation and application of the ECHR and the CFR. Where retained EU laws have the purpose of protecting fundamental rights, at least in the ECHR sense, that purpose will therefore continue to be relevant for their interpretation and with similar interpretative effect.

Beyond these examples, it could be that in areas that were more central to the European project the UK courts may determine that many of the underlying purposes remain relevant to the UK after Brexit. For example, many EU laws were created to harmonise regulations and standards across member states. These laws aimed to create a single market with consistent rules for goods, services, and capital. The purpose of harmonisation is likely to remain relevant to maintain regulatory alignment with the EU to facilitate trade and economic cooperation. The basic idea underlying the Withdrawal Act seems to be that these sorts of retained laws should continue to apply as before, until such time as Parliament chooses to diverge from them.

However, while the UK seeks to maintain legal continuity in many areas, it is also a fundamental objective of Brexit that it asserts its own legal identity and telos as something separate from the EU. A narrower, or at any rate different, interpretation of retained EU law may be required where it is inherent in the assertion of the UK's separate legal identity that aspects of the EU constitutional architecture and such purposes have been switched off. Where the content of the interpretative obligation inherent in the purposive approach, as derived from the constitutional architecture, changes, it is inevitable that there will be potential for the meaning to be given to the legislative text to change as well.[43]

Furthermore, the UK can amend or remove retained EU laws to align better with domestic policies, including by changing the manner in which such laws are interpreted. Parliament has enacted the Retained EU Law (Revocation and Reform) Act 2023 (the "2023 Act"). At the end of 2023 it will (i) revoke all or part of approximately 600 legislative instruments of EU origin, (ii) revoke all retained directly effective EU law (for example, rights and obligations formerly conferred directly under EU Treaties or directives), (iii) revoke the modified principle of supremacy of EU law, and (iv) revoke the retained general principles of EU law.[44] This latter revocation is particularly significant given that, as I mentioned earlier, the general principles govern the interpretation of retained EU law and the Explanatory Notes to section 6(3) of the Withdrawal Act had viewed this provision as requiring a purposive interpretation for retained EU law. Time precludes a detailed discussion of the 2023 Act but suffice to say that it still does not *preclude* the UK courts from continuing to adopt a purposive approach to retained EU law, and for the reasons

[40] *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, [44] (Lord Steyn).
[41] Ibid., [45]-[46].
[42] See, e.g., *Robertson v Swift* [2014] UKSC 50, [21] (Lord Kerr).
[43] Cf R (Z) v Hackney LBC [2020] UKSC 40, [113]-[114] (Lord Sales).
[44] 2023 Act, ss. 1-4.

that I will discuss shortly, it seems that such an approach remains the most appropriate starting point.

Equally, one cannot expect the EU to remain static from the moment of Brexit. The EU is a dynamic institution that will continue to adopt new policy initiatives in response to changing circumstances at the political, economic and social level. This may result in the UK operating "retro" EU law while the EU and the remaining member states move on. Areas where the law of foreign jurisdictions which have similar legal and historical roots is cited in UK courts may give a clue as to what may happen. UK and Australian courts often cite each other's decisions in developing areas of law to assist in drawing or justifying their conclusions. However, it has been observed that there has been a gradual decline in the citation rates of UK House of Lords and Supreme Court decisions by Australian courts. It seems that changes in the UK's constitutional architecture in the form of membership of the EU and the enactment of the HRA has made English law less relevant in Australia.[45] Such divergence is naturally to be expected.

*5. Taking account of, and departing from, CJEU caselaw*

Section 6 of the Withdrawal Act gives rise to two further issues in respect of statutory interpretation: (i) to what extent should UK courts have regard to and treat as persuasive judgments of the Court of Justice handed down post-Brexit which interpret legislative instruments which are part of the corpus of retained EU law?[46] and (ii) in what circumstances should the relevant UK courts depart from caselaw of the Court of Justice delivered prior to exit day?[47]

As to the first question, this is an area which has the scope to be politically charged and the UK courts will follow the directions given in the legislation. The wording of section 6(2) leaves open the question when reference to post-exit EU law and, more specifically, decisions of the Court of Justice should be seen as "relevant". So far we only have limited early indications of how the courts will undertake this exercise. In the *Tower Bridge GP* case[48] the Court of Appeal had regard to the post-completion day decision of the Court of Justice in the *Kemwater* case[49] when interpreting UK VAT legislation that had implemented the requirements of the EU Principal VAT Directive. The court set out a number of reasons why it should not follow the Court of Justice's decision, noting that the Court had broken new ground and the decision was "at odds with the previous jurisprudence of the court".[50] This was an early indication that the UK courts' approach would not be to simply follow the Court of Justice's post-Brexit judgments as a default position, but rather they will assess the appropriateness of doing so on a case-by-case basis.

On the other hand, in the *TuneIn* case, Arnold LJ regarded a post-completion day decision of the Court of Justice as "highly persuasive".[51] Not only was it directly relevant to the case, it was a Grand Chamber decision refining an extensive body of 24 retained EU judgments on the topic in

[45] R. Smyth, "Citations of Foreign Decisions in Australian State Supreme Courts Over the Course of the Twentieth Century: An Empirical Analysis" (2008) 22 Temple International & Comparative Law Journal 409, 421–422.
[46] See Withdrawal Act, s. 6(2).
[47] See Withdrawal Act, s. 6(4).
[48] *Tower Bridge GP Ltd v HMRC* [2022] EWCA Civ 998.
[49] C-154/20 *Kemwater ProChemie* ECLI:EU:C:2021:989.
[50] *Tower Bridge* (n 48), [119].
[51] *TuneIn* (n 21), [91].

question which had been followed in the UK. New decisions delivered by the Court of Justice are thus likely to remain influential in a number of contexts.

At the same time, however, there have been recent examples where the UK courts encountered difficulties in seeking to replicate the Court of Justice's reasoning style. Coulson LJ in the *Lipton* case,[52] concerning the rights of staff who are ill, began by referring to the Court of Justice's purposive interpretative method.[53] But the interpretative method he employed was closely aligned with familiar domestic procedure, working through a number of stages – literal, contextual, purposive – to reach a conclusion. This procedure is not identical with that usually articulated by the Court of Justice.

There are also aspects of the Court of Justice's reasoning which UK courts are ill-equipped to emulate. For example, in the *Greenaway* case[54] Spencer J referred to the "nightmare" for domestic courts of having to apply "the EU principle whereby the correct interpretation incorporates and encompasses all the various language versions of the directive" without the resources of the Court of Justice.[55]

As to the second question, the Court of Appeal's decision in the *TuneIn* case provides an early indication of how the courts will approach pre-Brexit caselaw of the Court of Justice. Arnold LJ set out eight reasons why the court should not depart from the Court of Justice's jurisprudence in that case, including the fact that there had been no change in the domestic legislation after Brexit; as he said, to "return to the drawing board … would create considerable legal uncertainty."[56] Sir Geoffrey Vos MR added that "[i]t would be undesirable for one nation to depart from the [Court of Justice's] approach without an exceptionally good reason".[57] The value of preservation of legal certainty was recognised as having high status under the Withdrawal Act.

The implication of *TuneIn* is that the UK courts will exercise the power to depart from caselaw of the Court of Justice cautiously. The threshold appears to be when a decision of the Court can be said to be contrary to public policy or to "restrict[…] the proper development of the law".[58] These are open-textured and rather indeterminate concepts which create their own degree of uncertainty which the courts will have to manage. The Court of Appeal gave some guidance about this, but a degree of indeterminacy is unavoidable. It seems inevitable that the Supreme Court will have to consider these matters at some point.

The *TuneIn* decision now has to be considered in light of the 2023 Act which encourages lower courts to be willing to depart from the EU caselaw. Section 6 reminds them that decisions of a foreign court "are not (unless otherwise provided) binding"[59] and encourages them to have regard to "the extent to which the retained EU caselaw restricts the proper development of domestic law".[60] It seems that the Court of Appeal in *TuneIn* already had these points in mind. Nevertheless, the courts will need to acknowledge this clear signal from Parliament in future cases.

[52] *Lipton v BA Cityflyer* [2021] EWCA Civ 454.
[53] Ibid., [13] (citing *Wallentin-Hermann v Alitalia*, C-549/07, EU:C:2008:771, [17]).
[54] *Greenaway v Parrish & Ors* [2021] EWHC 1506 (QB).
[55] Ibid., [44].
[56] *TuneIn* (n 21), [83].
[57] Ibid., [198].
[58] Ibid., [201].
[59] 2023 Act, s. 6(3)(a).
[60] 2023 Act, s. 6(3)(c).

All that said, in respect of all of the caselaw of the Court of Justice, whether delivered before or after completion day, its persuasiveness is likely to diminish with time. As I mentioned earlier, legislative and policy changes at both the domestic and EU level will lead to divergence in interpretation unless the UK seeks to mirror new developments or pursue policies of equivalence.

One final issue to mention has been raised by Christopher Vajda, formerly the UK judge on the Court of Justice.[61] In principle, departing from a decision is declaratory in nature and therefore has retrospective effect to the date on which the power was granted (i.e., IP completion day). The alternative, however, in order to reduce legal uncertainty for the future, would be for the court to decide that its judgment will have prospective effect only. That has been a feature of EU jurisprudence in complex cases with profound legal and financial effects.[62] In theory, it is a power available in relation to UK law, as explained by the House of Lords in the *Spectrum Plus* case, but only to be exercised exceptionally in accordance with the underlying objective of the courts to administer justice fairly, for example if a retrospective overruling would have gravely unfair and disruptive consequences for past transactions.[63] The power never has been exercised. It is possible, however, that the UK courts might proceed down this route if persuaded that the Court of Justice might have done so if confronted with the same problems arising from a change from previous interpretation of the same law.

*6. "Aiming off" from the CJEU's purposive interpretations of EU law*

The approach to the important and complex issues I have touched on in this lecture will inform the extent to which the UK courts' interpretation of retained EU law may need to "aim off" from purposive interpretations of EU law given by the Court of Justice. In so doing, however, the UK courts' desire to promote reasonable legal certainty in line with what Parliament has directed will always operate as a constraint. Many of the retained laws, as interpreted by the Court of Justice, have operated as an important part of our domestic legal order for many years, and in some cases decades. If excessive uncertainty were injected into the legal system, this would undermine individuals and companies in planning their affairs and would encourage wasteful and expensive litigation. The wider impact on the UK economy also cannot be ignored, given this concern influenced Parliament's decision to ensure continuity of EU law post-Brexit under the Withdrawal Act.

To address these challenges, it will be important for UK courts to provide clear and well-reasoned explanations when they consider it is appropriate to "aim off" from purposive interpretations of retained EU law. It is to be hoped that this should include detailed reasoning to explain why a particular interpretation is chosen; clear articulation of how the interpretation aligns with the domestic legal system and the specific context of the case; consideration of the potential impact of competing interpretations on legal certainty and an effort to mitigate any negative consequences; and consistency in interpretation between domestic cases whenever possible to minimise conflicting judgments. As always, clear and transparent judicial decision-making is essential in achieving as much certainty as is feasible.

[61] Christopher Vajda KC, "The UK Courts and EU law post-Brexit" (2021) Competition Law Journal, 20(3), 113-119.
[62] See, e.g., Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* (1990) IRLR 240, [43]-[44].
[63] *Re Spectrum Plus Ltd (In Liquidation)* [2005] UKHL 41, [2005] 2 AC 680, [40].

*7. Looking to the EFTA Court for inspiration?*

In working out how to "aim off" in interpreting retained EU law, the UK courts may find themselves looking at the caselaw of the EFTA Court. That court interprets the European Economic Area agreement (the "EEA Agreement"), which replicates many provisions of the EU Treaties and legislation which has been adopted for the EEA and follows the text of EU laws. It does so by looking at jurisprudence of the Court of Justice but aiming off to the extent necessary to take account of the different treaty architecture applicable in relation to the EFTA states.[64]

The European Free Trade Area operates in parallel with the EU, and all four member states participate in the European Single Market and are part of the Schengen Area. Under the EEA Agreement, new EU legislation with EEA relevance is incorporated into the EEA Agreement by Joint Committee Decision and implemented into the national legal orders of the EEA States.[65] Given the EEA's purpose of expanding the Internal Market to the EEA EFTA countries,[66] it is a natural consequence that both the EU and the EEA share the same or similar laws applicable for that purpose. In addition, in order to achieve a "homogenous" EEA,[67] the EFTA Court has held that EEA law provisions, in so far as they are identical in substance to the provisions of the EU Treaties, must be interpreted in conformity with the Court of Justice's rulings from the time before the signature of the EEA Agreement and due account shall be taken of relevant caselaw which has been rendered after the signing of the EEA Agreement.[68] In practice, the EFTA Court also follows the same methods of interpretation as the Court of Justice, including the need for a teleological interpretation of EEA law[69] and with a view to ensuring its effectiveness.[70] Despite claims that there cannot be direct effect or supremacy of EEA law, or state liability, because these are the constitutional principles of EU law, the EFTA Court has created equivalent principles which take due account of the constitutional architectural differences between the EU and the EEA,[71] but which also ensure a homogeneous and dynamic EEA.

At the same time, however, the EFTA Court is not bound by decisions of the Court of Justice and legal homogeneity does not mean that there is no possibility to deviate from the Court's jurisprudence if the scope and aim of the EU's primary legislation and the EEA Agreement deviate. For example, while the EU's internal market is a customs union, the EEA is not. The EFTA Court may also consider the national interests and priorities of EFTA member states which may differ from those of EU member states. For example, the *Icesave* case[72] involved Iceland's dispute with the UK and the Netherlands regarding the repayment of depositors' funds following the collapse of the Icesave online bank in the wake of the 2008 financial crisis. The Court of Justice had previously held that the EU Directive on Deposit Guarantee Schemes could be interpreted to require member states to provide a minimum level of deposit guarantee.[73] The EFTA Court ruled that the EEA Agreement did not require such a minimum level of protection. It noted that the relevant Directive did not exhaustively regulate the unavailability of deposits under EEA law, but

[64] See C. Baudenbacher, *The Fundamental Principles of EEA Law* (2017, Springer).
[65] EEA Agreement, Article 7.
[66] EEA Agreement, Article 1(1).
[67] Ibid.
[68] See, e.g., Case E-2/02 *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v ESA* (19 June 2003).
[69] Case E-4/04 *Pedicel AS v Sosial- og helsedirektoratet* (25 February 2005), [28]; see also Case E-4/11 *Arnulf Clauder* (26 July 2011).
[70] See, e.g., Case E-8/07 *Celina Nguyen v Staten v/Justis- og politidepartementet* (20 June 2008).
[71] See, e.g., Case E-1/94 *Restamark* [1994–95] EFTA Ct Rep 15.
[72] Case E-16/11 *EFTA Surveillance Authority v Iceland ("Icesave")* (28 January 2013).
[73] Case C-222/02 *Paul and Others v Germany* [2004] ECR I-9425, [26], [27] and [30].

simply required EEA States to provide for a harmonised minimum level of deposit protection. The EFTA Court therefore considered that national authorities had considerable discretion in how they organised the schemes.[74] It also held that the alleged obligation of result cannot be derived from the Court of Justice's earlier ruling given the distinguishing factual context of that case.[75] The EFTA Court went on to hold that any difference in treatment between groups could be objectively justified in light of "clear public interest objectives".[76]

The EFTA Court was evidently mindful of the novel context of the financial crisis and the need to afford a certain deference to national authorities on complex questions of economic policy. At the same time, it engaged with the relevant jurisprudence of the Court of Justice and explained why it did not provide the obligation of result alleged by the EFTA Surveillance Authority (and the European Commission as intervener). The path already trodden by the EFTA Court in "aiming off" when interpreting EU law may provide some guidance for the UK courts when they come to examine how they should proceed pursuant to the Withdrawal Act and the 2023 Act. The approach of the EFTA Court has been cautious, recognising the need to maintain a high degree of legal certainty while also carefully mapping out legitimate areas of departure where the constitutional architecture of the EEA clearly warrants this.

For the EFTA Court, deviations in interpretation are not common. The EFTA Court maintains a close dialogue with the Court of Justice to ensure coherence and consistency in the interpretation of related legal frameworks. In the unique context of Brexit, however, where the differences in constitutional architecture are greater and such a dialogue is not possible, the UK courts will inevitably have to take their own path.

*Conclusion*

In conclusion, one may observe that it was inevitable that, apart from its wider consequences, leaving the EU would lead to greater complexity and difficulty for lawyers and judges as they adjust to the new constitutional architecture of the UK and changes in the institutional and regulatory matrix in which a good deal of UK law is set. Brexit has raised and is going to continue to raise a number of novel and complex issues regarding statutory interpretation of retained EU law. While the Withdrawal Act seeks to ensure the continuity of a purposive interpretative approach in respect of retained EU law, the challenge for the courts will be to identify the relevant purposes of EU law in circumstances where the UK has stepped away from the European project and where it no longer engages with the EU institutions. It may be anticipated that interpretations of retained EU law by the UK courts will to some degree, depending on the context, "aim off" from interpretations given by the Court of Justice. This will be a natural response to changes in the UK's constitutional architecture, for profound reasons to do with legal theory and interpretative methodology.

[74] *Icesave* (n 72), [134].
[75] Ibid., [179].
[76] Ibid., [201].