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4 July 2018

Dear Cathy,

Thank you very much for your letter dated 12 June, as well as your continued engagement with the EU (Withdrawal) Bill throughout its passage through Parliament, which received Royal Assent on Tuesday 26 June. I am happy to provide the reassurance you have sought regarding the use of preambles and recitals of retained direct EU legislation.

I understand and fully agree with you on the importance of preambles and recitals as interpretative tools; their future use is key to ensuring the Act meets its aim of providing legal certainty and stability within our domestic statute book. As such, let me reassure you that the Act enables courts to look at this material when interpreting retained EU law, by preserving the effect of pre-exit Court of Justice of the European Union case law which establishes that both documentations can be considered when interpreting EU law.

My ministerial colleague, the Solicitor General, provided more details on this in his letter to Robert Neill MP (copy attached), which was placed in the libraries of both Houses.

In respect of decision-makers, while the Act deals with the question of how retained EU law is to be interpreted by the courts, it does not - and could not - explicitly address the question of how policy will be made and how decisions might be taken in future. However, policy- and decision-makers operating in areas where retained EU law is relevant will wish to make policy and take decisions considering the law as it will be construed and applied by the courts. In practice, they are therefore likely to want to have regard to supporting material (such as recitals and preambles) to assist them in that task where appropriate, for example, to resolve ambiguity in the operative text.

It also must be emphasised that there is nothing in the Act that would act to prevent those developing and making policy from having regard to recitals or preambles where these are relevant to retained EU law.

Ans

I hope you find this letter helpful. I will also place a copy in the House library.

Yours sincerely,

Annabel.

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Robert Neill MP
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Dear Bob,

13th March 2018

European Union (Withdrawal) Bill: clause 6(3) and the interpretation of "retained EU law"

I am grateful to you for the constructive way in which you engaged throughout the course of our debates on the EU (Withdrawal) Bill as it passed through the House of Commons. One of the issues you raised concerned clause 6 of the Bill, where you asked for further clarification on how "retained EU law" is to be interpreted after exit day and, specifically, what matters a court can consider as part of their interpretation of this law.

As you know, clause 6 builds on the saving and incorporation of retained EU law into our legal system. Specifically, clause 6(3) is designed to ensure that questions as to the meaning etc. of retained EU law are, so far as possible, approached by our courts in the same way that equivalent questions of EU law are approached now. Accordingly, the provision sets out that retained EU law is to be interpreted, so far as that law is unmodified[1], in accordance with the retained domestic and retained EU case law which is relevant to it.

There has, though, been considerable discussion of how pre-exit EU case law is to be accommodated in our law after exit day. This discussion has focused on what is seen as the greater emphasis placed by the CJEU on "purposive interpretation", in contrast with the greater focus of our domestic courts on the actual words used in the legislation.

The task of our domestic courts in interpreting legislation is to determine and give effect to the intention of Parliament in legislating. The words used in that legislation have always been the primary means of determining that question and the courts will, in deference to Parliament, give effect to language with a clear and unequivocal meaning. Where the words used do not answer the point before the court, however, considering the purpose of that legislation has long been recognised as a legitimate and valuable[2] element of statutory interpretation[3].

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[1] Clause 6(6) provides that modified retained EU law may also fall to be interpreted in line with retained case law, where that is consistent with the intent of the modifications.

[2] Per Hand J in *Cabell v Markham* 1945 F. 2d 737, 739: *"it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish."*

[3] While purposive interpretation has become more prominent over time, its use in our law is not new - see for example *Heydon's Case* (1584) 3 Co Rep 7a

In EU law, purposive interpretation has a greater importance when considering the EU Treaties themselves, as the Treaties detail the values and agreed competences of the EU. It should be noted that when it comes to EU legislation the starting point for its interpretation, as with our domestic legislation, is the actual words used. Only if there is an ambiguity within the text of the EU legislation will there be a need to consider the purpose of that measure[4].

Due to the way it is drafted (under particular Treaty bases, through negotiations between all Member States and between the relevant EU institutions, and in 24 official languages) EU legislation will often be less precise (and so require purposive interpretation more frequently) than domestic legislation, which goes through the line-by-line scrutiny of two Houses of Parliament (or the devolved legislatures) and is drafted with only UK legal systems in mind.

The CJEU has established in its jurisprudence the relevance of various sources when construing EU legislation by reference to its purpose. Clause 6(3) ensures that courts are to interpret retained EU law in accordance with this case law, where it is relevant to the task before them. For example, the treaty base of EU legislation[5], its recitals[6], and the working papers (or *travaux préparatoires*) prepared in advance of its adoption[7], may all be referred to at the moment. Our courts are well-versed in this, and in dealing with differences that exist between the interpretation of domestic law and EU law[8]. As such, clause 6(3) of the Bill should not disturb the existing approach taken by our courts. This is firmly in line with the core aims of the Bill to provide legal certainty and continuity.

Finally, I note that that under clause 6(4) the Supreme Court (and, in relation to certain matters, the High Court of Justiciary) will not be bound by this retained EU case law and so may depart from it, applying the same tests as they would when considering whether to depart from their own case law. The Supreme Court does not frequently depart from its own case law, and the interpretive approaches outlined above are likely to remain relevant for some time; however, where the Supreme Court has departed from its prior case law, it has been careful to ensure that the law, and the task of the courts in interpreting that law, remains sufficiently clear[9]. I am confident it will continue to do so.

I hope that this letter is helpful, but I am of course more than happy to discuss further. I will place a copy of this letter in the libraries of both Houses.

Yours ever,

Robert

ROBERT BUCKLAND QC MP
SOLICITOR GENERAL

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[4] See for example the comments of the Advocate General in *Schulte*, Case C-350/03, Advocate General's Opinion, EU:C:2004:568, paragraphs 84-94; judgment, EU:C:2005:637: *"Careful examination of the case-law shows that purposive interpretation is used only where the provision in question is open to several interpretations. ... teleological interpretation is not used where, as in the present case, the text in question is absolutely clear and unambiguous. In that case, the provisions of Community [Union] law are sufficient in themselves...."*.

[5] E.g. *BECTU, C-173/99, paragraphs 36-38*

[6] E.g. *Ziolkowski and others v Land Berlin*, Case C-424/10 and C-425/10, EU:C:2011:866, paragraphs 37, 42 and 43

[7] E.g. *Rockfon*, Case C-449/93, paragraph 33

[8] See for example the comments of Lady Justice Arden in *McCarthy v Home Secretary* [2008] EWCA Civ 641, paragraph 35: *"this clearly forms part of the travaux préparatoires. Legislative history can and should be used as an aid to interpretation of a directive; the restrictions which apply on the use of legislative history as an aid to the interpretation of domestic legislation (Pepper v Hart [1993] AC 593) do not apply to Community legislation"*

[9] See for example comments by Lord Hughes and Lord Toulson in paragraph 87 of *R v Jogee and others* [2016] UKSC 8