United Kingdom

Theodore Konstadinides & Anastasia Karatzia[1]

Question 1

The main trends here pertain to the application of EU law to the UK-EU withdrawal process. This has only been made implicit in the relevant judicial review cases. For instance, the High Court in *Webster* by recognising the normative effect of article 50(1) Treaty on European Union (hereinafter TEU) and by not denying that this provision may have 'direct effect', impliedly admitted that EU law plays a role in the UK's decision to withdraw. But beyond the question of whether or not article 50(1) TEU can produce direct effect (and therefore confer rights on individuals which UK courts are bound to enforce), the EU fundamental principles enshrined in article 2 TEU, such as the rule of law (as a commonly-shared principle safeguarded and enforced in the EU legal order) should also apply to the exit process by virtue of the UK's EU membership obligations.[2]

A UK precedent which dealt with the above issue, however, is the judgment in *Shindler* which concerns the issue of the applicability of EU legal principles to the exit process and in particular to the 2016 referendum and the withdrawal arrangements.[3] In particular, the opinion of Lord Justice Elias in the Court of Appeal was unequivocal in confirming that EU law has no place in a state's decision to remain or withdraw from the EU.[4] Such an opinion borrows from the German Constitutional Court's (*Bundesverfassungsgericht* or *BVerfG*) reserved judgment regarding the ratification of the Treaty of Lisbon. As it is well-known, the BVerfG's Lisbon judgment concerned a review of the compatibility with German constitutional law of Germany's ratification of the Lisbon Treaty. In its usual fashion,[5] the BVerfG interpreted EU withdrawal in its own domestic terms by placing emphasis on the satisfaction of domestic constitutional requirements over EU ones and declaring itself to be the final arbiter of the constitutionality of a potential withdrawal over and above the external assessment of the Court of Justice of the European Union (hereafter CJEU).[6]

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[1] School of Law, University of Essex.

[2] See Konstadinides for protection and enforcement of EU law against the Member States: T. Konstadinides, The Rule of Law in the European Union, Hart Publishing, Oxford, 2017, Chapter 5.

[3] [2016] EWCA Civ 469 at [60] '*…the construction of Article 50 ...which simply recognises the political reality that EU law can have no part to play in the decision whether a state chooses to remain in the EU*.'

[4] *Re Ratification of the Treaty of Lisbon* [2010] 3 CMLR 13.

[5] See *Brunner v European Union Treaty* [1994] CMLR 57; Court of Justice EU 16 June 2015 *Gauweiler and Others v Deutscher Bundestag*, ECLI:EU:C:2015:400 (the OMT case); Case 2 BvR 2728/13. See for an extensive analysis of the *OMT* case the special issue German Law Journal 15(2) (2014).

[6] See *Re Ratification of the Treaty of Lisbon* paras 329-330: [329] '(…) The Lisbon Treaty makes explicit for the first time in primary law the existing right of each member state to withdraw from the European Union (Article 50 TEU). The right to withdraw underlines the Member State's sovereignty (…) [330] Any Member State may withdraw from the European Union even against the will of the other Member States (…) There is no obligation for the decision to withdraw to be implemented by a withdrawal agreement between the European Union and the member state concerned. In the case of an agreement failing to be concluded, the withdrawal takes effect two years after the notification of the decision to withdraw (Article 50(3) TFEU). The right to withdraw can be

In a similar manner, it is worth noting the recent tendency of judges to take a rather introverted approach to the protection of fundamental rights vis-a-vis the European Convention of Human Rights (hereinafter ECHR) (described by Lord Steyn as a 'new legal order',[7] a phrase reminiscent of the CJEU's famous *Van Gend En Loos* and *Costa* proclamations about the EU legal order). For instance, the UK's Supreme Court has in a number of factually different cases placed specific emphasis on the common law as opposed, for instance, to the Human Rights Act 1998 and the ECHR, as fundamental rights sources.[8]

With reference to EU law, however, there is less resort to common law rights until Brexit. This is the case even during the UK's withdrawal period. By recognising the detrimental effect of withdrawal on freedom of movement, *Wightman* appears to limit the scope of the '*purely internal situation*' doctrine in the context of Brexit and confirms that 'the' decision to leave impacts on fundamental rights of EU and UK citizens.[9] In this respect, the CJEU had previously clarified in *Melloni*[10] and confirmed in *Opinion 2/13*[11] that national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter of Fundamental Rights of the European Union or the primacy, unity, and effectiveness of EU law. The *Wightman* decision reiterates the CJEU's position in this regard. Even if UK law might allow for a reverse discrimination against its citizens on freedom of movement issues (subject to the Belfast Agreement and the Common Travel Area rules), this does not translate into the disapplication of the EU constitutional principles and the protection afforded to fundamental rights by EU law in the context of UK's departure from the EU.

Furthermore, one can legitimately challenge, also based on *Wightman,* the view that the definition of 'constitutional requirements' under article 50(1) TEU should not engage with the EU general principles or the rule of law requirements under article 2 TEU as have been clarified by the Commission and the CJEU. Equally, it can be concluded that there is no legal basis to argue that the EU general principles of law are inapplicable to the UK's exit process based on

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exercised without further obligations because the Member State that wishes to withdraw does not need to state reasons for its decision. Article 50.1 Lisbon TEU merely sets out that the withdrawal of the Member State must take place 'in accordance with its own constitutional requirements'. Whether these requirements have been complied with in the individual case can, however, only be verified by the Member State itself, not by the European Union or the other Member States.' Lord Justice Elias cited this much criticised Karlsruhe Court's judgment as basis for his decision in *Shindler*. However, historically, the *BVerfG* has had limited authority in interpreting EU law and in determining the competences of the CJEU.

[7] *R (Jackson) v Attorney General* [2005] UKHL 56.

[8] *Kennedy v The Charity Commission* [2014] UKSC 20; *Osborn v Parole Board* [2013] UKSC 61

[9] See C. Gallagher QC et al, 'An Independent Legal Opinion Commissioned by The European United Left / Nordic Green Left (GUE / NGL) Group of the European Parliament, 2 March 2018 available at < https://www.doughtystreet.co.uk/news/independent-legal-report-brexit-and-human-rights-launched-today-westminster > visited 31 January 2020. See also on the flaws of the draft withdrawal agreement and on the impact on fundamental rights: S. Smismans, 'EU citizens' rights post Brexit: why direct effect beyond the EU is not enough' European Constitutional Law Review, Vol.14, No.3, 2018, 443 - 474.

[10] Court of Justice EU 26 February 2013, C-399/11, *Melloni,* ECLI:EU:C:2013:107, para. 60.

[11] Court of Justice EU 18 December 2014, *Opinion 2/13* (*Accession of the EU to the ECHR*) EU:C:2014:2454 cited in Court of Justice EU 10 December 2018, Court of Justice EU 10 December 2018, Case C-621/18, *Wightman,* ECLI:EU:C:2018:999, para [44].

the General Court's judgment in *Shindler v Council*[12] which dealt with the request for annulment of Council Decision of 22 May 2017 authorising the opening of the UK-EU negotiations and on domestic court decisions such as *Micula* given in the context of state aid.[13] The former case was rejected on procedural grounds. The latter one dealt with the issue as to whether a UK judgment should be subject to EU rules as to state aid in the context of Romania's abolition of certain tax incentives in 2005. It, therefore, carries no resonance here in the context of the constitutional requirements and implications of article 50 TEU for the UK.

To conclude, it is argued that the decision to leave the EU should derive from the sovereign will of the withdrawing state.[14] Such sovereign decision should be exercised within the boundaries of the rule of law also by reference to the principle of effectiveness of EU law and to the respect for fundamental rights. As such, the exercise of the sovereign right to withdraw from the EU pays regard to the impact of the manner of exercise of that right upon EU law in accordance with the common values. To argue to the contrary would be incompatible with the Supreme Court's well-known judgment in *Miller*.

Question 2

UK judges seem to have long accepted that the doctrine of Parliamentary sovereignty has been modified by legal developments including EU membership. *Jackson* and *Thoburn* are indicative of a turn in judicial approach that is keen on subjecting statutes to the scrutiny of constitutional review as well as elaborating on the theoretical foundations that underpin it. At the same time, the Supreme Court has placed in its recent judgment in *UNISON* emphasis on the rule of law as the underlying value of constitutional theory in the UK.[15]

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[12] General Court EU 26 November 2018, Case T-458/17, *Harry Shindler and others v Council of the European Union*, ECLI:EU:T:2018:838. The action was mainly dismissed because the claimants' plea was directed at quashing a Council Decision which did not produce any effect on his legal situation. As stated in para [46] the General Court held that '[a]nnulment of the contested decision would thus have no impact on the legal situation of UK citizens, including those who, like the applicants, live in another EU Member State and did not have the right to vote in the referendum of 23 June 2016 and the UK general elections. It would lead neither to annulment of the notification of intention to withdraw nor to suspension of the two-year time limit provided for by Article 50(3) TEU. The applicants' rights would remain unchanged.'

[13] See Legatt LJ in *Micula and others v Romania* [2018] EWCA 1081 [267]: 'under the UK constitution Parliament is sovereign and that European law has domestic effect in the UK only because and to the extent that it has been given such effect by section 2(1) of the 1972 Act: see e.g. *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324, para 79; *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591, [80], [90]; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] A.C. 61, [41]-[42]. Second, section 2(1) of the 1972 Act refers to rights, powers etc 'created or arising by or under the Treaties'. It is ultimately for the UK courts to determine the scope of section 2(1) and, in principle, a UK domestic court could decide that an EU measure or decision is so clearly outside the powers conferred by a Treaty provision that it would not be "created or arising by or under the Treaties" within the meaning of section 2(1): see *Shindler v Chancellor of The Duchy of Lancaster* [2016] EWCA Civ 469; [2017] QB 226, [58]- [59]; and the *Pham* case, [90].

[14] As confirmed by the CJEU in *Wightman* at [56]: 'It follows that Article 50 TEU pursues two objectives, namely, first, enshrining the sovereign right of a Member State to withdraw from the European Union and, secondly, establishing a procedure to enable such a withdrawal to take place in an orderly fashion.'

[15] *R (on the application of UNISON) v Lord Chancellor* [2017] 3 W.L.R. 409.

The CJEU has spelt out the implications of membership and (more recently) withdrawal in a host of decisions. With regard to UK membership, we know since *Factortame* that sovereignty meant that Acts of Parliament were no longer inviolable where they clashed with EU law. The CJEU has hardly changed its approach even with reference to domestic measures that aim to assist in the enforcement of EU law. For instance, in a recent case from Ireland, the CJEU held that the primacy of EU law precludes national legislation that sets up a body such as the Irish Workplace Relations Commission to ensure enforcement of EU law in the field of employment recruitment.[16] The CJEU held that such a body lacked jurisdiction to decide to disapply a rule of national law that was contrary to EU law.

Consistent with the CJEU's jurisprudence, in a recent case the Court of Appeal invalidated the UK government's decision to grant licences for the sale of military equipment to Saudi Arabia for possible use in the conflict in Yemen.[17] The Court found that the government had violated article 2.2 of the EU Common Council Position 2008/944/CGSP, as adopted in the Secretary of State's 2014 Guidance. Article 2.2 compels Member States to deny a licence for the sale of military equipment to other states if there is a clear risk that this equipment might be used 'in the commission of serious violations of international humanitarian law'.

Such a modification of sovereignty also applies to those measures identified as constitutional within the UK. For instance, if EU law engages with a fundamental right from a UK constitutional perspective, then it is perfectly appropriate, from a UK constitutional standpoint, for the general principles of EU law to apply to the abrogation (such as access to justice before the CJEU after the exit date) or the limitation of fundamental rights[18] due to Brexit. This was recently confirmed by *Benkharbouche*[19] at [78], where the Supreme Court confirmed that when dealing with fundamental rights such as article 47 of the EU Charter of Fundamental Rights[20] 'a conflict between EU law and domestic law must be resolved in favour of the former and the latter must be disapplied...'.

Equally the degree of application of EU law to the process of UK withdrawal is key to the constitutionality of the decision to leave the EU and the validity of the respective notification. The question of application of EU law to the UK-EU withdrawal process has hardly been addressed by the UK courts in the relevant judicial review challenges – it only features in some judges' reasoning in a rather implicit manner. By contrast, the academic debate on the scope

[16] Court of Justice EU 4 December 2018, Case C-378/17, *Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission*, (2018) ECLI:EU:C:2018:979.
[17] *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020.
[18] In this respect Lord Reed in *UNISON* stressed at [117] that: 'Given the conclusion that the fees imposed by the Fees Order are in practice unaffordable by some people, and that they are so high as in practice to prevent even people who can afford them from pursuing claims for small amounts and non-monetary claims..., it follows that the Fees Order imposes limitations on the exercise of EU rights which are disproportionate, and that it is therefore unlawful under EU law.'
[19] *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Foreign and Commonwealth Affairs and Libya (Appellants) v Janah* [2017] UKSC 62.
[20] Article 47 reads as follows: 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article….'

of application of EU law to the exit process (article 50(1) TEU in particular) provides a useful compendium in relation to the constitutionality of the decision contained in the UK's notification to leave the EU, especially its subjection to EU institutional and substantive rules. It points to the fact that in exercising its sovereign right to withdraw from the EU the UK should be vigilant about the impact of the manner of exercise of that right upon EU law. This includes the way in which the UK adopted the decision to leave the EU and communicated such decision to the European Council. In the same tone, the importance of interpreting article 50(1) TEU and the steps taken by the withdrawing Member State in line with EU law have hardly been understated by academics.[21]

Although reactions to the principle of EU law supremacy have been associated with the German Constitutional Court/BVerfG (see *OMT* preliminary reference),[22] there have been efforts in recent years from the UK highest courts to impose limits upon the potential supremacy of EU law on grounds derived from domestic constitutional norms. A notable reference to constitutional identity by the UK Supreme Court in the *HS2* case (expressed through a direct quote from the BVerfG) shows a tendency to revive (parliamentary) sovereignty in the context of identity.[23] It is worth noting that article 9 of the Bill of Rights 1689 which precludes the impeaching or questioning in any court of debates or proceedings in Parliament has shaped the constitutional relationship between the UK and EU law, which can only be established by common law in the light of domestic statutes and not by the CJEU holding, for instance, that national courts are obliged to scrutinise parliamentary process in order to comply with EU secondary legislation.

Outside the courtroom, the House of Commons European Scrutiny Committee has used the term/concept of UK "constitutional identity" explicitly, but it has been very mindful of a key characteristic, Parliamentary Sovereignty. The closest it has come to making any reference to the concept of "constitutional identity", albeit indirectly, is in the relevant Report on the HOC system of scrutinising EU law.[24] In paragraphs 164-178, the Committee recognised evidence given by Chalmers, which drew on the importance of the constitutional identities of Member

[21] See P. Eeckhout and E. Frantziou, 'Brexit and Article 50 TEU: A constitutionalist reading', CMLR Vol.54, No.3, 2017, pp.695-734; A.F. Tatham, 'Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon', in A. Biondi, P. Eeckhout and S. Ripley (Ed.), EU law after Lisbon, Oxford, Oxford University Press, 2012, p.149; D. Kostakopoulou, 'Brexit, voice and loyalty: Reflections on Article 50 TEU', ELR, Vol.41, No.4, 2016, pp. 487-489, at p.488. Kostakopoulou argues that 'In contemplating withdrawal and referenda, the Member States cannot appease themselves that they engage in *actio in distans*. Their actions as well as official discourses in national arenas affect their partners, the citizens and residents of the Union here, now and in the future. If they do not follow the voice or exit provisions contained in the Treaties, their actions essentially undermine the integrity of the EU's institutional framework and can easily lead to a decline in trust and confidence in the EU...' and 'Giving a dissenting Member State the licence to ignore the voice and exit mechanisms existing in the Treaties would also be tantamount to authorising the EU's involvement with domestic political games and intra-party interests and agendas, but the EU can only be guided by the "collective good"'.

[22] Court of Justice EU 16 June 2015, Case C-62/14 *Gauweiler v Deutscher Bundestag* ECLI:EU:C:2015:400.

[23] *R (on the application of HS2 Action Alliance Limited) v Secretary of State for Transport and another* [2014 UKSC 3.

[24] See 'European Scrutiny Committee - Twenty-Fourth Report Reforming the European Scrutiny System in the House of Commons'
<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/109/10908.htm#a31> visited 31 January 2020.

States, in making two of its recommendations. The first related to a unilateral national veto of prospective EU law and the second to the unilateral disapplication of existing EU law.

Question 3

The main trends regarding mutual recognition and mutual trust pertain to EU criminal law which is built on these premises.[25] As has been discussed elsewhere, mutual recognition constitutes the least contentious method for integration but one which nonetheless covers a wide range of judicial decisions in all stages of the criminal justice process. The European Arrest Warrant Framework Decision 2002/584 (hereinafter EAW Framework Decision) was the first instrument in EU criminal law to be adopted following the principle of mutual recognition (as opposed to harmonisation).[26] Simultaneously, it is an instrument which although augments judicial cooperation it touches upon a number of fundamental rights – vis-à-vis the rights of the accused subject to criminal proceedings and surrender within this framework.

Two cases are worth discussing here: the first is the case of *Minister for Justice and Equality v LM* (hereinafter *LM*), a preliminary ruling which concerns the balancing of mutual recognition with the commitment of the EU to protect judicial independence and the fundamental right to effective judicial review in the context of non-execution of a European Arrest Warrant (hereinafter EAW). The question referred to the CJEU was whether an Irish judge shall refrain from surrendering a criminal suspect detained in Ireland under a EAW issued against him by Poland when the latter State is undermining the principle of judicial independence upon which the rule of law depends. The second case concerns the *RO* decision of the CJEU which took place in the backdrop of the UK's withdrawal from the EU. The CJEU was requested by an Irish court to give a preliminary ruling concerning the implications, in view of Brexit, on the execution of a EAW issued by the UK under the EAW Framework Decision. The issue here concerned the status of mutual recognition where the execution of a EAW is pending clarification of the law that will be applicable in the issuing Member State after its withdrawal from the EU. [27]

Before making reference to the contribution of *LM*, it is important to mention that the CJEU has historically interpreted mutual recognition narrowly, restricting the avenues available for national courts to refuse to execute a EAW. Instead, it has given priority to the effectiveness of

[25] See on mutual recognition in EU criminal law: L. Klimek, Mutual Recognition of Judicial Decisions in European Criminal Law, Switzerland, Springer Verlag, 2017; W. van Ballegooij, The Nature of Mutual Recognition in European Law: Re-examining the notion from an individual rights perspective with a view to its further development in the Criminal Justice Area, Intersentia, 2015; C. Janssens, The Principle of Mutual Recognition in the EU, Oxford, Oxford University Press, 2013; K. Lenaerts, 'The principle of Mutual Recognition in the Area of Freedom, Security and Justice', University of Oxford, 30 January 2015. available at: <https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf. > visited 31 January 2020.

[26] See M. Fichera, The Implementation of the European Arrest Warrant in the European Union: Law, policy and practice, Antwerp, Intersentia, 2011.

[27] Court of Justice EU 19 September 2018, Case C-327/18 PPU, *Minister for Justice and Equality v RO*, ECLI:EU:C:2018:733.

mutual recognition based on presumed mutual trust. The *LM* judgment is therefore important because, although the legality of the mutual recognition system established by the EAW Framework Decision remains undisputed (as is its compatibility with fundamental rights), the judgment sees the CJEU setting the boundaries pertaining to the extent to which the EU can sustain an automatic system of recognition based solely on presumed trust. The CJEU's reference to the principles of mutual recognition and trust in *LM* serves to highlight this fundamental premise based on Member States' sharing of a set of common values on which the EU is founded (article 2 TEU). In this context, the CJEU explains that national implementation of EU law in a Member State is based on the presumption that all other Member States comply with EU law (fundamental rights in particular). It implicitly recognises, however, that such a presumption is difficult to sustain, especially in relation to maintaining a high level of mutual trust between the different actors which partake in the system.[28]

In *RO* the CJEU held that the UK's decision to leave the EU did not affect the execution of a EAW issued by it as long as the UK was a Member State, unless there was concrete evidence that the person surrendered would be at risk of being deprived of his recognised rights after the issuing State's withdrawal from the EU.

Question 4

Speaking in 2017 Lady Hale, President of the UK Supreme Court said that constitutionally, the characteristics of the judiciary in a democratic state consist of four main virtues: independence, incorruptability; high quality and diversity. She mentioned that 'in a recent survey of thousands of judges from 26 European countries, in six countries the judges' perception of their own independence scored more than nine out of ten: the United Kingdom was one of those countries, along with Ireland, Denmark (at the top in this as in every other respect surveyed), Finland, Norway and the Netherlands.'[29]

Judicial independence is a critical component of the concept of the rule of law and has taken a prominent role in the CJEU's recent caselaw. While one may speak of a trend in the CJEU's reasoning regarding judicial independence, it needs to be stressed that the CJEU's findings lie in different premises. For instance, the preliminary reference in *LM* was framed differently to *Associação Sindical*[30] which was a special case altogether dealing with the remuneration of judges in Portugal and its connection with judicial independence. While in *Associação Sindical* the CJEU established that judicial independence derives from articles 2, 4(3) and 19 TEU, in *LM* the CJEU focused primarily on article 47 of the Charter as the source of judicial

[28] Cases where *LM* was applied: *Poland v* Maciejec, 2019 S.L.T. (Sh Ct) 123; Regional Court in Bielsko-Biala, *Poland v Charyszyn,* [2019] 5 WLUK 195.
[29] Lady Hale 'Judges, Power and Accountability Constitutional Implications of Judicial Selection' Constitutional Law Summer School, Belfast <https://www.supremecourt.uk/docs/speech-170811.pdf> visited 31 January 2020.
[30] Court of Justice EU 27 February 2018, Case C-64/16, *Associacao Sindical dos Juizes Portugueses v Tribunal de Contas,* (2018) ECLI:EU:C:2018:117.

independence. The CJEU, therefore, connected judicial independence with effective judicial review and the right to an effective remedy before a court.

Judicial independence has been traditionally protected in the UK by means of a constitutional convention rather than by statute. Having said that, there are a number of written references to judicial exclusion from politics in various old and new sources of the UK constitution. First and foremost, as mentioned in relation to *HS2*, the separation of powers is key in maintaining that judges should not be involved in the legislative process. As mentioned, Parliament is sovereign in the UK and article 9 of the Bill of Rights prevents the courts from questioning what takes place in Parliament. Additionally, the Commonwealth (Latimer House) Guidelines are explicit that 'while dialogue between the judiciary and government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence.'

Most to the point regarding judicial independence, the Constitutional Reform Act 2005 makes provision in section 1 about the requirements of the rule of law, while section 3(1) stresses that 'The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.' What is also important is the fact that under the Constitutional Reform Act, the Lord Chancellor no longer acts as a bridge between the three branches of government: presiding officer in the House of Lords, member of the Cabinet and senior judge in England and Wales. The Constitutional Reform Act has also established the Supreme Court which replaced the Appellate Committee of the House of Lords. All these are positive steps with regard to judicial independence as required by the doctrine of separation of powers.[31] In a similar manner to the Constitutional Reform Act, the Judiciary and Courts (Scotland) Act 2008, established in section 1 similar duties on the First Minister, the Lord Advocate, the Scottish Ministers and all persons with responsibility for matters relating to the judiciary and the administration of justice.

Certain institutional initiatives are key to securing judicial independence in the UK. They include the Judicial Appointments Commission whose Chair and majority of members are not judges; the independent Judicial Appointments Board in Scotland; and the Senior Salaries Review Body which is a non-political body responsible for making recommendations to the Government on the remuneration of the judiciary. Other factors which are relevant to judicial independence include judges' personal immunity from suit for acts and omissions in the exercise of their judicial functions. Of course such immunity does not exempt them from the general duty to give reasons for their decisions or from complaints. On a similar note, it is important to mention that judges of the High Court and the courts above can only be removed by a resolution of both Houses of Parliament.

Moving forward, preserving public trust in the judiciary is a challenge ahead for the UK. This is important for the preservation of the rule of law which ultimately depends on the faith of the

[31] See A. Kavanagh, 'The constitutional separation of powers', in D. Dyzanhaus and M. Thorburn (Eds.) Philosophical Foundations of Constitutional Law, Oxford, Oxford University Press, 2015.

public for the institutions that uphold the law. Following recent Brexit litigation, the continuing political debate on the role of the judiciary has concerned the extent to which the judiciary is guilty of overreaching its constitutional remit, therefore interfering in the executive's work. As Lord Hodge stressed in 2018, 'there is a danger to judicial independence if elements in the media portray a caricature of the judiciary and if judges, politicians and officials with responsibility for the administration of justice do not act to correct misunderstandings.'[32] This refers to the aftermath of the *Miller* judgment and the Daily Mail's James Slack's slogan "Enemies of the People" aimed against the three High Court judges who made a rather predictable decision by resuscitating the obvious: i.e. that the 'subordination of the Crown (i.e. the executive government) to law is the foundation of the rule of law in the United Kingdom'[33] This backfired a reaction from the lord chief justice, Lord Thomas of Cwmgiedd, who criticised the then justice secretary, Liz Truss for her failure to defend judges who were branded 'enemies of the people'.

Striking the right balance between freedom of the press and media abuse is going to be crucial in future involvement of judges in political controversies – the term 'judicial overreach' comes to mind – and carries serious repercussions for the constitutional law of foreign affairs since, as has been stressed by a commentator, '[n]ow that Miller has been handed down, there is reason to think that courts will intervene – if appropriate circumstances present themselves – to protect treaty-based source from being extinguished as a result of prerogative action internationally.'[34]

Question 5

Regarding effective judicial protection and access to courts, the focus of the discussion in the UK in recent years is placed on the cuts to legal aid and on their effect on those who need to rely on legal aid in order to bring a case before a court. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) has limited the circumstances in which civil legal aid can be granted. A judgment of the Court of Appeal recently highlighted the impact of the EU principle of effective judicial protection on the application and limitations of the legal aid cuts. In *R* (Gudanaviciene*)*, the Court of Appeal held that an exceptional funding determination must be made regarding civil legal services if the denial of such funding would breach an individual's rights under the ECHR, and that the contested legal aid rules breached article 47 of the Charter.[35]

More generally speaking, it is undeniable that EU law has had an impact on domestic laws and procedures. For instance, as a result of the doctrine of state liability, UK citizens can claim compensation from public bodies who have breached EU law; this is a possibility that does not

[32] Lord Hodge, 'Preserving judicial independence in an age of populism', available at <https://www.supremecourt.uk/docs/speech-181123.pdf> visited 31 January 2020 .
[33] *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin); [2017] 1 All E.R. 158 at [26].
[34] A. Hameed, 'The rule of recognition and sources of law in Miller' Public Law, Vol.61, 2019, pp.53-73.
[35] *R. (on the application of Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622, at [56 - 59].

exist in situations of a legal or administrative wrongdoing where EU law (or the Human Rights Act 1998) does not apply.[36] EU law has also had a visible impact on domestic rules in the field of environmental law.[37] For instance, the CJEU has ruled more than once that the UK's litigation costs arrangements breached the Aarhus Convention on access to justice in environmental law cases.[38] Although in subsequent national litigation, the Supreme Court did not clarify the guidance issued by the CJEU that the cost of proceedings must not 'appear to be objectively unreasonable,'[39] the caselaw has led to changes to the costs and expenses rules in England and Scotland.[40]

An area where we might see future developments as to the effect of EU law on national procedures and remedies is that of private enforcement of competition law. The EU Damages Directive, which was transposed in the UK in 2016, covers certain aspects of private enforcement pertaining to damages claims resulting from breach of EU competition rules. However, the Directive - and thus the UK Damages Implementation Act[41]- is not exhaustive, leaving several other matters open to be dealt with by UK courts under EU law principles.[42] These issues include inter alia claims for nullity of contracts, restitution, or injunctions, the scope of compensation, the availability of class actions, showing fault and the extent of damage and proof required.[43] Under EU law, when the national judiciary will be called to fill in the gaps of the Directive, they should act in accordance with the EU law principles of effectiveness and equivalence. It would be interesting, then, to explore and compare the way in which domestic rules on private enforcement in the aftermath of the Damages Directive have been influenced by the EU legal framework on competition law in general and by the EU general principles more broadly speaking. These issues will, of course, depend on the final look of the UK's withdrawal from the EU and on the existence or not of a UK-EU deal.[44] Still, regardless

[36] D. Edwards, 'Thirty years of judicial review in Scotland: the influence of European Union law' Jur. Rev., Vol.4, 2015, pp.399-416, p.401.
[37] Edwards, 2015, pp. 415-417.
[38] Court of Justice EU 13 February 2014, Case C-530/11, *Commission v United Kingdom* (2014) ECLI:EU:C:2014:6. See also Court of Justice EU 11 April 2013, Case C-260/11, *Edwards and Pallikaropoulos v Environment Agency (2013)* ECLI:EU:C:2013:221. In *Venn v Secretary of State for Communities and Local Government [2014] EWCA Civ 1539,* Sullivan LJ stated that 'In the light of my conclusion on Article 9(3) , and the decisions of the Aarhus Compliance Committee and the CJEU in Commission v UK referred to in paragraph 24 above, it is now clear that the costs protection regime introduced by CPR 45.41 is not Aarhus compliant insofar as it is confined to applications for judicial review, and excludes statutory appeals and applications.'
[39] Court of Justice EU 11 April 2013, Case C-260/11, *Edwards and Pallikaropoulos v Environment Agency (2013)* ECLI:EU:C:2013:221. The guidance provided by the CJEU on the test of what is 'prohibitively expensive' has been characterised as cryptic and unable to provide a uniform interpretation throughout the EU. See J. Findlay, 'Protective Expenses Orders - A Settled Regime?' Scottish Planning & Environmental Law, Vol. 163, 2014, pp.53-54. For a broader discussion about effective judicial protection see Konstadinides, 2017.
[40] Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 (SSI 2013/81); Cost Protection Rules r.45.41; *Venn v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1539*;* See Edwards, 2015, pp.415-417.
[41] The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (SI 2017/385).
[42] K. Havu and L. Tarkkila, 'EU Competition litigation and Member State procedural autonomy - current issues' G.C.L.R., Vol.11, No.2, 2018, pp.65-71, p.66.
[43] Havu and Tarkkila, 2018.
[44] See also M. Perraudeau 'Back to the future: Brexit, EIA and the challenge of environmental judicial review' Env. L. Rev., Vol. 21, No.1, 2019, pp. 6-20, discussing the principle of effectiveness in the context of environmental law and the possible impact of Brexit in this field.

of Brexit, we submit that these considerations might be valid points regarding other EU Member States.

Question 6

We should note from the outset that there are no cases (pending or decided) in the jurisprudence of the European Court of Human Rights (hereinafter ECtHR) on the refusal of the UK Supreme Court to refer a case to the CJEU. There have been cases where the Supreme Court considered whether to refer a matter to the CJEU under article 267 TFEU but refused to do so.[45] In a number of these cases, the Court concluded that the question was *acte clair*.[46] When these cases raised questions of EU law for determination, the Court stated that those questions were either not open to reasonable doubt or they involved the application by the national court to the facts of established principles of European law.[47] Other reasons besides *acte clair* have also been provided by the Court to support its refusal to refer. In one occasion, preliminary reference was not sought because it seemed 'unrealistic to suppose that the Court of Justice would feel able to provide any greater or different assistance' than the Supreme Court.[48] This approach has been characterised as 'a striking and significant departure from the criteria contemplated by EU law'.[49] In another case, Lord Walker advised the Supreme Court that, even if they did not perceive the case as *acte clair*, they should still not refer the case to the CJEU because there was 'a strong public interest in resolving the matter without further delay.'[50]

The Supreme Court's refusal to comply with its obligation to refer a matter of EU law to the CJEU has attracted criticism with regard to a few key cases, some of which are discussed here.[51] In the case of *Re N (Children)*[52], which concerned Regulation 2201/2003, the Supreme Court proceeded on the basis that the issue in question was *acte clair* even though Lady Hale, who gave the judgment of the Court, had explicitly stated that the matter at hand (i.e. whether article 15 of the Regulation applied to public law proceedings) could not be regarded as *acte clair*.

[45] For a thorough analysis of the Supreme Court's preliminary references to the CJEU, see A. Arnull, 'The UK Supreme Court and References to the CJEU' Yearbook of European Law, Vol.36, No.1, 2017, pp.314-357.
[46] *Secretary of State for Work and Pensions v Gubeladze* [2019] UKSC 31; *R (on the application of Nouazli) v Secretary of State for the Home Department* [2016] UKSC 16; *R (on the application of Chester) v Secretary of State for Justice; McGeoch (AP) v The Lord President of the Council and another (Scotland)* [2013] UKSC 63; *Russell v Transocean International Resources Ltd* [2011] UKSC 57; *Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA Civ 321.
[47] See respectively*: X v Mid Sussex Citizens Advice Bureau and another*, 12 December 2012, [2012] UKSC 59; *R (on the application of Chester) v Secretary of State for Justice; McGeoch (AP) v The Lord President of the Council and another (Scotland)* [2013] UKSC 63.
[48] *Morge (FC) v Hampshire County Council* [2011] UKSC 2.
[49] V. Heyvaert, J. Thornton, R. Drabble, 'With reference to the environment: the preliminary reference procedure, environmental decisions and the domestic judiciary' Law Quarterly Review, Vol. 130, 2014, pp. 413-442, p.426.
[50] *The Office of Fair Trading v Abbey National plc & Others* [2009] UKSC 6.
[51] For a discussion of the UK courts and preliminary reference in the field of environmental law, see Heyvaert, Thornton, Drabble, 2014. The article argues that domestic courts seem to be particularly reluctant to use the preliminary reference procedure when it comes to matters of environmental law. The authors identify three reasons for this reluctance: the delay caused to the domestic litigation by sending a case to the ECJ; a concern about the quality of the ECJ's rulings' and the fact that UK courts appear uncomfortable with the hierarchical nature of the preliminary reference procedure.
[52] [2016] UKSC 15

The rationale behind refusing to refer the matter in this case was to avoid further delays in the litigation that involved children, and it was presented as the best option available to the Court at the time. This led to commentary that 'the option favoured by Lady Hale should have been avoided, for it involved a clear breach of the obligation to refer.'[53]

The refusal of the Court to refer a question in *Office of Fair Trading v Abbey National*[54] has also been criticised. The case concerned article 4(2) of Directive 93/13, which had not been interpreted by the CJEU up to that point. Various reasons were given for the refusal to refer, including that the parties did not want to further delay the litigation process, and that public interest mandated a swift resolution of the matter. Yet it is well known that delay in the litigation process is not a valid reason for a national court to refuse to refer a matter of EU law to the CJEU. As Lord Walker himself noted in the judgment, 'in other circumstances it might be regarded as rather unprincipled to take that means of avoiding an important issue of Community law, but in the special circumstances of this case I would regard it as the lesser of two evils.'[55]

In the joint cases *R (Chester)* and *R (McGeogh)*[56], the Supreme Court dealt with the UK's blanket ban on prisoners' voting. Questions were raised in the case about whether EU law post-Lisbon grants a right to vote in European elections and municipal elections to every EU citizen, and whether the term 'municipal elections' includes elections to the Scottish Parliament. The Supreme Court held that the applicants were not entitled to invoke European law because it conferred no individual right and the principle of non-discrimination was not engaged. It then went on to review the hypothetical question of what would have happened if EU law was applied. Although the question was considered in significant length, and despite the connection of the matter to EU law, no preliminary reference was made to the CJEU.[57]

Lastly, the refusal by the Supreme Court to refer is particularly noteworthy in *X v Mid-Sussex Citizens Advice Bureau*[58] because the case set a precedent for the UK that volunteers cannot rely on the Framework Directive 2000/78/EC on equal treatment in employment and occupation[59] or the national implementing legislation to challenge alleged discrimination. According to Lord Mance, there was no scope for reasonable doubt about this conclusion and hence there was no requirement to refer the case to the CJEU. It was noted, however, that 'it can certainly be doubted that it is *acte clair* that voluntary work is not covered by the

[53] Arnull, 2017, p.342.
[54] [2009] UKSC 6
[55] ibid at [50].
[56] *R (on the application of Chester) v Secretary of State for Justice, McGeoch (AP) v The Lord President of the Council and another (Scotland)* [2013] UKSC 63.
[57] K. Monaghan 'Case Comment: X v Mid Sussex Citizens Advice Bureau & Anor [2012] UKSC 59', UK Supreme Court Blog, 21 January 2013, <http://ukscblog.com/case-comment-x-v-mid-sussex-citizens-advice-bureau-anor/> visited 31 January 2020.
[58] *X v Mid Sussex Citizens Advice Bureau and another* [2012] UKSC 59.
[59] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Framework Directive. A more purposive and less literal interpretation of article 3 by the CJEU might have led to a different result.'[60]

It appears from the above examples that a number of reasons is given by the Supreme Court to justify its refusal to refer a case to the ECJ, which is not always based on the case being *acte clair*.[61] More recently, the preliminary reference procedure was discussed as a possibility in the context of cases pertaining to the UK's withdrawal from the EU. Academic commentators had argued that the Supreme Court was under an obligation to submit a reference in the case of *R(Miller)* with regard to the UK's constitutional requirements in triggering article 50 TEU.[62] Others argued that determining the revocability of a notice under article 50 TFEU was irrelevant to whether the internal, constitutional, requirements for withdrawing from the EU have been fulfilled.[63] Eventually, the Supreme Court in *Miller* proceeded on the assumption, which was common between the parties, that a notice under article 50 TEU is irrevocable. As such, the Court did not even consider the possibility for a preliminary reference. By way of contrast, in *Wightman v Secretary of State for Exiting the European Union*[64] a preliminary reference question was sent to the CJEU concerning the revocation by a Member State of the notification of its intention to withdraw.[65]

[60] C. Rauchegger, 'European Dimensions', CJICL, Vol. 3, 2014, p.204.
[61] Arnull, 2017.
[62] A. Sanchez-Graells, 'UK Supreme Court Miller Judgment seeks to reassert Parliamentary Sovereignty but it does so in breach of EU law and in disservice to the UK Parliament', 27 January 2017 <www.howtocrackanut.com/blog/2017/1/24/uk-supreme-court-miller-judgment-seeks-to-reassert-parliamentary-sovereignty-but-it-does-so-in-breach-of-eu-law-and-in-disservice-to-the-uk-parliament> visited 31 January 2020; G. Peretz, 'Will the Supreme Court have to make a reference to the Court of Justice of the EU in Miller?: further thoughts', 14 November 2016 visited 31 January 2020 <www.monckton.com/will-supreme-court-make-reference-court-justice-eu-miller-thoughts/> .
[63] O. Garner, 'Referring Brexit to the Court of Justice of the European Union: Why revoking an Article 50 notice should be left to the United Kingdom', European Law Blog, 14 November 2016, <https://europeanlawblog.eu/2016/11/14/referring-brexit-to-the-court-of-justice-of-the-european-union-why-revoking-an-article-50-notice-should-be-left-to-the-united-kingdom/> visited 31 January 2020; M. Wienbracke, 'The Article 50 Litigation and the Court of Justice: Why the Supreme Court must NOT refer', Verfassungsblog, 8 November 2016 <https://verfassungsblog.de/the-article-50-litigation-and-the-court-of-justice-why-the-supreme-court-must-not-refer/> visited 31 January 2020.
[64] [2018] CSIH 62
[65] Court of Justice EU 10 December 2018, Case C-621/18, *Wightman*, ECLI:EU:C:2018:999, para [44].