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Case Nos: 1517/11/7/22 (UM)  
1266/7/7/16

**IN THE COMPETITION APPEAL TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

26 July 2023

Before:

SIR MARCUS SMITH  
(President)  
THE HONOURABLE MR JUSTICE ROTH  
BEN TIDSWELL

Sitting as a Tribunal in England and Wales

BETWEEN:

**UMBRELLA INTERCHANGE FEE CLAIMANTS**

Claimants

- v -

**UMBRELLA INTERCHANGE FEE DEFENDANTS**

Defendants

(the “Merchant Interchange Fee Umbrella Proceedings”)

AND BETWEEN:

**WALTER HUGH MERRICKS CBE**

Class Representative

- v -

- (1) **MASTERCARD INCORPORATED**
- (2) **MASTERCARD INTERNATIONAL INCORPORATED**
- (3) **MASTERCARD EUROPE S.P.R.L.**

Defendants

(the “Merricks Proceedings”)

Heard at Salisbury Square House on 24-26 April 2023

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**JUDGMENT (VOLVO LIMITATION)**

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## APPEARANCES

Ronit Kreisberger KC, Philip Woolfe, Oliver Jackson and Antonia Fitzpatrick (instructed by Stephenson Harwood LLP) appeared on behalf of a number of Umbrella Proceedings Claimants.

Mehdi Baiou (instructed by Humphries Kerstetter LLP and Scott+Scott UK LLP) appeared on behalf of a number of Umbrella Interchange Fee Claimants.

Nicholas Saunders KC, Aidan O'Neill KC and Anneliese Blackwood (instructed by Willkie Farr & Gallagher (UK) LLP) appeared on behalf of the Class Representative in the Merricks Proceedings.

Simon Salzedo KC, Daniel Piccinin KC, Jason Pobjoy and Isabel Buchanan (instructed by Linklaters LLP and Milbank LLP) appeared on behalf of the Visa Scheme Defendants.

Timothy Otty KC, Matthew Cook KC, Naina Patel and Ben Lewy (instructed by Jones Day and Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Mastercard Scheme Defendants.

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## A. INTRODUCTION

### (1) The parties

1. The defendants in these various proceedings<sup>1</sup> are the operators of two, well-known, card schemes, known as “Mastercard” and “Visa”. We shall refer to them collectively as the “Scheme Defendants” and (where necessary) individually as the “Mastercard Scheme Defendants” and the “Visa Scheme Defendants”.
2. The claimants in these proceedings contend that the Scheme Defendants infringed Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) in the setting and implementation of certain terms relating to the “multilateral interchange fee” (“MIF”) pursuant to the Mastercard and Visa schemes. The details do not, for present purposes matter, and we would only observe that almost all aspects of these claims are controversial and will have to be resolved in future hearings. We say nothing, in this Judgment, about such points. This Judgment concerns what came to be known as the “Volvo Limitation Point”, and various questions arising out of that point.
3. We propose to refer to the claimants generally as the “Claimants”. The Claimants broadly fell into two groups:
  - (1) A group of Claimants who – as necessary – we will refer to as the “Umbrella Proceedings Claimants”,<sup>2</sup> who were represented by a team led by Ms Kreisberger KC.
  - (2) A class of claimants represented by Mr Walter Merricks CBE, who was represented by a team led by Mr Saunders KC. Where necessary, we shall refer to these proceedings as the “Merricks Proceedings”, and the

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<sup>1</sup> Referred to above as the “Merchant Interchange Fee Umbrella Proceedings” and the “Merricks Proceedings”.

<sup>2</sup> As defined in the Tribunal’s order dated 4 July 2022 in Case No 1517/11/7/22 (UM), the *Merchant Interchange Fee Umbrella Proceedings*.

members of the class represented by Mr Merricks as the “Merricks Class”.

Most of the Umbrella Proceedings Claimants, but not the Merricks Class, also claim on the basis of an equivalent infringement of the Chapter I prohibition under the Competition Act 1998.

4. Helpfully, Ms Kreisberger KC and Mr Saunders KC (together with Mr O’Neill KC, who addressed us on a discrete point involving Scottish law) co-operated in their submissions, so as to avoid duplication. Mr Otty KC (who led for the Mastercard Scheme Defendants) and Mr Salzedo KC (who led for the Visa Scheme Defendants) similarly ensured that their submissions did not duplicate. For that co-ordination, and the care and ability with which we were addressed, we are most grateful to all of the parties. They thereby ensured that the three days for oral submissions listed before us were used as efficiently as possible.

## **(2) The Volvo Limitation Point**

5. The Volvo Limitation Point involves consideration of the implications of a recent decision of the European Court of Justice (“CJEU”) dated 22 June 2022, Case C-267/20, *Volvo AB and DAF Trucks NV v. RM*.<sup>3</sup> We shall refer to this decision as the “*Volvo Decision*”.
6. The implications of the *Volvo Decision* are stated – by way of example, for there are many pleadings, many slightly differently framed – in the Re-Amended Particulars of Claim of the *Hillside* case (one of the Umbrella Proceedings Claimants) before this Tribunal:<sup>4</sup>

“The Defendants’ breaches have caused the Claimants loss and damage throughout the Claim Period and continuing loss and damage. In particular, the effect of the said breaches is that the MSCs paid by the Claimants have been throughout the Claim Period, and continue to be, higher than they would have been absent the infringements particularised above. The Claimants claim compensation for such loss and damage for the entirety of the Claim Period and for ongoing loss and damage. For the avoidance of doubt, the Claimants’ case will be that no part of their claim is time-barred. Pursuant to the judgment

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<sup>3</sup> EU:C:2022:494.

<sup>4</sup> Case No 1445/5/7/22 (T) at [81].

of the Court of Justice of the European Union in Case C-267/20 *Volvo*, in particular at paragraphs 56 and 61, limitation periods applicable to actions for damages for infringements of the competition law provisions of the Member States and of the European Union cannot begin to run before the infringement has ceased. The infringements alleged at paragraph 71 to 77 above are ongoing, alternatively ceased not more than six years prior to the issue of these proceedings.”

7. The contention is that as a matter of European Union (“EU”) law, time in these cases does not begin to run until the infringement has ceased; and that to the extent that the national laws of limitation or prescription within the United Kingdom<sup>5</sup> are inconsistent with this, they must give way to the law of the EU, even though the *Volvo* Decision post-dates “IP completion day”, that being 11:00pm on 31 December 2020, the point in time at which the transition period or implementation period (hence: “IP”) of the United Kingdom’s exit from the EU ended.
  
8. Prior to the hearing, the Tribunal identified four questions which arose out of the *Volvo* Decision as follows:
  - (1) “*Question 1*”. As a matter of EU law, is it the case that limitation periods applicable to a claim for damages for infringements of provisions of EU competition law and/or of national competition law provisions of EU Member States by reason of MIFs set for payment card schemes begin to run from the time when the infringement of competition law has ceased?
  
  - (2) “*Question 2*”. As a matter of EU law, is it the case that such limitation periods cannot begin to run before the claimant knows, or can reasonably be expected to know, the information necessary to bring the claim?
  
  - (3) “*Question 3*”. Should the Tribunal follow the judgment of the CJEU in *Volvo*, pursuant to section 6 of the European Union (Withdrawal) Act 2018 and/or because the claims concern accrued EU law rights? If not, to what extent should the Tribunal have regard to *Volvo*?

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<sup>5</sup> We shall, without intending any disrespect, from hereon refer to the laws of England.



(4) “*Question 4*”. As regards claims referred to in question (1) above, what is the effect of the answers to the questions above on:

- (i) The limitation regime applicable to such claims governed by English law?
- (ii) The prescription regime applicable to such claims governed by Scots law?

It is important to stress that all of these questions were directed to the effect of the *Volvo* Decision on the EU law of limitation, and specifically whether the *Volvo* Decision had materially expanded claimants’ ability to bring claims that would otherwise be out of time. The point of the questions was not to oblige the Tribunal to state a definitive position on what EU law was generally in regard to limitation (apart from the effects of the *Volvo* Decision). Such matters were not before the Tribunal and were not matters that the Tribunal could properly determine in response to these questions. There was, additionally, a fifth question (“*Question 5*” or the “levelling up question”), not arising out of these four questions, but on which we heard submissions and on which we will rule. That question concerned the differences between the English law of limitation and the Scottish law of prescription, and the extent to which more generous provision in one jurisdiction should affect the law in the other.

9. We set out our answers to Questions 1, 3 and 4 in Sections B to D below, although (given the somewhat interconnected issues arising out of Questions 1 to 4) we deal with the issues generally, and do not answer the questions *seriatim* until our concluding Section F. Question 5 is dealt with separately, in Section E. While we received relatively brief submissions on Question 2 on behalf of the Merricks Class and the Mastercard Scheme Defendants, we are not going to answer that question for reasons that will become apparent in this Judgment, and which we briefly articulate now. The submissions on Question 2 were (as we understood them) directed to assisting us in understanding the general thrust of the *Volvo* Decision, rather than in articulating a distinct expansion of the law of limitation regarding knowledge specifically arising out of the *Volvo* Decision. We did not understand any party to be contending that the *Volvo* Decision itself

had expanded the EU law of limitation as regards the knowledge requirement; we understood the Merricks Class Representative to be concerned that we should not trespass into areas which are properly the subject of other hearings involving the Merricks Class Representative, and heard the submissions made in that light. If something beyond this was intended, then insufficient opportunity was afforded to the Mastercard Scheme Defendants properly to respond to this point. Accordingly, nothing in this Judgment should be taken as suggesting what the answer to Question 2 might or might not be.

**(3) Structure of this Judgment**

10. The questions arising out of the *Volvo* Decision are best considered under three heads:

(1) First, we consider, in Section B below, the terms of the *Volvo* Decision, and articulate precisely what we find the *Volvo* Decision to have decided.

(2) As we have stated, the *Volvo* Decision post-dates “IP completion day”. Section C considers the extent to which the *Volvo* Decision is binding on this Tribunal and – if it is not – the extent to which it has any persuasive effect. Resolving this question will involve consideration of the legislation by which the United Kingdom left the EU. We should say that although we are agreed on the outcome of this point, we differ on the reasoning. In a concurring judgment of Mr Justice Roth (in Section G), Mr Justice Roth sets out his reasoning on this. To the extent, therefore, set out in Section G, Mr Justice Roth differs from the majority (the President and Mr Tidswell), the views expressed in Section C of the Judgment are those of the President and Mr Tidswell.

(3) Thirdly, Section D considers what we call the “Section 60A argument”, which was a secondary contention by the Scheme Defendants whereby they argued that even if the issues considered by us in Sections B and C were decided adversely to them, section 60A of the Competition Act 1998 (a provision replacing section 60 of that enactment, and introduced

pursuant to the legislation by which the United Kingdom left the EU) nevertheless had the effect of reversing that overall outcome.

- (4) Section E deals with what we have now labelled as Question 5, that is the question of “levelling up”.

Our answers to the five questions before us are briefly stated in a conclusory Section F.

## **B. THE *VOLVO* DECISION**

### **(1) Introduction**

11. The Claimants contended that the *Volvo* Decision held, as a matter of EU law, that limitation periods applicable to a claim for damages for infringements of Articles 101 and 102 TFEU and/or their equivalent national counterparts (here: the Chapter I and Chapter II prohibitions set out in Part I of the Competition Act 1998) could not begin to run until the time when the infringement of competition law had ceased. The Scheme Defendants’ position was that the *Volvo* Decision decided no such thing.

12. Our approach, in this Section, is to consider first what we call the Damages Directive. This Directive is – as will be seen – central to an understanding of the *Volvo* Decision, and is considered in Section B(2) below. Thereafter, we consider (in Section B(3) below) the terms of the *Volvo* Decision itself. That consideration falls into two parts: first, a consideration of the reasoning in the *Volvo* Decision, which we set out as neutrally as we can. Thereafter, we set out the “operative part” or *dispositif* of the *Volvo* Decision. Section B(4) below contains our analysis of the *Volvo* Decision, which considers:

- (1) The manner in which decisions of the CJEU are to be construed.
- (2) Our finding of what we consider the CJEU to have decided in the *Volvo* Decision.

(3) The *Volvo* Decision in the context of prior decisions of the CJEU.

We set out some further analysis and our conclusions in Section B(5).

## (2) The Damages Directive

13. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the “Damages Directive”) entered into force on 25 December 2014.<sup>6</sup> Article 21(1) provides that “Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 December 2016”. Article 22 deals with the temporal application of the Directive and provides:

- “1. Member States shall ensure that the national measures adopted pursuant to Article 21 in order to comply with substantive provisions of this Directive do not apply retroactively.
2. Member States shall ensure that any national measures adopted pursuant to Article 21, other than those referred to in paragraph 1, do not apply to actions for damages of which a national court was seized prior to 26 December 2014.”

Article 22 thus contains a distinction between the Directive’s substantive provisions and its procedural provisions. As we will come to describe, this (and the related question of the retrospectivity) is a distinction that is central to the *Volvo* Decision.

14. The Damages Directive was implemented into the law of the United Kingdom by the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (the “2017 Regulations”)<sup>7</sup> which came into force on 9 March 2017. The 2017 Regulations inserted a new Schedule 8A to the Competition Act

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<sup>6</sup> Article 23 provides that the Damages Directive enters into force on the twentieth day following that of its publication in the *Official Journal of the European Union* (“*Official Journal*”). The Damages Directive was published in the *Official Journal* on 5 December 2014.

<sup>7</sup> SI 2017 No 385.

1998,<sup>8</sup> which makes “further provision about claims in respect of loss or damage before a court or the Tribunal”.

15. Article 10 of the Damages Directive provides as follows:

- “(1) Member States shall, in accordance with this Article, lay down rules applicable to limitation periods for bringing actions for damages. Those rules shall determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended.
- (2) Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know:
  - (a) of the behaviour and the fact that it constitutes an infringement of competition law;
  - (b) of the fact that the infringement of competition law caused harm to it; and
  - (c) the identity of the infringer.
- (3) Member States shall ensure that the limitation periods for bringing actions for damages are at least five years.
- (4) Member States shall ensure that a limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.”

16. Paragraphs 17ff of Schedule 8A implement Article 10 of the Damages Directive. Those provisions are not relied upon by the Claimants because – as was common ground – the proceedings commenced by the Claimants relate to infringements that took place before Schedule 8A came into force: see paragraphs 42 and 44 of Schedule 8A.

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<sup>8</sup> As well as a new section 47F in the Act, which provides that Schedule 8A “makes further provision about claims in respect of loss or damage before a court or the Tribunal”.

### (3) The *Volvo* Decision

#### (a) Reasoning

17. The *Volvo* Decision arose out of a request for a preliminary ruling made to the CJEU by the Provincial Court in León, Spain, concerning a question of limitation arising out of proceedings before that court. The *Volvo* Decision – beginning with the reasoning – proceeds as follows:

- (1) The relevant provisions of the Damages Directive are set out.<sup>9</sup>
- (2) The transposition of the Damages Directive into Spanish law is described.<sup>10</sup>
- (3) The chronology relevant to the proceedings before the Spanish court is described, as well as the precise questions referred to the CJEU.<sup>11</sup> As to this:
  - (i) Trucks were purchased by RM from Volvo and DAF Trucks in 2006 and 2007.<sup>12</sup> On 19 July 2016, the EU Commission adopted its decision (the “*Trucks* decision”) regarding a cartel – which included Volvo and DAF Trucks – whereby the prices of trucks were collusively set. A summary of the *Trucks* decision was published on 6 April 2017, but a press release had been issued on the adoption of the decision (i.e. on 19 July 2016).<sup>13</sup>
  - (ii) The *Trucks* decision found that, in respect of Volvo and DAF Trucks, the infringement lasted from 17 January 1997 to 18 January 2011.<sup>14</sup> The purchases by RM thus were made within the period of infringement.

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<sup>9</sup> See [3] to [9]. We have set out the most pertinent provisions in paragraphs 13 to 15 above, and will refer, as necessary, to other provisions in the Damages Directive elsewhere in this Judgment.

<sup>10</sup> See [10] to [13].

<sup>11</sup> See [14] to [27].

<sup>12</sup> At [14].

<sup>13</sup> At [15] to [16].

<sup>14</sup> At [16].

- (iii) The transposition of the Damages Directive into Spanish law occurred on 27 May 2017, some five months after the time limit for the transposition of the Damages Directive should have taken place.<sup>15</sup>
  
- (iv) An action was brought by RM against Volvo and DAF Trucks seeking compensation in respect of losses arising out of the purchase of the trucks in 2006 and 2007 on 1 April 2018.<sup>16</sup> Volvo and DAF Trucks contended – amongst other things – that the action was time-barred.<sup>17</sup> At first instance, the Spanish court upheld the claim and rejected the limitation defence advanced by Volvo and DAF Trucks.<sup>18</sup> The limitation defence was rejected because the law transposing the Damages Directive was in force at the time of the commencement of the action, and the claim had been brought within time according to that law.<sup>19</sup> On appeal, Volvo and DAF Trucks contended that the Damages Directive “was not in force at the time the infringement at issue was committed, that infringement having ceased on 18 January 2011”.<sup>20</sup> Volvo and DAF Trucks contended that the Spanish law that applied provided for a one-year period of limitation, commencing with the publication of the press release of the EU Commission’s decision.<sup>21</sup>
  
- (v) In light of these contentions, the Spanish court sought a preliminary ruling as regards the following matters:<sup>22</sup>

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<sup>15</sup> At [17]. See paragraph 13 above for the relevant provisions of the Damages Directive.

<sup>16</sup> At [18].

<sup>17</sup> At [19].

<sup>18</sup> At [20].

<sup>19</sup> At [20].

<sup>20</sup> At [21]. This is what the judgment of the CJEU says, and nothing further can be gleaned as regards the argument before the Spanish court. Nothing is said about how municipal Spanish law works (as regards the entry into force of the Spanish implementing law, and the general rules of accrual of causes of action in Spain).

<sup>21</sup> At [22]. This is what Volvo and DAF Trucks were contending – not what the Spanish courts found. Of course, if the relevant date had been the publication of the summary of the EU Commission decision on 6 April 2017 (and not the press release on 19 July 2016), then the action might have been in time even with a one-year period of limitation (the action having been commenced on 1 April 2018).

<sup>22</sup> At [27].

- “(1) Must Article 101 TFEU and the principle of effectiveness be interpreted as precluding an interpretation of national legislation according to which neither the 5-year limitation period established in Article 10 of [the Damages Directive] nor Article 17 thereof,<sup>[23]</sup> concerning judicial estimation of harm, is retroactively applicable, and which establishes retroactive effect by reference to the date of the penalty rather than the date on which the action is brought?<sup>[24]</sup>
- (2) Must Article 22(2) of [the Damages Directive] and the term “retroactively” be interpreted as meaning that Article 10 of the directive is applicable to a claim such as that brought in the main proceedings, which, although lodged after the directive and the transposing legislation entered into force, refers to prior facts or penalties?
- (3) When applying a provision such as that of Article 76 of [the Spanish implementing law],<sup>[25]</sup> must Article 17 of [the Damages Directive], concerning judicial estimation of harm, be interpreted as a procedural provision that will apply to main proceedings in which an action is brought after the entry into force of the national transposing legislation?”
- (vi) The CJEU exercised its jurisdiction to re-frame these questions as turning on the temporal application of the Damages Directive (and in particular Articles 10 and 17 thereof).<sup>26</sup> Equally, it is clear that not all of the matters considered by the CJEU are relevant to the matters raised by the questions before us. What follows, therefore, is a full exposition of those aspects of the *Volvo* Decision that matter for purposes of this Judgment.
- (vii) The CJEU considered that the scope of the temporal application of a provision of the Damages Directive turned on whether that provision constituted a procedural or a substantive instrument, because of the terms of Article 22 of the Damages Directive stating that substantive provisions were not to have retrospective effect.<sup>27</sup> The CJEU considered this question separately in

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<sup>23</sup> Article 17 concerns rules regarding the quantification of harm in competition cases. It is not material for the purposes of this Judgment, and is not here set out.

<sup>24</sup> This appears to pre-suppose that the Spanish implementing law did not have retrospective effect – which, however, appears to have been the decision of the judge at first instance. That question appears to arise in respect of the second question referred, namely the prohibition against retrospective effect contained in Article 22 of the Damages Directive, which appears to prevent a more extensive implementation of the Damages Directive at least in retrospectivity terms.

<sup>25</sup> This concerned quantification of harm, which the Spanish courts regarded as procedural in nature.

<sup>26</sup> At [30].

<sup>27</sup> At [31] to [42], and in particular [38].



relation to Article 10 and Article 17 of the Damages Directive. It is the former consideration that matters for the purposes of this Judgment, Article 17 not being material.

(viii) As regards Article 10, the CJEU noted that:<sup>28</sup>

“The limitation period provided for in Article 10(3) of [the Damages Directive] has the function, inter alia, first, of ensuring protection of the rights of the injured party, who must have sufficient time in which to gather the appropriate information with a view to a possible action, and, second, of preventing the injured party from being able to delay indefinitely the exercise of his or her right to damages to the detriment of the person responsible for the harm. That period thus definitively protects both the injured party and the person responsible for the harm. ...”

(ix) This is a perfectly fair general statement of the point of limitation periods: to enable claimants to have enough time to bring claims to the court, whilst preventing the litigation of stale claims that could have been brought sooner. The CJEU went on to note that “it is apparent from the case-law of the Court that, unlike procedural time limits, the limitation period, by resulting in the extinction of the legal action, is a matter of substantive law since it affects the enforceability of a subjective right which the person concerned can no longer effectively assert before the courts”.<sup>29</sup> The CJEU concluded that Article 10 “is a substantive provision for the purposes of Article 22(1) of that directive”.<sup>30</sup>

(4) The CJEU also considered the significance of Spain’s late implementation of the Damages Directive which, as we have noted, was 5 months late,<sup>31</sup> stating:<sup>32</sup>

“... it is necessary, in order to determine the temporal applicability of Article 10 of that directive, to ascertain whether the situation at issue in the main proceedings arose before the expiry of the time limit for the

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<sup>28</sup> At [45].

<sup>29</sup> At [46].

<sup>30</sup> At [47].

<sup>31</sup> The Damages Directive should have been implemented by **27 December 2016** and was implemented by Spain on **27 May 2017**. The action commenced on **1 April 2018**.

<sup>32</sup> At [48].

transposition of the directive or whether it continued to produce effects after the expiry of that time limit.”

In considering this question, the CJEU did not ask itself whether the late implementation of the Damages Directive made any difference (i.e. if, on the facts of the case, the Spanish implementing law had been brought into force on 27 December 2016, rather than on 27 May 2017, a claim that would otherwise have been time-barred was not time-barred), but sought, more generally, to ascertain “whether, on the date of the expiry of the time limit for the transposition of [the Damages Directive], namely 27 December 2016, the limitation period applicable to the situation at issue in the main proceedings had elapsed, which means determining the time when that limitation period began to run”.<sup>33</sup>

- (5) As to this, the CJEU noted that:
- (i) According to the CJEU’s case law, where none of the EU rules governing the matter are applicable *ratione temporis*, it is for the legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an infringement of Articles 101 and 102 TFEU, including those on limitation periods, provided that the principles of equivalence and effectiveness are observed.<sup>34</sup> In particular, effectiveness required that “the rules applicable to actions for safeguarding rights which individuals derive from the direct effect of EU law [do] not make it practically impossible or excessively difficult to exercise rights conferred by EU law”.<sup>35</sup>
  - (ii) Prior to the transposition of the Damages Directive into Spanish law, the limitation period for bringing actions for damages for infringements of competition law was governed by the general regime of non-contractual civil liability, with a one-year period of limitation running from the moment when the circumstances

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<sup>33</sup> At [49].

<sup>34</sup> At [50].

<sup>35</sup> At [50].

giving rise to the liability became known to the claimant concerned.<sup>36</sup>

- (iii) Where a national court has to determine a dispute between individuals, it is for the national court, where appropriate, to interpret the national provisions at issue in the main proceedings, so far as possible, in the light of EU law and, in particular, the wording and purpose of Article 101 TFEU, without, however, interpreting those national provisions *contra legem*.<sup>37</sup> In that regard:<sup>38</sup>

“... it must be recalled that national legislation laying down the date on which the limitation period starts to run, the duration of that period, and the rules for its suspension or interruption must be adapted to the specificities of competition law and the objectives of the implementation of the rules of that law by the persons concerned, so as not to undermine completely the full effectiveness of Articles 101 and 102 TFEU ...”

- (iv) The CJEU went on to identify some of these “specificities”, notably their factual complexity and the role of economic analysis<sup>39</sup> and the informational asymmetry between infringer and injured party.<sup>40</sup>

- (6) The CJEU then went on to state as follows:<sup>41</sup>

“56. In that context, it must be considered that, unlike the rule applicable to the Commission, set out in Article 25(2) of Regulation No 1/2003, according to which the limitation period for the imposition of penalties begins to run on the day on which the infringement is committed or, in the case of continuing or repeated infringements, on the day on which the infringement ceases, the limitation periods applicable to actions for damages for infringements of the competition law provisions of the Member States and of the European Union cannot begin to run before the infringement has ceased and the injured party knows, or can reasonably be expected to know, the information necessary to bring his or her action for damages.

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<sup>36</sup> At [51].

<sup>37</sup> At [52].

<sup>38</sup> At [53].

<sup>39</sup> At [54].

<sup>40</sup> At [55].

<sup>41</sup> Since these paragraphs are of considerable importance, and were the subject of much submission before us, we set them out in full.

57. Otherwise, the exercise of the right to claim compensation would be rendered practically impossible or excessively difficult.
58. As regards the information necessary for bringing an action for damages, it should be recalled that it is apparent from the settled case-law of the Court that any person is entitled to claim compensation for the harm suffered where there is a causal relationship between that harm and an infringement of EU competition law ...
59. What is more, it is apparent from the case-law of the Court, that it is indispensable, in order for the injured party to be able to bring an action for damages, for it to know who is liable for the infringement of competition law ...
60. It follows that the existence of an infringement of competition law, the existence of harm, the causal link between that harm and that infringement, and the identity of the perpetrator of the infringement are among the necessary elements which the injured party must have in order to bring an action for damages.
61. In those circumstances, it must be considered that the limitation periods applicable to actions for damages for infringements of the competition law provisions of the Member States and of the European Union cannot begin to run before the infringement has ceased and the injured party knows, or can reasonably be expected to know, (i) the fact that it had suffered harm as a result of that infringement and (ii) the identity of the perpetrator of the infringement.”

We shall refer to the two requirements specified in [61] of the *Volvo* Decision as the “Cessation Requirement” and the “Knowledge Requirement”.

- (7) The CJEU then noted in [62] that “[i]n this instance, the infringement ceased on 18 January 2011”. That is the only reference made by the CJEU to the Cessation Requirement, expressed in [61] above, that actions for damages for competition law infringement “cannot begin to run before the infringement has ceased”. Given that (to use English terminology) the cause of action accrued in 2006 and 2007, when RM purchased the trucks; the infringement ceased on 18 January 2011; and the action was commenced on 1 April 2018, it is difficult to see how (even if the Damages Directive had been in force in 2005) cessation of the infringement could have been in any way relevant to the ability of RM to bring the claim, given that over seven years had passed between the cessation of the infringement and the commencement of the action.

(8) It is, thus, entirely unsurprising that the judgment proceeded (in the rest of [62] to [72]) to address only the Knowledge Requirement. The CJEU concluded, in this regard, that “the full effectiveness of Article 101 TFEU requires it to be considered that, in this instance, the limitation period began to run on the day of that publication”,<sup>42</sup> that is the date of publication of the summary of the infringement decision in the *Official Journal* on 6 April 2017.

(9) The CJEU then sought to tie this analysis back into its starting point, namely the date of implementation of the Damages Directive.<sup>43</sup> Again, it is important to set out the CJEU’s reasoning in full:

“73. Thus, in so far as the limitation period began to run after the date of expiry of the time limit for the transposition of [the Damages Directive], that is to say, after 27 December 2016, and continued to run even after the date of entry into force of [the Spanish implementing law], adopted to transpose that directive, that is to say, after 27 May 2017, that period necessarily elapsed after those two dates.

74. It therefore appears that the situation at issue in the main proceedings continued to produce effects after the date of expiry of the time limit for the transposition of [the Damages Directive], and even after the date of entry into force of [the Spanish law] transposing that directive.

75. In so far as that is the case in the dispute in the main proceedings, which it is for the referring court to verify, Article 10 of that directive is applicable *ratione temporis* in this instance.

76. It should be borne in mind in that context that, according to settled case-law, a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. If the possibility of relying on a provision of a directive that has not been transposed, or has been incorrectly transposed, were to be extended to the sphere of relations between individuals, that would amount to recognising a power in the European Union to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations ...

77. It is also apparent from the case-law of the Court that, in a dispute between individuals such as that at issue in the main proceedings, the national court is required, where appropriate, to interpret national law, as soon as the time limit for the transposition of an untransposed directive expires, so as to render the situation at issue immediately

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<sup>42</sup> At [72].

<sup>43</sup> See paragraph 17(4) above for the relevant dates.

compatible with the provisions of that directive, without however interpreting national law *contra legem* ...

78. In any event, given that fewer than 12 months elapsed between the date of publication of the summary of [the *Trucks* decision] in the *Official Journal of the European Union* and the bringing of RM's action for damages, that action does not appear, subject to verification by the referring court, to have been time-barred at the time when it was brought.
79. In the light of the foregoing, Article 10 of [the Damages Directive] must be interpreted as constituting a substantive provision for the purposes of Article 22(1) of that directive, and as meaning that an action for damages for an infringement of competition law which, although relating to an infringement of competition law which ceased before the entry into force of the directive, was brought after the entry into force of the provisions transposing it into national law falls within the temporal scope of that directive, in so far as the limitation period for bringing that action under the old rules had not elapsed before the date of expiry of the time limit for the transposition of the directive.”

- (10) The remainder of the reasoning in the judgment concerns the temporal applicability of Article 17 of the Damages Directive and costs. These paragraphs are not material for present purposes.

**(b) Operative part or “dispositif”**

18. The relevant paragraph in the operative part of the *Volvo* Decision, or *dispositif*, provides:<sup>44</sup>

“Article 10 of [the Damages Directive] must be interpreted as constituting a substantive provision for the purposes of Article 22(1) of that directive, and as meaning that an action for damages which, although relating to an infringement of competition law which ceased before the entry into force of the directive, was brought after the entry into force of the provisions transposing it into national law falls within the temporal scope of that directive, in so far as the limitation period for bringing that action under the old rules had not elapsed before the date of expiry of the time limit for the transposition of the directive.”

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<sup>44</sup> We do not set out those parts of the *dispositif* relating to immaterial matters to this judgment, like Article 17 of the Damages Directive.

**(4) Analysis**

**(a) Interpretation of decisions**

19. Normally this is the exclusive province of the CJEU. The CJEU is the highest court in the EU, and in cases of uncertainty of EU law, where certainty is required by a national court, the preliminary ruling procedure exists – or, in the case of the United Kingdom, existed – to provide that certainty. Since the United Kingdom’s withdrawal from the EU, we cannot make nor can the CJEU accept a reference for a preliminary ruling,<sup>45</sup> and it falls to us to decide what, as a matter of the law of the United Kingdom, the *Volvo* Decision stands for.
20. We appreciate that, logically, we ought to decide first the extent to which decisions of the CJEU post-dating the United Kingdom’s withdrawal from the EU have any effect (no matter what they say) on the law of the United Kingdom. However, we consider that the better approach, both in terms of exposition and because we are unanimous on the point, is to deal with this question after we have ruled on the *ratio* of the *Volvo* Decision. That is also, in broad terms, the order in which the parties addressed us.
21. Using the term “*ratio*”, as in “*ratio decidendi*”, is to import terminology and thinking not necessarily that of the CJEU. The CJEU has its own Rules of Procedure, of which Chapter 9 of Title II deals with Judgments and Orders. In that Chapter, Article 87 provides that a judgment “shall” contain (amongst other things) a summary of the facts, the grounds for the decision and the operative part of the judgment.<sup>46</sup>
22. Although now somewhat dated, Anderson and Demetriou, *References to the European Court* (2<sup>nd</sup> edn, 2002) describes the form of CJEU judgments very clearly. For practical purposes, they say, judgments consist of two main elements:<sup>47</sup>

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<sup>45</sup> Except in discrete circumstances, as provided for under the UK-EU Withdrawal Agreement (see footnote 76 below), which do not apply here.

<sup>46</sup> Article 87(1), (m) and (n).

<sup>47</sup> At [13-008].

- (1) A series of numbered paragraphs containing a brief summary of the facts and a statement of the Court’s reasoning; and
  - (2) The operative part, which consists of the answers given to the referring court.
23. The operative part, or *dispositif*, is clearly distinguished from the reasons. It is prefaced – as was the case in the *Volvo* Decision – by the words “On those grounds, the Court hereby rules”, and is set out in **bold** type so as to clearly differentiate it.
24. Anderson and Demetriou say this about the significance of the operative part:<sup>48</sup>

“Strictly speaking, it would appear that the “ruling” is restricted to the operative part, whereas the numbered paragraphs simply constitute the Court’s explanation of its ruling. As Advocate General Warner once explained, however:

“... the operative part of a Judgment of this Court should always be interpreted in the light of the reasoning that precedes it.”<sup>49</sup>

25. Judge Lenaerts, the current president of the CJEU, writing extra-judicially,<sup>50</sup> similarly states: “[t]he binding effect attaches to the whole of the operative part and main body of the judgment, since the operative part has to be understood in the light of the reasoning on which it is based”.<sup>51</sup>

**(b) What the *Volvo* Decision decides**

26. We determine the question of what the *Volvo* Decision decides beginning with the *dispositif* and interpreting it in light of the reasons that precede it. The decision holds that:<sup>52</sup>

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<sup>48</sup> At [13-009].

<sup>49</sup> The quotation derives from Case 135/77, *Robert Bosch GmbH v. Hauptzollamt Hildesheim*, Opinion of Advocate General Warner, EU:C:1978:52, [1978] ECR 855 at 861.

<sup>50</sup> Lenaerts, Maselis and Gutman, *EU Procedural Law* (1<sup>st</sup> edn, 2014).

<sup>51</sup> At [6.27].

<sup>52</sup> For clarity, we set out in **bold** what we find the CJEU to have held; our explanation and expansion of this finding then follows in unemphasised text.



- (1) **Article 10 of the Damages Directive is a substantive provision of the Directive such that, by virtue of Article 22(1), the provisions of the Directive (when implemented) may not apply retrospectively.** This is the clear meaning of the opening words of the *dispositif* (“Article 10 of [the Damages Directive] must be interpreted as constituting a substantive provision for the purposes of Article 22(1) of that directive”) and those words resonate with much of the reasoning in the decision, which is concerned with the question of whether Article 10 is to be classified as “substantive” or “procedural”.<sup>53</sup> That question only matters because of Article 22(1), which seeks to limit the implementing Member States’ power to render the substantive provisions of the Damages Directive retrospective.
- (2) Accordingly, a necessarily implied holding of the CJEU in the *Volvo* Decision is that Article 10 may not be given retrospective effect by a Member State. The rest of the relevant part of the *dispositif* is concerned with the difficult question of what the prohibition on the retrospective application of substantive provisions actually entails. In other words, where is the line between the prospective and the retrospective to be drawn when considering essentially backward looking provisions like Article 10 or what is its “temporal scope” (the words used by the CJEU)?
- (3) **The fact that an action for damages relates to an infringement that ceased before the entry into force of the Directive (on 25 December 2014) does not, in and of itself, render the claim outside the temporal scope of the Directive.** This is the clear meaning of the next words in the *dispositif* (“and as meaning that an action for damages which, although relating to an infringement of competition law which ceased before the entry into force of the directive”). This holding is, essentially, negative in effect. It is a holding to the effect that one cannot rely upon the anterior cessation of the infringement as rendering an action claiming damages in relation to it outside the temporal scope of the Damages Directive. Obviously, one can see that the contrary is easily

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<sup>53</sup> See paragraph 17 above.

arguable – that the Damages Directive cannot, by virtue of Articles 10 and 22, apply to infringements that ceased before its entry into force. But the CJEU has rejected this argument. This part of the *dispositif* says nothing about the claims that do fall within the temporal scope of the Damages Directive. That comes next.

- (4) **An action for damages falls within the temporal scope of the Damages Directive where: (i) it was brought after the entry into force of the provisions transposing it into the national law; and (ii) the limitation period for bringing that action under the “old rules” had not elapsed before the date when the Directive should have been transposed.** These positive requirements (which derive from the words “was brought after the entry into force of the provisions transposing it into national law falls within the temporal scope of that directive, in so far as the limitation period for bringing that action under the old rules had not elapsed before the date of expiry of the time limit for the transposition of the directive”) are not straightforward. Unpacking them:
- (i) The first requirement reflects the CJEU’s position that directives cannot have “horizontal effect” and cannot, of themselves, impose obligations on individuals.<sup>54</sup> So, in order to benefit from the limitation periods implemented pursuant to Article 10 of the Damages Directive, the action must have been brought after the entry into force of the relevant national implementing provisions.<sup>55</sup>
  - (ii) The second requirement reflects the CJEU’s view that if the limitation period under “the old rules” for the bringing of an action had not elapsed, then the situation giving rise to the claim continues to “produce effects” as a matter of law; such that if the time limit for implementation of the Damages Directive is within

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<sup>54</sup> See paragraph 17(9) above.

<sup>55</sup> The transposition, in this case, occurred on **27 May 2017** (five months after the latest date for transposition, which was **27 December 2016**). The action, in this case, however, post-dated both of these dates, having been commenced on **1 April 2018**.

that period (i.e. before the limitation period elapsed), then the claim will fall within the temporal scope of the directive. This second requirement appears, with respect, to be a bold view of the temporal application of the Damages Directive but it is not relevant to the questions before us.

- (iii) It is obvious that by the “old rules” the CJEU was referring to the law as it stood prior to the coming into force and implementation of the Damages Directive. That law was accordingly the national law of limitation interpreted in accordance with the EU principle of effectiveness.
- (5) Since the limitation period under Spanish law was one year, it was therefore necessary for the purpose of the ruling to determine whether that period had expired before 27 December 2016, the date for implementation of the Damages Directive. That was the issue dividing the parties. The two defendants, Volvo and DAF Trucks, argued that the one year time limit ran from the date of publication of the EU Commission’s press release concerning the *Trucks* decision (i.e. 19 July 2016) whereas the claimant, the Spanish Government and the EU Commission all argued that it was the date of publication of the summary of the decision in the *Official Journal* (i.e. 6 April 2017).<sup>56</sup> Since the date for implementation of the Directive was 27 December 2016, determination of which of the two arguments was correct was decisive.
- (6) The CJEU noted that the critical question was therefore to determine the time when the limitation period began to run.<sup>57</sup> The CJEU stated that for this purpose it is necessary to apply the principle of effectiveness: see [57] quoted at paragraph 17(6) above, which reflects the classic formulation of that principle.

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<sup>56</sup> See [22] and [62]-[63].

<sup>57</sup> See [49].

(7) The CJEU addressed the question of which of the press release or the subsequent summary in the *Official Journal* was the publication from which RM could reasonably be expected to have known the elements necessary to bring an action for damages.<sup>58</sup> Considering the nature of such press releases in general, and the particular press release issued for the *Trucks* decision, the CJEU determined, as noted above, that “in this instance” the limitation period began to run from the date of publication of the summary of the *Trucks* decision. In that regard, the CJEU expressly followed the Opinion of the Advocate General.

27. Accordingly, while the necessary foundation for the operative part of the *Volvo* Decision was the finding that the limitation period under Spanish law had not expired by 27 December 2016, that conclusion rested entirely on the CJEU’s application of the Knowledge Requirement. Since the infringement in the form of the trucks cartel had ceased in 2011, we do not see that the Cessation Requirement, articulated briefly in the body of the *Volvo* Decision, can be regarded as an essential foundation, or indeed a foundation at all, of the operative part. This conclusion is supported by the Opinion of the Advocate General, who discusses how the principle of effectiveness applies to determine the start date for the running of the limitation period in the circumstances of the case and does so entirely on the basis of the Knowledge Requirement, with no mention of any Cessation Requirement.

28. It follows that the CJEU’s expression of the Cessation Requirement, which is not reflected at all in the *dispositif*, is not binding. Therefore, even if the United Kingdom were still part of the EU, we would not be required to follow it. We recognise that the *Volvo* Decision stated that the principle of effectiveness encompassed a Cessation Requirement, and that is an observation (albeit *obiter*) to which we of course have regard, but we consider that we should not follow it. We reach that conclusion for several reasons.

(1) We do not accept the submission of Mr Saunders KC that this was a logical development of the law on the principle of effectiveness. On the

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<sup>58</sup> See [65].

contrary, we think it would be a dramatic extension of the principle, unheralded in any of the prior authorities to which he took us and which we discuss below. Indeed, as Mr Otty KC pointed out, in Cases C-295/04 to C-298/04, *Manfredi v. Lloyd Adriatico Assicurazioni SpA* (“*Manfredi*”)<sup>59</sup> although the national court in its reference for a preliminary ruling had expressly asked whether the limitation period should run from the date of cessation of the infringement,<sup>60</sup> the CJEU declined to lay down any such rule. We apprehend it would mean that not only the English law of limitation but the laws of many of the EU Member States as previously understood (prior to implementation of the Damages Directive) failed to comply with the effectiveness principle.

- (2) With great respect to the CJEU, the bald statement that the principle of effectiveness incorporates a Cessation Requirement for the start of a limitation period is not supported by any reasoning. In that regard, it stands in sharp contrast to the approach taken by the CJEU in Case C-637/17, *Cogeco Communications Inc. v. Sport TV Portugal SA* (“*Cogeco*”),<sup>61</sup> where Advocate General Kokott said in her Opinion that for the assessment of effectiveness “it is not sufficient to consider individual elements of the national rules on limitation in isolation” but that the national rule must be considered as a whole.<sup>62</sup> That view was expressly endorsed by the CJEU in its judgment in that case.<sup>63</sup>
- (3) It is of course not open to us to make a further reference to the CJEU. However, as Ms Kreisberger KC helpfully informed us, there is a pending reference from the Czech court, Case C-605/21, *Heureka Group a.s. v. Google LLC*, which is before the Grand Chamber of the CJEU where one of the questions before the Court is whether such a Cessation Requirement applies in a case that does not concern a secret cartel. We

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<sup>59</sup> EU:C:2006:461. See also discussion at paragraph 32(2) below.

<sup>60</sup> At [20].

<sup>61</sup> EU:C:2019:263. See also discussion at paragraph 32(4) below.

<sup>62</sup> *Cogeco*, Opinion of Advocate General Kokott, EU:C:2019:32, at [81].

<sup>63</sup> At [45].

understand that the EU Commission submitted to the CJEU at the oral hearing that the *Volvo* Decision should not be followed in that regard.

- (4) Further, and in any event, given our conclusion that the *Volvo* Decision is not a binding decision on this point, the Tribunal is bound by the Court of Appeal decision in *Arcadia Group Brands Ltd v. Visa Inc.* (“*Arcadia*”).<sup>64</sup> There, in a case concerning claims by merchants arising out of credit card MIFs which was closely analogous to the present claims, the Court held that the limitation rules under the English Limitation Act 1980 complied with the principle of effectiveness and that the incorporation of a Cessation Requirement by Article 10(2) of the Damages Directive constitutes new law.<sup>65</sup>

(c) ***The “old rules”***

(i) Relevance of the “old rules”

29. Although none of the Claimants seriously sought to suggest that the Cessation Requirement somehow existed in EU law prior to the *Volvo* Decision,<sup>66</sup> we were taken through decisions both before and after the *Volvo* Decision, in order to place that decision into context. It is appropriate that we briefly refer to this case law. The Claimants referred us to both previous, and subsequent, case law to the *Volvo* Decision.

(ii) Subsequent case law

30. We will deal, first, with the subsequent decision of the CJEU in Cases C-198/22 and C-199/22, *QJ and IP v. Deutsche Bank AG* (“*Deutsche Bank*”).<sup>67</sup> This is a very recent decision<sup>68</sup> in the form of a “reasoned order”.<sup>69</sup> Given this fact, the

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<sup>64</sup> [2015] EWCA Civ 883.

<sup>65</sup> At [75]-[78].

<sup>66</sup> If the Cessation Requirement had actually featured in EU law prior to the *Volvo* Decision, then of course it would have been pleaded earlier by the Claimants.

<sup>67</sup> EU:C:2023:166.

<sup>68</sup> So recent that we had to rely on an informal translation, helpfully produced by the parties.

<sup>69</sup> Reasoned orders have significantly less weight than decisions of the CJEU. Lenaerts, Maselis and Gutman (see footnote 50 above) at [6.32] state: “... This is underscored by Art. 99 of the ECJ Rules of Procedure: ‘Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled...the Court may at any time, on a proposal from the Judge Rapporteur

CJEU will not have intended to extend or in any way vary prior determinations of the CJEU, including those made in the *Volvo* Decision. In short, if the *Volvo* Decision did not introduce a Cessation Requirement, then *Deutsche Bank* will not have done. (To be fair, none of the Claimants contended that *Deutsche Bank* could be anything other than confirmatory of what was held in the *Volvo* Decision.)

(iii) Prior case law

31. As stated above, we see nothing in the prior case law to support the existence of a Cessation Requirement in EU law. There is articulation in the prior case law of what we have termed the Knowledge Requirement. No doubt because of the concentration of the parties on the Cessation Requirement, and because the Knowledge Requirement is an issue only in the Merricks Proceedings and therefore does not concern the Umbrella Proceedings Claimants or the Visa Scheme Defendants, we received very limited submissions as to whether the *Volvo* Decision should be interpreted as affecting the scope of the Knowledge Requirement and neither we nor, we anticipate the Mastercard Scheme Defendants understood the Merricks Class Representative to be suggesting that the *Volvo* Decision, in and of itself, was re-writing and extending the Knowledge Requirement. We appreciate, of course, that that are passages within the *Volvo* Decision (although not within the *dispositif*) potentially suggestive of such an expansion, but (as the Merricks Class Representative submitted) “[i]n substance, *Volvo* simply amounts to a more explicit articulation of principles already established in retained EU law”, and so (on this basis) is not an expansion at all. We therefore consider it entirely inappropriate to address the extent of the Knowledge Requirement in this Judgment. We think it is preferable for questions concerning the Knowledge Requirement, including whether the present law of limitation in UK law is consistent with the Knowledge Requirement, to be addressed in the context of the actual facts regarding the

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and after hearing the Advocate General, decide to rule by reasoned order.’ That provision combines with the practice of many years standing by which the Court informs the national court by letter from the Registrar that an earlier judgment has answered its question and requests it to inform it whether in the circumstances it still wishes to pursue its request for a preliminary ruling. (Often the national court will then withdraw its request.)”

information which the Mastercard Scheme Defendants contend was available, which is the subject of a separate hearing listed in the Merricks Proceedings.

32. Nevertheless, because we were taken to the case law in some detail, we should very briefly set out what it states:

(1) In Case C-453/99, *Courage Ltd v. Crehan* (“*Crehan*”),<sup>70</sup> the CJEU stressed the importance of the principle of effectiveness in relation to private actions seeking compensation for competition law infringements:

“25. As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case-law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals ...

26. The full effectiveness of [Article 101 TFEU] and, in particular, the practical effect of the prohibition laid down in [Article 101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

27. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.”

This is a clear articulation of the general principle of “effectiveness” in EU law: but it says nothing specific about either the Cessation Requirement or, indeed, the Knowledge Requirement.

(2) In *Manfredi*, the CJEU stated:

“78. A national rule under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or

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<sup>70</sup> EU:C:2001:465.



practice, particularly if that national rule also imposes a short limitation period which is not capable of being suspended.

79. In such a situation, where there are continuous or repeated infringements, it is possible that the limitation period expires even before the infringement is brought to an end, in which case it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action.
80. It is for the national court to determine whether such is the case with regard to the national rule at issue in the main proceedings.
81. The answer to the third question in Cases C-295 to C-297/04 and the fourth question in Case C-298/04 must therefore be that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under [Article 101 TFEU], provided that the principles of equivalence and effectiveness are observed.
82. In that regard, it is for the national court to determine whether a national rule which provides that the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under [Article 101 TFEU] begins to run from the day on which that prohibited agreement or practice was adopted, particularly where it also imposes a short limitation period that cannot be suspended, renders it practically impossible or excessively difficult to exercise the right to seek compensation for the harm suffered.”

There is thus a recognition that the rules on limitation may well be relevant to the effective enforcement of EU law rights: but there is no – or no very clear – articulation of the Knowledge Requirement, and certainly no articulation of the Cessation Requirement.

- (3) In Case C-557/12, *Kone AG v. ÖBB-Infrastruktur AG*,<sup>71</sup> the CJEU considered the principle of effectiveness in relation to non-limitation questions concerning the enforcement of private rights of action regarding infringements of EU competition law. Unsurprisingly, the decision says nothing about the Knowledge Requirement or the Cessation Requirement.
- (4) In *Cogeco*, the CJEU considered the principle of effectiveness in the context of limitation in some detail. The CJEU made clear – as it had done in *Manfredi* – the importance of a reasonable limitation period to

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<sup>71</sup> EU:C:2014:1317.

the effective enforcement of EU rights,<sup>72</sup> and stressed a significant factor going to the Knowledge Requirement:<sup>73</sup>

“It is indispensable, in order for the injured party to be able to bring an action for damages, for it to know who is liable for the infringement of competition law.”

This might be regarded as an articulation, or further articulation, of the Knowledge Requirement, and we say no more about it. There is no suggestion that the principle of effectiveness requires a Cessation Requirement to be built into the limitation rules of Member States.

## **(5) Conclusion**

33. We conclude that the *Volvo* Decision does not stand as authority for the proposition that, as a matter of EU law, time must run from the time when the infringement of competition law has ceased for the purposes of claims asserting an infringement of EU competition law. We have referred to this as the Cessation Requirement, and hold that national limitation law is not required by EU law to comply with any such principle whether before or after IP completion day, save as contained in the Damages Directive, whether as a result of the *Volvo* Decision or any other case-law of the EU, and whether preceding or succeeding the *Volvo* Decision. For these reasons, Question 1 must be answered in the negative. We do not, for the reasons we have given, intend to answer Question 2, and say no more about this question.

## **C. ARE WE OBLIGED TO FOLLOW THE *VOLVO* DECISION?**

### **(1) Introduction**

34. Given the conclusion we have reached in relation to the *Volvo* Decision, the question of whether we are obliged to follow that decision does not have to be answered. However, we were helpfully and fully addressed on the point and we consider that we should address it, not only because the point has wider

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<sup>72</sup> At [52].

<sup>73</sup> At [50].

significance, but also because this case may go further. We do not consider that the outcome set out above constitutes a sufficiently good reason not to consider and determine this question.

35. In this Section, we first provide (in Section C(2) below) an overview of the relevant legislation, beginning with the European Communities Act 1972. We then (in Sections C(3) and C(4) below) set out and unpack the Claimants' contentions in regard to the applicability of the *Volvo* Decision in relation to questions of limitation before the English Courts. Finally, in Section C(5), we analyse and determine this question.

**(2) An overview of the relevant legislation**

**(a) *The European Communities Act 1972***

36. The European Communities Act 1972 (the "1972 Act") made provision for the incorporation of EU law into the municipal law of the United Kingdom. It is important to distinguish between EU law that is intended to be implemented into the law of the United Kingdom without more and EU law that requires implementation by the Member State.

37. The former case was dealt with by section 2(1) of the 1972 Act, which provided:

"All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies."

The term "enforceable EU right" was added into section 2(1) by amendment,<sup>74</sup> and is a term we will continue to use (notwithstanding the fact that the 1972 Act has been repealed). Enforceable EU rights are not enacted into the law of the United Kingdom ("without further enactment") but derive their legal effect as an ambulatory body of law from EU law directly. By "ambulatory", we mean a

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<sup>74</sup> The European Union (Amendment) Act 2008, with effect from 1 December 2009.

body of law foreign to the United Kingdom in one sense (because not enacted by any United Kingdom body) yet domestic because it is the law of the land. Enforceable EU rights are such because section 2(1) acts as a “gateway” by way of which this ambulatory body of law flows into the legal system of the United Kingdom.

38. The latter case – implementation of EU law by a Member State – was dealt with by section 2(2) of the 1972 Act, which made provision for the implementation of EU law by way of subordinate legislation. The Damages Directive was implemented in this way. We shall refer to EU law incorporated in this way as “implemented EU law”.

***(b) Repeal of the 1972 Act***

39. Section 1 of the European Union (Withdrawal) Act 2018 (the “2018 Act”) repealed the 1972 Act in its entirety on “exit day”. Exit day is defined as 31 January 2020 at 11:00pm.<sup>75</sup> What happened to enforceable EU rights by reason of this repeal is a matter of considerable importance, to which we will return. We would only observe, at this stage, that there can be no question of the law giving rise to enforceable EU rights having been “repealed”. That is for a number of reasons:

- (1) First, it is not for the United Kingdom to repeal EU law that has not been implemented into domestic legislation. We do not consider that Parliament is competent to amend or repeal the law of another legal system, which is what enforceable EU rights are. EU law is a creature of the EU, and it is made, varied and repealed by the constitutional bodies of the EU. We of course accept that implemented EU law can be varied by the legislature of the United Kingdom. It is law of the United Kingdom.

- (2) Secondly, as we have already noted, even on the express terms of the 1972 Act, enforceable EU rights were never enacted into the law of the

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<sup>75</sup> Section 20(1) of the 2018 Act.

United Kingdom and it seems to us a logical impossibility that they can be repealed, never having been enacted.

(c) *The “implementation period”*

40. The “implementation period” refers to the transition or implementation period provided for in the “withdrawal agreement” between the United Kingdom and the EU.<sup>76</sup> The implementation period began with exit day (i.e. at 11:00pm on 31 January 2020) and ended on “IP completion day” (11:00pm on 31 December 2020). During the implementation period, a great deal of EU law continued to have effect on a transitional basis.<sup>77</sup> On IP completion day, the legal basis for EU law forming a part of the law of the United Kingdom without specific implementation ceased, and the regime that we will come to describe took effect.
41. We were not addressed on the significance of the implementation period by any of the parties, who concentrated on the position pre-exit day and post-IP completion day, leaving the implementation period (effectively, a period of transition) out of account. We consider that period important, if only to provide a complete picture.
42. The gap between exit day (when the 1972 Act was repealed) and the commencement of the regime of retained EU law (under the 2018 Act), which commenced on IP completion day and to which we will come, was filled by provisions in the 2018 Act that have also now been repealed.<sup>78</sup> Those subparagraphs of section 1A of the 2018 Act deal with the implementation period and provided:

“(1) Subsections (2) to (4) have effect despite the repeal of the European Communities Act 1972 on exit day by section 1.

(2) The European Communities Act 1972, as it has effect in domestic law or the law of a relevant territory immediately before exit day, continues to

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<sup>76</sup> i.e. the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community dated 17 October 2019, and entering into force on 1 February 2020 (the “UK-EU Withdrawal Agreement”): see Part Four.

<sup>77</sup> See the provisions in section 1A(1) to (4) of the 2018 Act, which were repealed on IP completion day by section 1A(5).

<sup>78</sup> See paragraph 40 above.

have effect in domestic law or the law of the relevant territory on and after exit day so far as provided by subsections (3) to (5).

- (3) The Act of 1972 has effect on and after exit day as if –
- (a) the definitions of “the Treaties” and “the EU Treaties” given by section 1(2) to (4) (interpretation) –
    - (i) included Part 4 of the [UK-EU Withdrawal Agreement] (implementation period), other than that Part so far as it relates to, or could be applied in relation to, the Common Foreign and Security Policy, but
    - (ii) were otherwise limited to anything which falls within those definitions as at immediately before exit day so far as it is not excluded by regulations made on or after exit day by a Minister of the Crown under this sub-paragraph,
  - (b) the reference in section 2(2) to the objects of the EU were a reference to those objects so far as they are applicable to and in the United Kingdom by virtue of Part 4 of the [UK-EU Withdrawal Agreement],
  - (c) section 2(3) (payment of EU costs, etc) were omitted,
  - (d) in section 3 (decisions on, and proof of, EU Treaties and EU instruments etc) –
    - (i) the references to the Treaties in subsections (1) and (2) included the [UK-EU Withdrawal Agreement], and
    - (ii) the words in brackets in subsection (1) only applied so far as they are in accordance with Part 4 of the [UK-EU Withdrawal Agreement],
  - (e) references in sections 5 and 6 (customs duties and common agricultural policy) to the common customs tariff of the EU, directly applicable EU provision, the exclusion of customs duties, EU arrangements and agricultural levies of the EU were to such things so far as they are applicable to and in the United Kingdom by virtue of Part 4 of the [UK-EU Withdrawal Agreement], and
  - (f) in Part 2 of Schedule 1 (general definitions in relation to the EU) –
    - (i) in the definition of “EU customs duty”, the reference to directly applicable EU provision were to such provision so far as it is applicable to and in the United Kingdom by virtue of Part 4 of the [UK-EU Withdrawal Agreement], and
    - (ii) in the definition of “Member” in the expression “member State”, after “EU” there were inserted “and for the purposes of this expression the United Kingdom is to be treated as if it were a member of the EU during the implementation period (within the meaning given by section 1A(6) of the European Union (Withdrawal) Act 2018”.
- (4) In this section “relevant territory” means the Isle of Man, any of the Channel Islands or Gibraltar.”

43. The crucial provision is section 1A(2), which – despite the repeal of the 1972 Act<sup>79</sup> – preserves the effect of the 1972 Act in domestic law albeit subject to the qualifications specified in subsections (3) to (5).

*(d) Saving and incorporation of EU law into the law of the United Kingdom post-IP completion day*

44. The distinction drawn between “enforceable EU rights” and “implemented EU law”, described in paragraphs 36 to 38 above, unsurprisingly informs the post-IP completion day legal landscape. Thus:

(1) Section 2 of the 2018 Act provides that “EU-derived domestic legislation, as it has effect in domestic law immediately before IP completion day, continues to have effect in domestic law on and after IP completion day”.<sup>80</sup> This is subject to certain exceptions, which are for present purposes immaterial.<sup>81</sup> The term “EU-derived domestic legislation” is very broadly defined in section 1B(7) of the 2018 Act, and comprises all of implemented EU law (as we have defined that term). The provision ensures that notwithstanding the repeal of the 1972 Act, EU law implemented by virtue of its provisions continues as part of the law of the United Kingdom – subject, of course, to any amendment by the 2018 Act or subsequent legislation.

(2) Section 3 of the 2018 Act provides that “[d]irect EU legislation, so far as operative immediately before IP completion day, forms part of domestic law on and after IP completion day”:<sup>82</sup>

(i) Although the detail of the definition of “direct EU legislation” does not matter for present purposes, its broad meaning does matter. Essentially, and subject to the more specific articulation in section 3 of the 2018 Act, direct EU legislation means “any

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<sup>79</sup> Section 1A(1) provides that this section, including section 1A(2), applies despite the repeal of the 1972 Act.

<sup>80</sup> Section 2(1) of the 2018 Act.

<sup>81</sup> See section 2(3) of the 2018 Act.

<sup>82</sup> Section 3(1) of the 2018 Act.

EU regulation, EU decision or EU tertiary legislation, as it has effect in EU law immediately before IP completion day and so far as ... it is applicable to and in the United Kingdom by virtue of Part 4 of the [UK-EU Withdrawal Agreement]”.<sup>83</sup>

- (ii) The important point to note is that section 3 deals with EU law made by the EU which required no implementation by Member States (like a regulation), but it does not deal with EU law having direct effect in the United Kingdom deriving from treaties between the Member States themselves and constituting the EU, notably the TFEU, the Treaty on European Union and the Charter of Fundamental Rights of the European Union. In the present case, this is particularly significant, because the Claimants’ claims are – amongst other provisions – based upon Article 101 TFEU.
  
- (iii) For the reasons given above we do not consider that this is a case (to use terminology relating to insurance policies) of a “cancel and re-write”. As we have noted, there is nothing to “cancel” or “repeal” and that explains the somewhat unusual language in section 3(1), which refers to direct EU legislation “so far as operative immediately before IP completion day”. Tracing the process by which that part of the body of enforceable EU rights not comprising rights deriving from treaties becomes part of domestic law, it is quite clear that two stages are involved:
  - (a) First, the “gateway” by way of which EU law flowed into the law of the United Kingdom without implementation was preserved during the implementation period. If we may continue with the “gateway” analogy, the gateway (the 1972 Act) was removed (by repeal) and a new – narrower – gateway constructed in its place by section

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<sup>83</sup> Section 3(2)(a) and (ai) of the 2018 Act.



1A.<sup>84</sup> This is the regime applying during the implementation period. It does not involve the enactment into the domestic law of the United Kingdom of any further EU law, but rather circumscribes the “gateway” through which such law flows into the United Kingdom, such that certain (defined) parts of EU law cannot create rights in the United Kingdom.

- (b) Secondly, on IP completion day, the narrowed “gateway” was removed and this time not replaced. Instead, a form of “translation” took place, whereby what was (but remains<sup>85</sup>) EU law is “translated” so as to become the domestic law of the United Kingdom. There is no repeal. It is simply that EU legislation that once was “directly effective” and so not implemented into the law of the United Kingdom ceased to be directly effective, and so required and received implementation.
- (c) It is worth noting two further matters about section 3(1) of the 2018 Act. First, the translation is limited to “direct EU legislation” (as defined in section 3(2)). It does not extend, for example, to a cause of action that might have accrued out of the rights conferred by direct EU legislation. Thus, for instance, were a person to have a cause of action (e.g. a statutory tort based upon a breach of direct EU legislation), that claim would not be caught by section 3.
- (d) Secondly, section 3(1) is expressly prospective in effect (“on or after IP completion day”). It is obviously sensible to match the closing of the “gateway” with the

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<sup>84</sup> See paragraph 42 above.

<sup>85</sup> But in the same way as we would refer to the law of the United States of America, for example. The law of another entity (a state, in the case of the United States) to which the courts of the United Kingdom will have regard as “foreign law”.

incorporation of the law that flowed through it into domestic law. Obviously, that implies a point at which the law flowing through the “gateway” is frozen and “translated”. For the purposes of section 3, that point is immediately before IP completion day. Thus, changes to EU law that passed through the “gateway” up to IP completion day will be “translated”.

- (3) As we have noted, section 3 of the 2018 Act is limited to “direct EU legislation”, as defined in section 3(2). Section 3 does not serve to “translate” all enforceable EU rights, in particular treaty rights. Section 4 of the 2018 Act deals with this *lacuna*. This section provides in section 4(1):

“Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP completion day –

- (a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and
- (b) are enforced, allowed and followed accordingly,

continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).”

As to this:

- (i) Section 2(1) of the 1972 Act was broadly drawn to encompass rights “created or arising by or under the Treaties”.<sup>86</sup> Of course, section 2(1) provides for the incorporation into the law of the United Kingdom of much more than rights created or arising by or under the Treaties (namely, enforceable EU rights generally), but any duplication as to the basis on which EU law is “translated” into the law of the United Kingdom between sections 3 and 4 of the 2018 Act is provided for by section 4(2)(a) of the same Act, which excludes from the effect of section 4 “any rights, powers, liabilities, obligations, restrictions, remedies or

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<sup>86</sup> Section 2(1) is set out in paragraph 37 above.

procedures so far as they ... form part of domestic law by virtue of section 3”. Section 3, of course, is limited to the incorporation of “direct EU legislation”, as we have described.

- (ii) The ambit of section 4 is both different to and wider than that of section 3. It obviously does not extend to “direct EU legislation”, but sweeps up “[a]ny rights, powers, liabilities, obligations, restrictions, remedies and procedures” recognised under section 2(1) of the 1972 Act which are enforced, allowed and followed accordingly. It is difficult to imagine wider wording than this. The wording is, in our judgment, not merely sufficient to transfer enforceable EU rights,<sup>87</sup> but also, where a cause of action arises out of enforceable EU rights, that cause of action also.<sup>88</sup>
- (iii) The extent of rights captured is reflected by the language of “translation” that we have used. Whereas section 3(1) states that direct EU legislation “forms part of domestic law”, section 4(1) states that “rights, powers”, etc “continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly)”.
- (iv) Section 4 extends to past rights, powers, etc. It expressly does not extend to any right arising on or after IP completion day. Take therefore, a cause of action under an EU treaty giving rise to a claim for damages accruing before IP completion day. Such a cause of action would: (i) be a right or remedy, (ii) recognised and available in domestic law by virtue of section 2(1) of the 1972 Act immediately before IP completion day, and (iii) enforced, allowed and followed accordingly. It would, therefore, “continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).”

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<sup>87</sup> Subject to the “carve out” in favour of section 3.

<sup>88</sup> Note the reference in section 4(1) of the 2018 Act to “remedies and procedures which ... are enforced, allowed and followed”.

(e) *Exceptions to saving and incorporation*

45. EU law is not without exception saved as part of and/or incorporated into the law of the United Kingdom. There are many exceptions. A number of these exceptions are set out in section 5 of the 2018 Act. These exceptions include:

(1) The principle of the supremacy of EU law. Section 5(1)-(3) provides:

“(1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after IP completion day.

(2) Accordingly, the principle of the supremacy of EU law continues to apply on or after IP completion day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP completion day.

(3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after IP completion day of any enactment or rule of law passed or made before IP completion day if the application of the principle is consistent with the intention of the modification.”

(2) The Charter of Fundamental Rights. Section 5(4)-(5) provides:

“(4) The Charter of Fundamental Rights is not part of domestic law on or after IP completion day.

(5) Subsection (4) does not affect the retention in domestic law on or after IP completion day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).”

46. Other exceptions are contained in Schedule 1 to the 2018 Act, to which we will be returning.

(f) *“Retained EU law”*

47. Section 6(7) of the 2018 Act defines “retained EU law” as:

“anything which, on or after IP completion day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time)”.

Thus, retained EU law includes all EU law saved or incorporated into the law of the United Kingdom by virtue of the three sections we have already considered above – sections 2, 3 and 4 of the 2018 Act.

48. Within this definition of retained EU law are three sub-sets:

(1) “Retained case law”, which comprises “retained domestic case law” and “retained EU case law”. These are respectively defined as:<sup>89</sup>

(i) “Retained domestic case law”:

“... means any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom, as they have effect immediately before IP completion day and so far as they –

(a) relate to anything to which section 2, 3 or 4 applies, and

(b) are not excluded by section 5 or Schedule 1,

(as those principles and decisions are modified by or under this Act or by other domestic law from time to time)”.

(ii) “Retained EU case law”:

“... means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before IP completion day and so far as they –

(a) relate to anything to which section 2, 3 or 4 applies, and

(b) are not excluded by section 5 or Schedule 1,

(as those principles and decisions are modified by or under this Act or by other domestic law from time to time)”.

(2) “Retained general principles of EU law”:

“... means the general principles of EU law, as they have effect in EU law immediately before IP completion day and so far as they –

(a) relate to anything to which section 2, 3 or 4 applies, and

(b) are not excluded by section 5 or Schedule 1,

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<sup>89</sup> Section 6(7) of the 2018 Act.

(as those principles and decisions are modified by or under this Act or by other domestic law from time to time)".

Paragraph 2 of Schedule 1 to the 2018 Act provides that:

"No general principle of EU law is part of domestic law on or after IP completion day if it was not recognised as a general principle of EU law by the European Court in a case decided before IP completion day (whether or not as an essential part of the decision in the case)."

**(3) The Umbrella Proceedings Claimants' contentions**

*(a) Overview*

49. We shall come to the question of how the *Volvo* Decision is to be treated in due course. The question cannot be addressed at this stage because there is an anterior, and most significant, question of classification. The Scheme Defendants contended that the claims advanced by the Claimants were – post-IP completion date – a part of retained EU law and that it was through the prism of retained EU law that the *Volvo* Decision needed to be viewed.
50. The Umbrella Proceedings Claimants, on the other hand, contended that their claims did not form part of retained EU law at all and that they constituted "accrued EU law rights", a term which is nowhere defined in the withdrawal legislation and which is not used in that legislation, but which we use as a helpful means of differentiating the position of the Umbrella Proceedings Claimants from the position of the Scheme Defendants. In a nutshell, the Scheme Defendants contended that post-IP completion day, retained EU law was the only means by which EU law could have legal force in the United Kingdom, whereas the Umbrella Proceedings Claimants contended that there was a distinction between retained EU law and accrued EU law rights. The manner in which that distinction arose was by virtue of section 16 of the Interpretation Act 1978.
51. The Umbrella Proceedings Claimants' position was that their rights were protected by section 16 of the Interpretation Act 1978, and that these rights – accrued EU law rights – remained subject to EU law unaffected by the withdrawal legislation. Accrued EU law rights would develop organically as

part of the development of EU law within the EU, and not as part of the development by the courts of the United Kingdom of what had been EU law and was now translated into the law of the United Kingdom by virtue of the statutory provisions we have referenced in Section C(2) above. The *Volvo* Decision, according to the Umbrella Proceedings Claimants, was simply a part of the ordinary development of EU law, and binding on the courts of the United Kingdom in just the same way as it would have been binding prior to the United Kingdom's exit from the EU.<sup>90</sup>

52. In order to understand the point articulated by the Umbrella Proceedings Claimants, it is necessary first to describe the relevant provisions of the Interpretation Act 1978 and then to consider what an “accrued right” is.

**(b) *The Interpretation Act 1978***

53. So far as is material, the Interpretation Act 1978 provides:

**“15 Repeal of repeal.**

Where an Act repeals a repealing enactment, the repeal does not revive any enactment previously repealed unless words are added reviving it.

**16 General savings.**

- (1) Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,—
- (a) revive anything not in force or existing at the time at which the repeal takes effect;
  - (b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;

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<sup>90</sup> It was common ground between the Claimants and the Scheme Defendants that decisions of the CJEU were declaratory in the sense that they declared what EU law was retrospectively, in much the same way as the common law. See, for instance, Case C-292/04, *Meilicke v. Finanzamt Bonn-Innenstadt*, EU:C:2007:132 at [34]: “In that connection, regard must be had to the settled case-law of the Court to the effect that the interpretation which, in the exercise of the jurisdiction conferred on it by Article 234 EC, the Court gives to a rule of Community law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the competent courts are satisfied ...”.

- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against that enactment;
- (e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.

- (2) This section applies to the expiry of a temporary enactment as if it were repealed by an Act.”

54. As *Craies* notes,<sup>91</sup> the principle articulated by section 16 “is really the corollary of the presumption against retrospectivity: just as we assume, in the absence of very clear evidence to the contrary, that the legislature does not intend to introduce a new law in relation to past events, so too we assume that the abolition of a particular law for the future is not intended to prevent the due operation of the rule of law as it stood prior to the abolition’s taking effect. Section 16 is a very broad set of propositions and the courts will give it an appropriately wide construction, so as not to frustrate the underlying intention of allowing matters arising before the repeal of an enactment to be followed through to their conclusion as if the repeal had not happened.”

55. As regards section 16(1)(c), *Craies* says:<sup>92</sup>

“The notion of a right accrued in s.16(1)(c) requires a little exposition. In particular, the saving does not apply to a mere right to take advantage of a repealed enactment (clearly, since that would deprive the notion of a repeal of much of its obvious significance). Something must have been done or have occurred to cause a particular right to accrue under a repealed enactment. So where under the Agricultural Holdings Act 1908 a tenant had become entitled to compensation by his landlord’s having given him notice to quit, he acquired a right to compensation which was not lost by the repeal of the Act, so he was entitled to continue after the repeal the proceedings necessary for the recovery of compensation.

A contrary intention for the purpose of displacing s.16 of the Interpretation Act must be very clear, although it could in theory arise by very strong implication. ...”

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<sup>91</sup> Greenberg (ed), *Craies on Legislation* (12<sup>th</sup> edn, 2022) at [14.4.10].

<sup>92</sup> At [14.4.12].



(c) *What are accrued rights?*

56. The term “cause of action” is not defined by statute, even though (for instance) it is frequently used in the Limitation Act 1980. However, a good definition in the case law is that a cause of action comprises every fact which it would be necessary for a claimant to prove in order to support their right to the judgment of the court.<sup>93</sup>
57. An asserted cause of action is some form of originating process by which a claimant asserts (at the commencement of a process of litigation) certain facts which, if not successfully disputed by the defendant, will entitle the claimant to judgment according to the law as it stood at the time the cause of action accrued.
58. A cause of action will typically accrue before it is asserted.<sup>94</sup> A cause of action accrues when the facts that trigger, under the then prevailing law, a right to a legal response have occurred. Later changes to the law (whether to the benefit or disadvantage of the claimant) ought to make no difference; but similarly, the law should not (unless the language is very clear) subsequently take away rights which have accrued. It is in relation to this latter aspect that section 16 of the Interpretation Act 1978 is concerned with.
59. A cause of action is something that is no more than an allegation or set of allegations. The moment the existence or non-existence of the cause of action is established by a court, or the claim is settled, the cause of action ceases to be.
60. McGee, in *Limitation Periods*, observes that “[i]t is in the nature of limitation provisions to be concerned with time, and to have to deal with cases where considerable time has elapsed. Consequently, changes in the law relating to limitation cause particular problems”.<sup>95</sup> We agree with this, although we would note that these problems arise much more generally (and not just in connection with limitation) when there is a change in the law concerning accrued and

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<sup>93</sup> See, generally, Smith and Leslie, *The Law of Assignment* (3<sup>rd</sup> edn, 2018), chapter 3; *Coburn v. Colledge*, [1897] 1 QB 702 at 706-707.

<sup>94</sup> The exception is *quia timet* relief.

<sup>95</sup> McGee, *Limitation Periods* (9<sup>th</sup> edn, 2022) at [1.012].

asserted causes of action. The question of what changes are, and what changes are not, retrospective is – in and of itself – a very difficult one. Take, for example, the case of a cause of action that has accrued, but not been asserted. Before the claim has been asserted, the rules of procedure are changed such that the bringing of the claim becomes more expensive. Is this a retrospective change affecting the claimant’s rights – or not? What is the position where, in the case of a claim that has been asserted, but not yet determined by a court of first instance, the rights of appeal of the protagonists are abrogated or altered so as to render appeals harder (or, indeed, easier)?

*(d) The essence of the Umbrella Proceedings Claimants’ contentions*

61. It seems to us that, although both the Umbrella Proceedings Claimants and the Merricks Class have (in their originating processes and in their pleadings) asserted various causes of action, the Umbrella Proceedings Claimants’ contention at the hearing was wider than this, and extended to causes of action that had accrued, even if they had not been asserted. Ms Kreisberger KC submitted that all causes of action accruing before exit day,<sup>96</sup> whether asserted or not, were governed by EU law incorporated into the law of the United Kingdom by virtue of the 1972 Act and not by virtue of any later enactment. The manner in which Ms Kreisberger put her case is helpfully stated in the following exchange:<sup>97</sup>

- |                          |  |
|--------------------------|--|
| <b>Mr Justice Roth</b>   | But isn’t the problem that you’ve got that you are bringing a claim – yes, it’s an accrued right – but you have a claim before the court based on Article 101 [TFEU], which you can enforce before our courts or the Tribunal, because of the European Communities Act 1972, otherwise it would be – |
| <b>Ms Kreisberger KC</b> | Correct, yes, absolutely.  |
| <b>Mr Justice Roth</b>   | And the [European Union (Withdrawal) Act 2018] has repealed that Act, and therefore the basis of your claim has completely gone.   |
| <b>Ms Kreisberger KC</b> | No. Sorry –  |

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<sup>96</sup> The position as regards causes of action accruing between exit day and IP completion day was not addressed, and is not something we need to specifically to resolve (although it is a matter incidentally relevant to the question that is before us).

<sup>97</sup> Transcript of Hearing (Day 3)/p.57-58.

**Mr Justice Roth**

That's what I think is the case against you, and it would have gone, but it's not gone because – and you need section 4 [of the European Union (Withdrawal) Act 2018] to be able to maintain your claim, and that's why it's within the statute.

**Ms Kreisberger KC**

In my respectful submission, Sir, that's not the appropriate analysis of how this works. Section 1 [of the European Union (Withdrawal) Act 2018] repeals the European Communities Act from [IP] completion day,<sup>98</sup> so the rights only disappear after completion day.

62. The Umbrella Proceedings Claimants' case was that:

- (1) The repeal of the 1972 Act was prospective only and that accrued rights (including accrued EU law rights) were not affected by that repeal (absent clear language to the contrary) because of sections 16(1)(c) and (e) of the Interpretation Act 1978.
- (2) It followed – the 2018 Act saying nothing to the contrary – that such accrued rights were governed by EU law as given effect in the law of the United Kingdom by the 1972 Act and not by the 2018 Act. The label “retained EU law” was not relevant, nor were almost all other provisions of the 2018 Act, which applied prospectively and not retrospectively.<sup>99</sup> The present case concerned, in short, and to use the Umbrella Proceedings Claimants' label, a matter of “accrued EU law rights”.
- (3) From this, it followed that any rule of EU law affecting the substance of “accrued EU law rights” – like, for instance, a different period of limitation, as the Umbrella Proceedings Claimants contended had been laid down in the *Volvo* Decision – applied as if the legislation following the 1972 Act had never been passed, even if that rule (viz, the *Volvo* Decision) had been made after the 2018 Act. By way of example, it was suggested by the Scheme Defendants in argument that application of any

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<sup>98</sup> That is not completely accurate. The 1972 Act is actually repealed from exit day, with large parts of EU law being retained on a transitional basis (see paragraphs 39-40 and 42-43 above), with those transitional provisions then being repealed on IP completion day (again, see paragraph 42 above).

<sup>99</sup> The Umbrella Proceedings Claimants said that where the 2018 Act did expressly deal with retrospective aspects, those provisions supported their case.

rule said to arise out of the *Volvo* Decision would be a new general principle of EU law within the meaning of paragraph 2 of Schedule 1 to the 2018 Act,<sup>100</sup> and so not a retained general principle of EU law within the meaning of section 6(7) of the 2018 Act. The Umbrella Proceedings Claimants’ answer was that the provisions of the 2018 Act were simply irrelevant.

63. It is helpful to consider these contentions in the specific context of the causes of action actually advanced by the Umbrella Proceedings Claimants in their pleadings. This we do in Section C(4) below. We then, in Section C(5) below, determine and analyse the contention advanced by the Umbrella Proceedings Claimants.

**(4) Causes of action asserted by the Umbrella Proceedings Claimants**

*(a) Before, and after*

64. It is helpful to consider the operation of the 2018 Act in the context of the specific causes of action advanced by the Umbrella Proceedings Claimants. We do so on a “before” and “after” basis. In other words, we consider first the Umbrella Proceedings Claimants’ claims asserted before exit day (i.e. before 31 January 2020). We then consider the position where those claims had been asserted after exit day but in relation to a cause of action accruing before exit day.

*(b) The claims of the Umbrella Proceedings Claimants*

65. The Umbrella Proceedings Claimants generally<sup>101</sup> began their claims before exit day in the High Court, asserting infringements of Article 101 TFEU (and prior provisions preceding Article 101 TFEU) as well as the Chapter I prohibition.<sup>102</sup>

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<sup>100</sup> The provision is set out in paragraph 48(2) above.

<sup>101</sup> There are many claimants: we are not seeking to be exhaustive.

<sup>102</sup> There is generally also an allegation of infringement of Article 53 of the EEA Agreement. We were not addressed separately in relation to Article 53. If – in light of this Judgment – any points arise specifically in relation to Article 53, we would be minded to receive submissions on paper, and determine the issue on the papers.

These claims were then transferred to the Tribunal pursuant to the rules in the Practice Direction to Part 30 of the Civil Procedure Rules 1998.<sup>103</sup>

66. Although it would not be (and, indeed, is not) evident from the pleadings,<sup>104</sup> the legal basis for the claims would be as follows:

- (1) The claim under Article 101 TFEU<sup>105</sup> would be based on directly effective EU law contained in the TFEU (and litigated as a statutory tort in England<sup>106</sup>) without any implementation in the United Kingdom at all.<sup>107</sup>
- (2) The claim under the Chapter I prohibition<sup>108</sup> would be based on a statutory enactment created by the Competition Act 1998. The Chapter I prohibition closely tracks Article 101 TFEU, but is neither an enforceable EU right nor implemented EU law (as we use those terms). The provision is merely a voluntary reading across into United Kingdom domestic law of the substance of Article 101 TFEU.
- (3) It was for this reason that section 60 of the Competition Act 1998 was originally enacted. Prior to its amendment and subsequent repeal, Section 60 provided as follows:

“(1) The purpose of this section is to ensure that so far as possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.

(2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part

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<sup>103</sup> Paragraphs 8.1ff.

<sup>104</sup> The pleadings rightly plead fact, not law.

<sup>105</sup> Save where the contrary is stated, or the context otherwise requires, what we say about Article 101 TFEU also goes for Article 102 TFEU.

<sup>106</sup> For the sake of simplicity, where different law districts of the United Kingdom are in play, we will refer to the law of England. We will not consider any differences, if any, with the laws of Northern Ireland, Scotland or Wales.

<sup>107</sup> Beyond section 2(1) of the 1972 Act. See that section, and *Crehan*, cited at paragraph 32(1) above.

<sup>108</sup> Section 2 of the Competition Act 1998. Save where the contrary is stated, or the context otherwise requires, what we say about the Chapter I prohibition also goes for the Chapter II prohibition in section 18 of the Competition Act 1998.

and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between –

- (a) the principles applied, and the decision reached, by the court in determining that question; and
  - (b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.
- (3) The court must, in addition, have regard to any relevant decision or statement of the Commission.

...”

- (4) These provisions applied to “any court or tribunal”.<sup>109</sup> The reason section 60 needed to exist is because EU law would not, automatically and as a matter of law, inform the Chapter I prohibition; but, given the fact that the Chapter I prohibition was so obviously drawn from Article 101 TFEU, it would be undesirable for “clear blue water” to subsist as between EU law and the municipal law of the United Kingdom.<sup>110</sup>

67. Turning, then, to a cause of action accruing prior to exit day, but being asserted after IP completion day, it is convenient to begin with the Chapter I prohibition:

- (1) The text of the Chapter I prohibition is – as the Umbrella Proceedings Claimants contend – unaffected by the 2018 Act. Section 2 of the Competition Act 1998 stands unamended since it came into force, although there are proposed amendments arising out of the Digital Markets, Competition and Consumers Bill. However, that is because the Chapter I prohibition is not retained EU law. The Chapter I prohibition obviously does not fall within sections 3 or 4 of the 2018 Act (it is not an enforceable EU right) nor is it within section 2 of the 2018 Act, not being EU-derived domestic legislation within the meaning of section 1B(7) of the 2018 Act.<sup>111</sup>

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<sup>109</sup> Section 60(5).

<sup>110</sup> The position would, of course, be different if the Chapter I prohibition was very differently framed in contrast with Article 101 TFEU – as was the case before the Competition Act 1998 was enacted. In such a case, a provision like section 60 would not be necessary.

<sup>111</sup> See paragraph 44(1) above.

- (2) However, as from IP completion day, section 60 of the Competition Act 1998 was repealed, and (from IP completion day) a new section 60A came into force. These changes were effected by the Competition (Amendment etc.) (EU Exit) Regulations 2019 (the “2019 Regulations”).<sup>112</sup> The new section 60A provides as follows:

“(1) This section applies when one of the following persons determines a question arising under this Part in relation to competition within the United Kingdom –

- (a) a court or tribunal;

...

(2) The person must act (so far as is compatible with the provisions of this Part) with a view to securing that there is no inconsistency between –

- (a) the principles that it applies, and the decision that it reaches, in determining the question, and

- (b) the principles laid down by the Treaty on the Functioning of the European Union and the European Court before IP completion day, and any relevant decision made by that Court before IP completion day, so far as applicable immediately before IP completion day in determining any corresponding question arising in EU law,

subject to subsections (4) to (7).

(3) The person must, in addition, have regard to any relevant decision or statement of the European Commission made before IP completion day and not withdrawn.

(4) Subsection (2) does not require the person to secure that there is no inconsistency with a principle or decision referred to in subsection (2)(b) so far as the principle or decision is excluded from the law of England and Wales, Scotland and Northern Ireland on or after IP completion day.

(5) For the purposes of subsection (4), a principle or decision is to be treated as not excluded from the law of England and Wales, Scotland and Northern Ireland if it is excluded only by virtue of an exclusion or revocation in the Competition (Amendment etc.) (EU Exit) Regulations 2019.

(6) Subsection (2) does not apply so far as the person is bound by a principle laid down by, or a decision of, a court or tribunal in England and Wales, Scotland or Northern Ireland that requires the person to act otherwise.

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<sup>112</sup> SI 2019 No 93, regulations 2, 22 and 23.

- (7) Subsection (2) does not apply if the person thinks that it is appropriate to act otherwise in the light of one or more of the following –
- (a) differences between the provisions of this Part under consideration and the corresponding provisions of EU law as those provisions of EU law had effect immediately before IP completion day;
  - (b) differences between markets in the United Kingdom and markets in the European Union;
  - (c) developments in forms of economic activity since the time when the principle or decision referred to in subsection (2)(b) was laid down or made;
  - (d) generally accepted principles of competition analysis or the generally accepted application of such principles;
  - (e) a principle laid down, or decision made, by the European Court on or after IP completion day;
  - (f) the particular circumstances under consideration.
- (8) In subsection (2)(b), the reference to principles laid down before IP completion day is a reference to such principles as they have effect in EU law immediately before IP completion day, disregarding the effect of principles laid down, and decisions made, by the European Court on or after IP completion day.
- (9) In this section, references to a decision of the European Court or the European Commission include a decision as to –
- (a) the interpretation of a provision of EU law;
  - (b) the civil liability of an undertaking for harm caused by its infringement of EU law.”
- (3) A Chapter I claim accruing and asserted post-IP completion date would be governed by section 60A. But what about the harder case of a claim accruing pre-exit day, but asserted post-IP completion day? This would not be a case of accrued EU law continuing to apply to an accrued cause of action, but rather a case of how or in accordance with which laws municipal or national competition law framed along the lines of Article 101 TFEU is to be applied. Section 60 and section 60A appear to be quite sophisticated choice of law provisions, where the court (including the Tribunal) is directed to the law to apply when determining a dispute



based on the Chapter I prohibition. This view is very much reinforced by the wording of these sections.<sup>113</sup>

68. We turn to the rather different question of a claim under Article 101 TFEU that accrued prior to exit day, but was asserted after IP completion day:

(1) On the basis of the legislation so far considered,<sup>114</sup> there is no doubt that such a claim could be asserted. A claim under Article 101 TFEU existed prior to exit day (by virtue of the 1972 Act) and exists after IP completion day (by virtue of section 4 the 2018 Act). The gap between exit day (when the 1972 Act was repealed) and the commencement of the regime of retained EU law (under the 2018 Act) was governed by sections 1A(1) to (4), which we have described, and which have also now been repealed.<sup>115</sup>

(2) Neither the law applicable during the transition period nor the translation of EU law into retained EU law makes any substantive change to the rights that arise under Article 101 TFEU. As we have noted, none of these provisions is consistent with the language of repeal used by Ms Kreisberger KC in her submissions. It will be recalled that central to her argument was that an accrued right (specifically, a right to make a claim under Article 101 TFEU) was unaffected by the repeal of the 1972 Act by virtue of the provisions in the Interpretation Act 1978. Her analysis was one of repeal. The question that we ask now – and seek to resolve later – is whether that is the correct frame of reference. Of course, the 1972 Act was repealed – the 2018 Act says so. But that repeal affected the “gateway” by way of which enforceable EU rights were capable of application in the United Kingdom. Those rights – deriving from EU law – could not, in themselves, be abrogated. All that could happen was the basis for their application in the United Kingdom could fall away. As it happens, the basis for the application of these rights fell away twice:

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<sup>113</sup> Section 60(2): “At any time when the court determines a question arising under this Part, it must act ...”; and section 60A(2): “The person must act ...”.

<sup>114</sup> We will come to regulation 62 of the 2019 Regulations in due course, as this regulation adds yet further complexity.

<sup>115</sup> See paragraph 42 above.

- (i) First, when the “gateway” by way of which EU law flowed into the legal system of the United Kingdom was replaced by another, as happened during the period of transition.
- (ii) Secondly, when that “gateway” itself was repealed and the place of “pure” EU law taken by retained EU law.

We do not consider that absent a gateway by way of which EU law has application in the United Kingdom or some other means by way of which EU law is translated into domestic law any EU law can survive the repeal of the 1972 Act, not because it is itself repealed, but because it ceases to be relevant. Section 2(1) of the 1972 Act concerns enforceable EU rights as “from time to time created or arising” and those rights are, as we have indicated, ambulatory: a living and breathing body of law. Once the means by way of which that law flows into the United Kingdom’s legal system is cut off, so too is the applicability of that law in the United Kingdom (although not, obviously, amongst Member States still in the EU). That body of law becomes law entirely foreign to the United Kingdom.

- (3) That is why sections 2, 3 and 4 of the 2018 Act exist, namely to replace a “gateway” for EU law, following the United Kingdom’s exit from the EU, with an incorporation into domestic law of that same EU law. There is, thus, no general intention of abrogating rights arising out of EU law. Rather, as the provisions of the 2018 Act suggest, what appears to have occurred is a process of translation, whereby rights that flowed into the law of the United Kingdom by one enactment are now incorporated into the law of the United Kingdom by another, different, enactment and in an altogether different way, transferring sovereignty away from the EU and to the United Kingdom. This is an issue that we return to below: the question is whether this case is – as suggested by the Umbrella Proceedings Claimants – properly to be characterised as one of repeal.

- (4) Of course, once incorporated into EU law, that retained EU law can also be changed by domestic means. Regulation 62 of the 2019 Regulations provides that:

“Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which –

- (a) continue by virtue of section 4(1) of the European Union (Withdrawal) Act 2018; and
- (b) are derived from Articles 101, 102 ... [TFEU] ...

cease to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly) on the coming into force of these Regulations.”

The 2019 Regulations came into force on 31 December 2020, which is IP completion day. Regulation 62 is, obviously, intended to be prospective (“on the coming into force of these Regulations”), but what is retrospective and what is prospective can be difficult to work out. Three scenarios arise in this case:

- (i) A cause of action accruing and asserted on or after IP completion day. Such a claim would obviously be caught by regulation 62.
- (ii) A cause of action accruing and asserted before IP completion day. Such a cause of action – for the reasons we have given – would be a right under retained EU law. That is (rightly) the premiss of regulation 62, that the right continues “by virtue of section 4(1)” of the 2018 Act. We consider (although the point was not argued before us, and without expressing any concluded view) that abrogating such a claim would be retrospective, and would cause section 16 of the Interpretation Act 1978 to be engaged.
- (iii) A cause of action accruing before but asserted after IP completion day. This is a hard case. Our tentative view is that abrogating such a claim would also be retrospective, and would also engage section 16 of the Interpretation Act 1978. But this issue was not argued before us, and we express no final view.

- (5) For completeness, we must also mention paragraph 14(2) in Schedule 4 to the 2019 Regulations, which provides for the following saving and transitional provision:

“Where an EU competition infringement occurs before IP completion day, on and after IP completion day a person may –

- (a) continue any claim (or defence to a claim) in relation to that infringement in proceedings before a court or tribunal in the United Kingdom, and
- (b) make any claim (or defence to a claim) in relation to that infringement in proceedings before a court or tribunal in the United Kingdom which the person could have made before IP completion day.”

The term “EU competition infringement” is defined in paragraph 13A in Schedule 4 as including “the prohibition in Article 101(1) of the Treaty Functioning of the European Union” and “the prohibition in Article 102 of that Treaty”. As we have described, and for the reasons we have given, post-IP completion day, rights arising out of these provisions are now given effect in the United Kingdom not as a part of EU law but have been translated into the law of the United Kingdom. That, of course, gives rise to a labelling problem: how to differentiate between a claim based on Article 101 TFEU or Article 102 TFEU under EU law or a claim based on Article 101 TFEU or Article 102 TFEU as translated into the law of the United Kingdom. In the case of paragraph 14 in Schedule 4, the latter and not the former is obviously meant, but (as a counsel of perfection) that could have been made clearer. In any event, this paragraph does not change the views we have expressed so far.

**(5) Analysis and conclusion**

69. We have taken some time to set out the context in which the Umbrella Proceedings Claimants’ contentions arise, because those contentions can only be considered in that broader context. We reject the contention advanced by the Umbrella Proceedings Claimants that causes of action accruing before exit day are governed by and subject to EU law as it stood prior to the enactment of the 2018 Act for the following reasons:

- (1) The contention is, at the most fundamental level, inconsistent with what Parliament intended by the United Kingdom's exit from the EU as set out in the relevant enactments. That exit involved, from a certain point in time (that is, IP completion day) a transition of the United Kingdom from a Member State of the EU (subject to the burdens and benefits of that membership) to a third country outside the EU (not subject to those burdens and benefits).
  
- (2) The litigation of claims arising under Article 101 TFEU, including those claims accruing and asserted before exit day, must reflect this reality. The United Kingdom's transition from Member State to third country means that the entire legal order has undergone a paradigm shift:
  - (i) EU law is no longer supreme save to the extent willed by the Parliament of the United Kingdom and save to the extent required by the treaties implementing the United Kingdom's withdrawal from the EU on the plane of international law.
  
  - (ii) As a direct result of this, it is no longer possible (whether the Umbrella Proceedings Claimants' claims arise under the rights conferred by the 1972 Act or the 2018 Act) to make a reference to the CJEU for a preliminary reference. That impossibility exists whatever the Parliament of the United Kingdom might choose to say, because the CJEU is no longer<sup>116</sup> competent to hear such matters.
  
  - (iii) If the Umbrella Proceedings Claimants are right about the existence of a class of law such as "accrued EU law rights", an immediate and unavoidable procedural vacuum is created. The point was put by the President to Ms Kreisberger KC, hypothetically, in argument:<sup>117</sup>

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<sup>116</sup> Save in the very limited instances where that jurisdiction is preserved (*i*) on the plane of international law, by treaty, (*ii*) by the law of the EU and/or (*iii*) by the law of the United Kingdom.

<sup>117</sup> Transcript of Hearing (Day 3)/p.69-70.

“... Let’s suppose what you call an accrued claim, what I would say is a cause of action asserting a pre-IP completion day right, and it comes to trial post-IP completion date, and the Judge trying it scratches his or her head , and says:

“You know, this is a really hard question ... if only I could make a reference. But I can’t, because I can’t, so I’ll do my best and I’ll decide the matter by reference to what I understand EU law to be as at the time the right was extant.”

So, the Judge does his or her best, and by a coincidence that might be regarded as fortunate or unfortunate, France has made a preliminary reference on exactly the same point to the [CJEU], and a week after judgment has been handed down, in a preliminary reference an answer is given which is completely contradictory to what the Judge has decided in this particular case. So the Judge would have reached one conclusion, did reach one conclusion, and would have reached a different conclusion had they appreciated what the [CJEU] would have said had they regarded it as binding.

In those circumstances, what does the Court of Appeal do?”

Ms Kreisberger KC’s answer was that a Judge must apply the substantive law as it applied to the facts at the time:<sup>118</sup>

“... in relation to the President’s question on the Judge who makes a decision and then sees a judgment a week later, the position is the ordinary position, which is the Judge must apply the substantive law as it applied to the facts at the time, so substantive law. Procedural rules operate differently. The procedural rules are, in the usual way, applied as they are at the moment of decision. That’s the classic distinction. And if it turns out that the law changes one week later, that will need to be sorted out by the Court of Appeal, and we’ve seen that happen in cases. It’s an intervening judgment, and it will need to be treated as such.”

- (iv) If we may respectfully say so, Ms Kreisberger KC’s answer captures exactly why “accrued EU law rights” are no such thing and do not in law exist. Aside from the absurdity of the courts of this jurisdiction being left in a state of unresolvable uncertainty as to the very claims coming before them, the point about the 2018 Act is that it leaves substantive rights unchanged but alters, quite fundamentally, the procedural manner in which such rights are enforced. The relevance of evolving EU law is constrained, such that the development of those substantive rights – even if

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<sup>118</sup> Transcript of Hearing (Day 3)/p.78.

they accrued (but were not resolved) prior to the United Kingdom's exit from the EU – becomes a matter not for the CJEU but for the courts of this jurisdiction, in the manner described in sections 5 and 6 of the 2018 Act.

- (v) Further, the existence of parallel jurisdictions for cases in which accrued rights appear and cases which arise only after exit day can only be a recipe for confusion, not least where claims straddle exit day and/or IP completion day – for example, where there is a continuing infringement covering both before and after that date. It seems difficult to accept that can be the intention of Parliament, unless there is no other logical reading of the 2018 Act.
- (3) To put the same point differently, this is not in reality a case which turns on section 16 of the Interpretation Act 1978. Sections 16(1)(c) and (e) preserve rights that have accrued under a repealed enactment (to use looser language than section 16 itself uses). Whilst the 1972 Act has been repealed, that repeal affects only the “gateway” by which substantive rights came into the law of the United Kingdom. The rights themselves (by which we mean not merely the directly effective Article 101 TFEU but any accrued claims under that directly effective provision) are preserved by section 4(1) of the 2018 Act, which deals expressly with this case. Although we have set out this provision once before, it is sufficiently important for us to do so again:

“Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP completion day –

- (a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and
- (b) are enforced, allowed and followed accordingly,

continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).”

- (4) The substantive law is unchanged; and rights accruing in respect of alleged past infringements of that substantive law are similarly

unchanged. All that has happened is that they have been translated into a new constitutional environment, where the supremacy of EU law only holds sway to the extent laid down by Parliament. Parliament has, in section 6 of the 2018 Act, made absolutely clear what the position is. Thus, even if section 16 of the Interpretation Act 1978 needed to be satisfied (and we do not think it does need to be), any requirement for clear evidence of intention to remove those aspects of substantive rights which are being affected in the translation process is satisfied. In addition to the provisions referred to above, we also refer to section 6(1) of the 2018 Act:

“A court or tribunal –

- (a) is not bound by any principles laid down, or any decisions made, on or after IP completion day by the European Court, and
- (b) cannot refer any matter to the European Court on or after IP completion day.”

The Umbrella Proceedings Claimants’ only answer to this was to say that accrued EU law rights were not retained EU law rights. For the reasons we have given, we consider that contention to be unsustainable.

- (5) The notion of “accrued EU law” as a body of law separate from “retained EU law” is not one that has been recognised by the courts of the United Kingdom, although to be fair the point does not appear to have been argued, and certainly not in the terms and with the granularity it was argued before us. Ms Kreisberger KC was driven to say that at least the reasoning of a number of cases was wrong, or incomplete, and she relied upon hints in other cases to suggest the existence of a category of “accrued EU law rights”. We were not much assisted by this case law – because the point argued before us was not there under consideration – but because these cases were cited to us we briefly deal with them now:

- (i) In *Lipton v. BA City Flyer Ltd*,<sup>119</sup> the Court of Appeal considered how an EU Regulation came to be part of domestic law after IP

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<sup>119</sup> [2021] EWCA Civ 454.



completion day.<sup>120</sup> Green LJ held that the Regulation was translated into the law of the United Kingdom by way of section 3 of the 2018 Act,<sup>121</sup> and that the principle of the supremacy of EU law applied pursuant to and according to the terms of section 5 of the 2018 Act.<sup>122</sup> Green LJ then considered the relevance of CJEU judgments to the consideration of the Court, and said this:<sup>123</sup>

“Section 6(1) is concerned with the interpretation of retained EU law. It deals both with the binding effect of EU law and with the non-binding persuasive effects of such law. Under the section the English Court is not bound by any principles laid down, or any decisions made by, the CJEU on or after IP completion day and may not refer any matter to the European Court. However, the court can “*have regard to*” anything done on or after IP completion day by the CJEU or another EU entity or the EU “*so far as it is relevant to any matter before the court or tribunal*”.”

Green LJ thus made no room for “accrued EU law rights”, and Ms Kreisberger KC submitted that he was (in his exposition) wrong to do so. We reject that contention: Green LJ’s analysis aligns precisely with our own.<sup>124</sup>

- (ii) In *JJH Enterprises Ltd v. Microsoft Corp*,<sup>125</sup> Picken J referred to the “accrued EU law rights” argument. But that was in the context of a strike-out/reverse summary judgment application, and Picken J did not endorse (although neither did he reject) the argument. The case takes us no further.
- (iii) In *News Corp UK & Ireland Ltd v. HMRC*,<sup>126</sup> Lord Hamblen and Lord Burrows said this at the very outset of their judgment:<sup>127</sup>

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<sup>120</sup> At [4] (*per* Coulson LJ) and [52] to [62] (*per* Green LJ).

<sup>121</sup> At [57] to [60]. The effect of section 3 is described in paragraph 44(2) above.

<sup>122</sup> At [61] to [62].

<sup>123</sup> At [65]. Section 6(1) is (in part) quoted in paragraph 69(4) above.

<sup>124</sup> There was even briefer consideration and articulation of the same point in *Jersey Choice Limited v. HM Treasury*, [2021] EWCA Civ 1941 at [20]ff. Exactly the same point can be made in relation to this decision. See also *Tower Bridge GP Limited v. HMRC*, [2022] EWCA Civ 998 at [108] and [111] (*per* Lewison LJ); *Secretary of State for Work and Pensions v. Beattie*, [2022] EAT 163 at [82]ff (*per* Eady J).

<sup>125</sup> [2022] EWHC 929 (Comm) at [46].

<sup>126</sup> [2023] UKSC 7.

<sup>127</sup> At [7]. Emphasis added.

“It is common ground between the parties that the withdrawal of the UK from the European Union (“EU”) has no impact at all on the issues in this case. While the UK was part of the EU, VAT was governed by EU Directives and those Directives were implemented in the UK by domestic statutes, in particular by the VAT Act. By reason of the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020,<sup>128]</sup> the relevant EU law and EU derived domestic legislation is “retained EU law” after the implementation completion day (31 December 2020) **but, in any event, the period with which this case is concerned expired before the implementation completion date.**”

Ms Kreisberger KC placed considerable stress on the emphasised words, which she suggested drew precisely the line between “accrued EU law rights” and “retained EU law rights” that she was contending for. We see her point, and had the Supreme Court treated a post-IP completion day decision of the CJEU as binding then we would have had to consider this decision with extreme care. On that basis, the Supreme Court’s decision would no doubt have formed the centre-piece of Ms Kreisberger KC’s submissions, as binding us in this case. But Ms Kreisberger KC did not go so far, and rightly so. No such authority was referred to by the Supreme Court, and we take this passage as amounting to no more than a loosely worded statement that – in this case – there was no difference between the law of the United Kingdom post-IP completion day and the law as it stood immediately before exit day.

- (iv) *Balogun v. Secretary of State for the Home Department* (“*Balogun*”)<sup>129</sup> was a decision of the Court of Appeal handed down on 19 April 2023 (i.e. very shortly before the oral hearing in this case). At the hearing, Ms Kreisberger KC was only able to make very brief submissions, but she suggested that the decision was drawing a distinction between “accrued EU law rights” and “retained EU law rights”. The Scheme Defendants –

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<sup>128</sup> This enactment (the “2020 Act”) substantially amended the 2018 Act. We have, in the Judgment, been referring to the 2018 Act as amended by the 2020 Act. In other words, we are talking about the same enactments.

<sup>129</sup> [2023] EWCA Civ 414.

entirely reasonably – sought permission to respond to this point in writing, and we received a series of notes on, *inter alia*, the (non-)significance of *Balogun* after oral submissions had concluded. The Scheme Defendants’ first note concluded by suggesting that the correct analysis of *Balogun* “illustrates the perils – particularly extreme in this field of complex statutory provision – of taking single paragraphs from Court judgments without adequate consideration of the different factual and legal contexts, the arguments in fact raised or the true issues determined”.<sup>130</sup> We substantially agree with this. *Balogun* concerned and considered the construction of altogether different statutory and EU provisions, without in any way touching upon the central question arising before us, namely whether the repeal of the 1972 Act brought into play section 16 of the Interpretation Act 1978 in the manner suggested by the Umbrella Proceedings Claimants. That is the critical question, not the manner and extent to which pre-exit day EU-law has been translated into post-IP completion day United Kingdom law.<sup>131</sup> *Balogun* says nothing about this. Although we are extremely grateful to the parties for their work in relation to this case, we say no more about it other than to record that it assists neither side’s contentions.

(6) We were also taken – and ourselves took the parties – to a number of other points within the statutory scheme which, so it was suggested, pointed to the separate existence of “accrued EU law rights”. Thus:

(i) Paragraph 38 of Schedule 8 to the 2018 Act provides:

“Section 4(2)(b) does not apply in relation to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they are of a kind recognised by a court or tribunal in the United Kingdom in a case decided on or after IP completion day but begun

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<sup>130</sup> Scheme Defendants’ first note at [34].

<sup>131</sup> The essence of Ms Kreisberger KC’s contentions was that there was no translation at all, because there was a repeal, which preserved accrued rights, including rights that had accrued under EU law.

before IP completion day (whether or not as an essential part of the decision in the case).”

We described the effect of section 4(1) in paragraph 44(3) above. The section provides for the translation of rights, powers, etc, recognised immediately before IP completion day into the law of the United Kingdom post-IP completion day (as we have described). Section 4(2)(b) states that section 4(1) does not apply to any rights, powers, etc arising “under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before IP completion day (whether or not as an essential part of the decision in the case)”. Thus, certain rights are expressly not translated and – even if they had accrued and been asserted – would be lost. Paragraph 38 of Schedule 8 deals with that case, and ensures that where those rights have been asserted prior to IP-completion day, they are not lost. Paragraph 38 of Schedule 8 is, thus, entirely consistent with the scheme of the legislation that we have described.<sup>132</sup>

(ii) Paragraph 39(1) of Schedule 8 to the 2018 Act provides:

“Subject as follows and subject to relevant separation agreement law (for which see section 7C) and any provision made by regulations under section 23(6) of this Act or section 41(5) of the European Union (Withdrawal Agreement) Act 2020, section 5(4) and paragraphs 1 to 4 of Schedule 1 apply in relation to anything occurring before IP completion day (as well as anything occurring on or after IP completion day).”

We set out the provisions of section 5(4) in paragraph 45(2) above. This subsection removes the Charter of Fundamental Rights from the domestic law of the United Kingdom. Paragraphs 1 to 4 of Schedule 1 to the 2018 Act make clear that certain rights are not part of the domestic law of the United Kingdom, namely: the right to contend that an EU instrument

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<sup>132</sup> To be clear, none of the rights asserted by the Claimants fall within the scope of this provision.

was invalid (paragraph 1 of Schedule 1); general principles of EU law not recognised as a general principle before IP completion day (paragraph 2 of Schedule 1); rights of action based on a failure to comply with any of the general principles of EU law (paragraph 3 of Schedule 1); and the right to claim damages in accordance with the rule in *Francovich* (paragraph 4 of Schedule 1). These provisions sit in the framework of the 2018 Act as follows:

- (a) As we have described, the 2018 Act causes rights incorporated into the law of the United Kingdom by one enactment (the 1972 Act) to be translated into that law by a different enactment (namely the 2018 Act).<sup>133</sup> That is the effect of sections 2, 3 and 4 of the 2018 Act.<sup>134</sup>
- (b) If that translation were unqualified then – assuming reciprocity from the EU<sup>135</sup> – the United Kingdom’s exit from the EU would be of limited legal significance. However, the translation is very far from unqualified. At its most basic level, the translation moves the corpus of EU law from the jurisdiction of the courts of the EU and places them within the jurisdiction of the courts of the United Kingdom. In this, the 2018 Act operates very much like the act of secession that it (in reality) is.
- (c) The 2018 Act does more, however, than simply render EU law subject to an exclusively United Kingdom jurisdiction. The translation is qualified in a series of substantive respects, some of which have a retrospective quality, and some of which do not. The provisions that we have referred to (section 5(4) and paragraphs 1 to 4 of Schedule 1) all affect the translation of EU law in a

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<sup>133</sup> See, in particular, paragraph 68(2) above.

<sup>134</sup> Described in paragraph 44 above.

<sup>135</sup> E.g. in accepting references from United Kingdom courts.

manner that subtracts from the rights that would have existed absent the United Kingdom's exit from the EU. The question is whether that subtraction is prospective or retrospective and – if retrospective – the nature of that retrospectivity.

- (d) Paragraph 39(1) of Schedule 8 makes clear that section 5(4) and paragraphs 1 to 4 of Schedule 1 are aggressively retrospective, in that rights which accrued prior to IP completion day are abrogated. That is the very hallmark of retrospectivity, and the meaning of the words shall “apply in relation to anything occurring before IP completion day”.

Of course, that retrospective abrogation is itself qualified by paragraphs 39(2) and 39(3), to which we now turn.

- (iii) Paragraph 39(2) of Schedule 8 makes clear that section 5(4) and paragraphs 1 to 4 of Schedule 1 “do not affect any decision of a court or tribunal made before IP completion day”. In other words, the decision of a court of competent jurisdiction stands.
- (iv) Paragraph 39(3) of Schedule 8 provides:

“Section 5(4) and paragraphs 3 and 4 of Schedule 1 do not apply in relation to any proceedings begun, but not finally decided, before a court or tribunal in the United Kingdom before IP completion day.”

Paragraph 39(3) makes clear that accrued rights provided that they have been asserted are not affected.

- 70. This scheme of adjustments is in our view consistent with the underlying scheme of translation of accrued rights which existed prior to exit day and/or IP completion day into rights given effect to by section 4 of the 2018 Act, with specific adjustments to deal both with removal of substantive rights prospectively (section 5(4)) and retrospectively (paragraph 39(1) of Schedule 8, as qualified by paragraphs 39(3) and (4)).

71. We accept that the analysis has many intricate aspects. However, we consider there to be a consistent thread of reasoning running through the complexity and we conclude that the interpretation set out above is considerably preferable to the one advanced by the Umbrella Proceedings Claimants, which seems to cut across the whole purpose of the 2018 Act and to create a regime which is both unreasonably complex and uncertain, which we anticipate Parliament would have wished to avoid.
72. For these reasons we conclude that even if the *Volvo* Decision had unequivocally required that a limitation period must not start to run before the cessation of an infringement (and, for the reasons we have given, that is not the holding of the *Volvo* Decision) we consider that we would not be bound to follow that decision.
73. Pursuant to section 6(2) of the 2018 Act, we could still “have regard” to the *Volvo* Decision. In this case, we do not consider that the *Volvo* Decision should lead us to interpret the principle of effectiveness as incorporating a Cessation Requirement into the English limitation rules. Our reasons for this are essentially the same as those set out at paragraph 28 above. Fundamentally, the principle of effectiveness requires that the exercise of the right to claim compensation under Article 101 TFEU should not be rendered practically impossible or excessively difficult. In our judgment, that principle is satisfied by what we have called the Knowledge Requirement and does not require the imposition of a Cessation Requirement, particularly as regards claims which do not concern a secret cartel. Even if the *Volvo* Decision had held what the Claimants contended for, introducing a Cessation Requirement into the limitation scheme that operates in England would do such violence to a well-worked-out scheme that we regard this as inappropriate and unnecessary.

#### **D. THE SECTION 60A ARGUMENT**

74. The Scheme Defendants contended that application of the *Volvo* Decision (assuming it held what the Claimants contended it held) was precluded by the operation of section 6 of the 2018 Act, which provided a “complete answer”,

and that what we term the “section 60A argument” was “only of second order significance”.<sup>136</sup>

75. For the reasons we have given:

- (1) We consider that the *Volvo* Decision does not stand for the proposition relied upon by the Claimants and that the first question above is answered in the negative;
- (2) Even if we are wrong, and the first question is answered in the positive, the Tribunal is neither obliged to follow the decision nor should the decision be treated as persuasive.

76. We therefore agree that the section 60A argument – whereby the putative effect of the *Volvo* Decision could be avoided by virtue of section 60A of the Competition Act 1998 – does not arise. If, however, it were necessary for the Scheme Defendants to rely upon the point, we are in no doubt that it would fail:

- (1) The original (and now repealed) section 60 was intended to keep municipal competition law in line with EU competition law. The point of the provision – as we described in paragraph 66 above – was to keep the Chapter I and Chapter II prohibitions in line with EU law, and specifically Articles 101 and 102 TFEU.
- (2) Section 60 did not extend to Articles 101 and 102 TFEU. These are (or were, prior to the United Kingdom’s departure from the EU) autonomous provisions of EU law, where it is wrong for a Member State to seek to confuse the position as regards directly effective EU law by separately implementing it. In essence, directives must be implemented; regulations, and directly effective treaty provisions, must not.<sup>137</sup>

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<sup>136</sup> Scheme Defendants’ first note at [2].

<sup>137</sup> It is a general principle of EU law that national implementing measures are improper, unless necessary. That is in order to ensure that the EU nature of the provision is not (or, in the case of the United Kingdom, was not) obscured: see, for instance, Hartley, *The Foundations of European Union Law* (8<sup>th</sup> edn, 2014) at 216.



- (3) There can thus be no question of section 60 applying to proceedings commenced in the High Court whereby a claimant advanced a claim under (say) Article 101 TFEU. Issues regarding such claims are not “questions arising under this Part” (to quote from section 60) and – much more importantly – questions of consistency with EU law could not arise: the High Court would be applying EU law, nowhere incorporated into the law of the United Kingdom save through section 2(1) of the 1972 Act.
- (4) The same is true of Article 101 TFEU claims in the Tribunal. True it is that, prior to the amendments made by the 2019 Regulations, section 47A of the Competition Act 1998 gave the Tribunal jurisdiction to hear (amongst other things) claims concerning Article 101 TFEU. But section 47A (pre-31 December 2020) did nothing more than confer a statutory jurisdiction to hear such claims on the Tribunal. The law upon which the Tribunal decided such claims was, until exit day, EU law unintermediated by any implementing legislation. In short, even as regards Article 101 TFEU claims before the Tribunal, no “questions arising under this Part” do, in fact, arise.
- (5) Part I of the Competition Act 1998 is, of course, the statutory source for the Chapter I and Chapter II prohibitions, and section 60 existed to ensure that there was as little divergence between these prohibitions and their EU law counterparts (Articles 101 and 102 TFEU) as possible.
- (6) It follows that if, prior to exit day, the CJEU had materially affected the operation of, e.g. Article 101 TFEU, then in any proceedings concerning the Chapter I prohibition, both the High Court and the Tribunal would have sought to resolve “questions arising under this Part” in accordance with the provisions of section 60. That is because “this Part” refers to Part 1 of the Competition Act 1998 which is the part of the statute that enacts the Chapter I prohibition (and the Chapter II prohibition).
- (7) Section 60A is similarly limited to “a question arising under this Part”, which, as for the previous section 60, does not include Articles 101 and

102 TFEU, irrespective of whether those provisions were converted into retained EU law by virtue of the 2018 Act.

**E. “LEVELLING UP”: THE SIGNIFICANCE OF THE SCOTTISH LAW OF LIMITATION**

77. The Merricks Class comprise a number of members whose claims are governed by the law of Scotland and whose claims are therefore subject to the Scottish law of limitation (better “prescription”, but we will – consistently in this judgment – refer to “limitation”).
78. The Tribunal has already ruled as to the limitation periods applicable to Scottish claims in *Merricks v. Mastercard Incorporated*,<sup>138</sup> and the Tribunal’s determinations in this regard are not under appeal and are final – at least as regards the Merricks Class. Without going into the detail, it was common ground that the Scottish law of limitation, as it has been held to apply to the Scottish claims within the Merricks Class, is more generous than the English law of limitation, as it applies to the English claims within the Merricks Class.<sup>139</sup>
79. Mr O’Neill KC, for the Merricks Class, contended that the difference in treatment needed to be justified and that inconsistent treatment of persons in the same position was, *prima facie*, indefensible. This inconsistent treatment required that the English law of limitation ought to be disapplied so as to put those members of the Merricks Class subject to the less generous English rules of limitation in the same position as their Scottish law counterparts. In short, “levelling up” was required, unless a differentiation could be justified which – *pace* the Merricks Class – it could not be.
80. We reject this contention as unarguable:

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<sup>138</sup> [2023] CAT 15.

<sup>139</sup> We appreciate that there are open issues to be resolved regarding this point. We have no intention of trespassing into them. But the broad proposition that Scottish law is more generous than English law we take as read for the sake of argument.

- (1) We accept that it is a general principle of EU law (just as it is of the law of the United Kingdom) that like cases should be treated alike, and that all are entitled to equal treatment and non-discrimination before the law.<sup>140</sup> The point is put very well in *Edward and Lane on European Union Law*:<sup>141</sup>

“The general principle of equality forms ‘part of the foundation’ of the Union, now ‘enshrined in Articles 20 and 21 of the Charter of Fundamental Rights’. Put concisely, the principle of equal treatment, or non-discrimination, requires that equal, comparable, or similar situations not be treated differently, and different situations not be treated alike, unless there is in either case objective justification for doing so. ...”

- (2) But that does not mean that the law needs to be the same the world over. The whole point of constitutional autonomy – whether between nation states or different law districts within nation states – is that law districts are entitled to exercise the autonomy granted them by international and/or national constitutional law. That is all that the laws of Scotland and England have done here.

- (3) In *R (on the application of A and B) v. Secretary of State for Health*,<sup>142</sup> Lord Reed stressed the importance of diversity (and so “discrimination”) in the context of the devolved constitutional structure of the United Kingdom. He cited various authorities to this effect with approval. We will content ourselves with his citation from Judge Matscher’s judgment in *Dudgeon v. United Kingdom*:<sup>143</sup>

“The diversity of internal legislation in a federal state can never, in itself, constitute discrimination, and it is unnecessary to justify it. To claim the contrary would be to mistake totally the very essence of federalism.”

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<sup>140</sup> We initially thought that the argument was based on the principles of effectiveness and or equivalence, but neither of these points was maintained, nor are they arguable. There is no question that both the English and Scottish rules are effective (subject to arguments later about notice under the Limitation Act) and there is no question that the enforcement of EU law rights in England are equivalently treated as the enforcement of English law rights. Indeed, the distinction between English and Scottish law is altogether irrelevant to both of these principles.

<sup>141</sup> Edward and Lane, *European Union Law* (1<sup>st</sup> edn, 2013) at [6.125].

<sup>142</sup> [2017] UKSC 41 at [37]ff.

<sup>143</sup> Cited by Lord Reed at [40]. *Dudgeon*’s citation is (1981) 4 EHRR 149. But it is, for these purposes, the judgment of Lord Reed that we are principally relying on for a statement of what ought to be obvious.

81. We reject the Merricks Class’ contention. We would also say that if arguable, the proposition would give rise to unresolvable difficulties. Whilst it might be said that the members of the Merricks Class asserting English law claims have a right to be “levelled up”, so too do the Scheme Defendants resisting the Scottish law claims against them have a right to be similarly, but inconsistently, “levelled up”, by being able to assert in response to Scottish claims an English-law defence of limitation. It is actually impossible to resolve these inconsistent “rights” because they arise out of law properly made in each of the two relevant jurisdictions. (We should say that this point was not put in this way by us in argument, and we should, therefore, make clear that our answer would have been the same, even if this point had not occurred to us. We mention it because it arises directly out of the deference that needs to be accorded to different, but equally constitutionally valid, legal systems, and for that reason we consider that the point should not be unarticulated.)

## **F. ANSWERS TO THE QUESTIONS BEFORE US**

82. For the reasons given in this Judgment, we answer the questions put to us, and set out in paragraph 8 above, as follows:

- (1) *Question 1.* The *Volvo* Decision does not require that as a matter of EU law, limitation periods for competition law infringements cannot start to run before the time when the infringement of competition law has ceased.
- (2) *Question 2.* There is such a principle in EU law, but we do not say anything at all about its extent, nor as to whether the law of the United Kingdom (and specifically) England is or is not consistent with that principle. Such questions are for another day.
- (3) *Question 3.* Given the answers to Question 1, this question does not really arise. However, assuming that the answer to Question 1 was “Yes”, then the answer to this question would be that the Tribunal is not bound by the *Volvo* Decision nor should it be followed in this respect.

(4) *Question 4.* Subject to our qualified answer to Question 2, our answers to Questions 1 and 3 mean that there is no effect on either the English law limitation regime nor the Scots law prescription regime. Question 5 – as we call it – resolves accordingly.

83. Save to the extent stated in the concurring judgment of Mr Justice Roth (which follows below), this Judgment is unanimous.

## **G. CONCURRING JUDGMENT OF MR JUSTICE ROTH**

### **(1) Introduction**

84. The Tribunal is unanimous in its answers to the questions before us. The judgment of the Tribunal is also unanimous as regards the effect and application of the *Volvo* Decision, along with the dismissal of what we have called the “levelling up” argument advanced for the Merricks Class. That effectively determines the limitation questions now before the Tribunal. However, on the distinct issue regarding the implications of the Brexit legislation, which arises only if we are wrong in our interpretation of the *Volvo* Decision, while I agree on the outcome I have not found that an easy matter to resolve and reach my conclusion by reasoning that is somewhat different from that of the majority. Given the potential significance of this issue, I therefore set out my reasoning in this separate judgment.

85. Like the majority, I shall refer to the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020), compendiously as “the 2018 Act”.

### **(2) EU law in the UK prior to Brexit**

86. It is appropriate at the outset to consider the nature of EU law in the UK prior to Brexit, or more specifically prior to Implementation Period completion day (“IPCD”) when the changes made by the 2018 Act took full effect.

87. EU law entered into the legal order of the UK by means of the European Communities Act 1972 (“the 1972 Act”), and in particular by s. 2(1) and (2). As subsequently amended, they provide, insofar as relevant:

“(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression “enforceable EU right” and similar expressions shall be read as referring to one to which this subsection applies.

(2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision—

(a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

(b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;

and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the EU and to any such obligation or rights as aforesaid.  
...

88. The operation and effect of these provisions was comprehensively summarised by the majority of the Supreme Court in its seminal judgment in the first *Miller* case, *R (on the application of Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5 (“*Miller no. 1*”) at [63]-[64]:

“63. Under the terms of the 1972 Act, EU law may take effect as part of the law of the United Kingdom in one of three ways. First, the EU Treaties themselves are directly applicable by virtue of section 2(1). Some of the provisions of those Treaties create rights (and duties) which are directly applicable in the sense that they are enforceable in UK courts. Secondly, where the effect of the EU Treaties is that EU legislation is directly applicable in domestic law, section 2(1) provides that it is to have direct effect in the United Kingdom without the need for further domestic legislation. This applies to EU Regulations (which are directly applicable by virtue of article 288 of the TFEU). Thirdly, section 2(2) authorises the implementation of EU law by delegated legislation. This applies mainly to EU Directives, which are not, in general, directly applicable but are required (again by article 288) to be transposed into national law. While this is an international law obligation, failure of the United Kingdom to comply with it is justiciable in domestic

courts, and some Directives may be enforced by individuals directly against national governments in domestic courts. Further, any serious breach by the UK Parliament, government or judiciary of any rule of EU law intended to confer individual rights will entitle any individual sustaining damage as a direct result to compensation from the UK government: *Brasserie du Pêcheur SA v Germany*; *R v Secretary of State for Transport (Ex p Factortame Ltd) (No 4)* (Joined Cases C-46/93 and C-48/93) [1996] QB 404 (provided that, where the breach consists in a court decision, the breach is not only serious but also manifest: *Köbler v Austria* (Case C-224/01) [2004] QB 848).

64. Thus, EU law in EU Treaties and EU legislation will pass into UK law through the medium of section 2(1) or the implementation provisions of section 2(2) of the 1972 Act, so long as the United Kingdom is party to the EU Treaties. Similarly, so long as the United Kingdom is party to the EU Treaties, UK courts are obliged (i) to interpret EU Treaties, Regulations and Directives in accordance with decisions of the Court of Justice, (ii) to refer unclear points of EU law to the Court of Justice, and (iii) to interpret all domestic legislation, if at all possible, so as to comply with EU law (see *Marleasing v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135). And, so long as the United Kingdom is party to the EU Treaties, UK citizens are able to recover damages from the UK government in cases where a decision of one of the organs of the state based on a serious error of EU law has caused them loss.”

The final sentence of [64] is a reference to the potential to recover damages under the rule in the *Francovich* case.

89. Then the Supreme Court majority judgment significantly said this:

“65. In our view, then, although the 1972 Act gives effect to EU law, it is not itself the originating source of that law. It is, as was said on behalf of the Secretary of State echoing the illuminating analysis of Professor Finnis, the “conduit pipe” by which EU law is introduced into UK domestic law. So long as the 1972 Act remains in force, its effect is to constitute EU law an independent and overriding source of domestic law.”

### (3) The 2018 Act

90. Section 1 of the 2018 Act repealed the 1972 Act completely. Accordingly, subject only to transitional provisions over the implementation period up to IPCD, which are not relevant for present purposes, the “conduit pipe” was effectively blocked.

91. However, over the almost four decades of the UK’s membership of the EU, EU law had come to apply in the UK in a multitude of respects over a vast number of fields. It was wholly impractical prior to exit day as originally envisaged (i.e. 31 January 2020) or then prior to IPCD (i.e. 31 December 2020), to go through

each of these many pieces of legislation, whether directly applicable EU legislation or domestic implementing legislation, and decide whether and in what form it should be reintroduced as domestic UK legislation. It was also necessary to achieve legal certainty. Accordingly, the 2018 Act took the approach of, in effect, adopting the entire body of EU law in all its manifestations as domestic law, subject only to very specific exceptions, while giving the Government broad powers to remove or adapt specific provisions of that new domestic law by secondary legislation. This approach is manifest from ss. 2-5 and 8 of the 2018 Act.<sup>144</sup>

92. Accordingly:

- (1) Section 2 provides that EU-derived domestic legislation as it had effect before IPCD, continues to have effect in domestic law on and after IPCD;
- (2) Section 3 provides that direct EU legislation, so far as operative immediately before IPCD, forms part of domestic law on and after IPCD;
- (3) Section 4 is headed: “Savings for rights etc. under section 2(1) of the ECA”. Sub-section (1) states:

“(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP completion day—

(a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and

(b) are enforced, allowed and followed accordingly,

continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).”

93. I think that these provisions effectively cover the three ways in which EU law could previously take effect in the UK, albeit in the reverse order from the enumeration in *Miller no. 1*. Thus s. 2 covers EU Directives transposed into

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<sup>144</sup> All statutory references below are to the 2018 Act, save as otherwise stated.



UK law, s. 3 covers EU Regulations and s. 4 covers directly applicable Treaty rights and obligations. Those would include the direct rights flowing from the competition provisions of Articles 101 and 102 TFEU, and, for example, Article 49 on the freedom of establishment and Article 57 on the right to equal pay without discrimination on the ground of sex.<sup>145</sup>

94. As noted above, there are express exceptions from this wholesale adoption. Sections 2(3), 3(5) and 4(3) all provide, in identical language:

“This section is subject to section 5 and Schedule 1 (exceptions to savings and incorporation) and section 5A (savings and incorporation: supplementary).”

95. Section 5(4) notably states that:

“The Charter of Fundamental Rights is not part of domestic law on or after IP completion day.”

And s. 5(6) gives effect to Schedule 1, which, *inter alia*, provides, by para 3, that there is no right of action in domestic law on or after IPCD based on a failure to comply with any of the general principles of EU law; and by para 4, that there is no right in domestic law on or after IPCD to damages in accordance with the rule in *Francovich*.

96. The body of EU law thereby adopted into domestic law, or (in the case of s. 2) maintained as part of domestic law, was designated compendiously by s. 6(7) as “retained EU law”. The other definitions in that sub-section are as follows:

““retained case law” means—

- (a) retained domestic case law, and
- (b) retained EU case law;

“retained domestic case law” means any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom, as they have effect immediately before IP completion day and so far as they—

- (a) relate to anything to which section 2, 3 or 4 applies, and
- (b) are not excluded by section 5 or Schedule 1,

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<sup>145</sup> See the illustrative list of the provisions of the TFEU which the Government considers fall within s. 4 in the *Explanatory Notes* to the 2018 Act, at para 94.

(as those principles and decisions are modified by or under this Act or by other domestic law from time to time);

“retained EU case law” means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before IP completion day and so far as they—

- (a) relate to anything to which section 2, 3 or 4 applies, and
- (b) are not excluded by section 5 or Schedule 1,

(as those principles and decisions are modified by or under this Act or by other domestic law from time to time);

...

“retained general principles of EU law” means the general principles of EU law, as they have effect in EU law immediately before IP completion day and so far as they—

- (a) relate to anything to which section 2, 3 or 4 applies, and
- (b) are not excluded by section 5 or Schedule 1,

(as those principles are modified by or under this Act or by other domestic law from time to time).”

97. Section 8 is headed “Dealing with deficiencies arising from withdrawal”, and sub-section (1) states:

“(1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate—

- (a) any failure of retained EU law to operate effectively, or
- (b) any other deficiency in retained EU law,

arising from the withdrawal of the United Kingdom from the EU.”

98. However “deficiencies” is given a wide interpretation by s. 8(2), which includes the following:

“(2) Deficiencies in retained EU law are where the Minister considers that retained EU law—

- (a) contains anything which has no practical application in relation to the United Kingdom or any part of it or is otherwise redundant or substantially redundant,
- (b) confers functions on, or in relation to, EU entities which no longer have functions in that respect under EU law in relation to the United Kingdom or any part of it,

...

(d) makes provision for, or in connection with, other arrangements which—

(i) involve the EU, an EU entity, a member State or a public authority in a member State, or

(ii) are otherwise dependent upon the United Kingdom's membership of the EU or Part 4 of the withdrawal agreement,

and which no longer exist or are no longer appropriate, ...”

Therefore, section 8 enables a provision of retained EU law to be repealed or modified by secondary legislation.

#### **(4) EU law and retained EU law**

99. Retained EU law can be regarded as encapsulating EU law effectively “frozen” as at IPCD. However, I think it is important to recognise that, despite the name, retained EU law is not a form of EU law, i.e. law for which the EU is the overriding source (cf para 89 above). On the contrary, it is altogether domestic law, meaning that the overriding source of this law is the UK Parliament, as with any other kind of domestic law.

100. In my view, Ms Kreisberger KC was correct in her submission that retained EU law is forward-looking: it addresses the legal situation as from IPCD. However, the critical question is whether rights which arose pre-IPCD, which were at that time determined and governed by EU law, become converted by the 2018 Act into rights under retained EU law, and thus rights under domestic law.

101. Somewhat surprisingly, the 2018 Act does not set out a clear answer to this question, which therefore generated extensive and sophisticated submissions to the Tribunal. The Defendants sought to rely on s. 4(1) as providing the answer, but in my view that provision cannot bear the weight which they sought to place upon it and that provision does not assist. A vast number of rights accrued to persons and bodies in the UK under EU Regulations. If s. 4(1) were the mechanism whereby rights which had accrued under EU law pre-IPCD were translated or converted as from IPCD into rights under retained EU law, s. 4(1) would have to cover rights which accrued under EU Regulations (since there is

no equivalent language in s. 3). But s. 4(1) expressly does not apply to such Regulations: see s. 4(2). In my view, the statutory wording in s. 4(1) which refers to “any rights, powers, liabilities, obligations” (etc) simply traces the wording of s. 2(1) of the 1972 Act, thereby converting directly effective rights and obligations under the EU Treaties into retained EU law: see para 91 above. Accordingly, I do not think that s. 4(1) is of any relevance to the question before us.

102. Nonetheless, I conclude that the statutory scheme, considered as a whole, indeed has, in effect, converted or ‘translated’ rights which had accrued under EU law into rights under retained EU law, save insofar as the 2018 Act otherwise expressly provides. Put another way, as from IPCD, the 2018 Act becomes the basis upon which such rights may be pursued or asserted in the United Kingdom. I reach this conclusion for several reasons.

103. In most cases, this change will not affect the substance of a right which accrued prior to IPCD, since the essence of retained EU law is to comprise EU law in all its manifestations as at IPCD. But it is necessary to recognise that in certain respects, this construction of the statute clearly will affect accrued rights:

(1) The obvious examples are those aspects of substantive EU law which are expressly excluded from being retained EU law: e.g. a right arising only under the Charter of Fundamental Rights (excluded by s. 5(4)); and a right to claim *Francovich* damages (excluded by para 4 of Schedule 1).

(2) Moreover, the EU jurisprudence is based on the declaratory theory of law: i.e. when the CJEU by a ruling interpreting a legal instrument ‘develops’ the law, this is treated as stating the law as it has always been. That enables the judgment to apply to the conduct or arrangements of the parties in the case, which of course preceded the case being brought, without violating the rule against retrospectivity. The EU rule is encapsulated in Case C-292/04 *Meilicke v Finanzamt Bonn-Innenstadt* EU:C:2007:132, para 34, where the CJEU referred to:

“... the settled case-law of the Court to the effect that the interpretation on which, in the exercise of the jurisdiction conferred on it by Article 234 EC,

the Court gives to a rule of Community law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, ...”

Therefore when a right or cause of action which had accrued under EU law prior to IPCD is ‘converted’ into a right or cause of action under retained EU law, that could affect its substance. Consider the example of a dominant pharmaceutical company, X, which in 2012 very substantially increased the price of its drug sold across Europe, until the market for that drug declined in 2016 on the entry of other products. The purchasing entities for the health services in the UK start proceedings against X in the English court in 2017, alleging that X was abusing its dominant position by excessive and unfair pricing. Those proceedings are still pending on IPCD. In 2022 the CJEU gives a judgment in a wholly unrelated case which ‘clarifies’ the law on excessive pricing as applied to pharmaceutical products, in a manner which assists the claimants’ case against X. If that interpretation is not binding as regards Article 102 in the UK courts, and X could therefore argue that the prohibition on unfair pricing should be interpreted more narrowly, that could affect the substance of the right, which would be interpreted more broadly in the courts of EU Member States where the 2022 CJEU judgment is binding.

104. Accordingly, not only would the application of the 2018 Act to rights which accrued pre-IPCD take away some of those rights by excluding them altogether, in my judgment the conversion of accrued rights under EU law into rights under retained EU law may also have the effect of modifying some of those rights.

105. Section 16(1) of the Interpretation Act 1978 (“IA”) provides, insofar as relevant:

“(1) ... where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,—

...

(b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;

...

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, ...;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, ... as if the repealing Act had not been passed.”

*Craies on Legislation*<sup>146</sup> notes that: “A contrary intention for the purpose of displacing s. 16 of the Interpretation Act must be very clear, although it could in theory arise by very strong implication.” The terms of s. 16(1) IA reflect the presumption against retrospectivity which exists at common law. This was set out and explained in *Yew Bon Tew v. Kenderaan Bas Mara* [1983] 1 AC 553, where Lord Brightman, delivering the opinion of the Judicial Committee of the Privy Council, said at 558F-G:

“Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is, however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.”

But Lord Brightman significantly added at 558H to 559A:

“But these expressions “retrospective” and “procedural,” though useful in a particular context, are equivocal and therefore can be misleading. ...; and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself.”

See also the illuminating discussion of the presumption by Lord Rodger in his speech in *Wilson v First County Trust Ltd (No.2)* [2003] UKHL 40 at [186]-[201].

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<sup>146</sup> 12 edn, 2022, para 14.4.12.

106. The question is whether the 2018 Act does provide with the necessary clarity for the removal or modification of accrued rights, so as to accord with s. 16(1) IA. I consider that question first as regards the expressly excluded rights and then as regards the effect of the future case-law of the EU courts.

107. Schedule 8 of the 2018 Act concerns “consequential, transitional, transitory and saving” provisions. Para 39 of Sch 8 states at sub-para (1), insofar as relevant:

“(1) Subject as follows ..., section 5(4) and paragraphs 1 to 4 of Schedule 1 apply in relation to anything occurring before IP completion day (as well as anything occurring on or after IP completion day)”

108. This makes clear that the specifically identified provisions will have retrospective effect. Ms Kreisberger strongly relied on this provision for her argument. She submitted that it is inconsistent with the whole of retained EU law applying retrospectively, since if that were the case, this provision would be unnecessary. She submitted that para 39 is accordingly prescribing the particular provisions of the 2018 Act which do have retrospective application, by distinction with the rest of the statute. Although at first sight attractive, I think that submission is mistaken and that the contrary is the case. Since the exclusion of certain provisions from retained EU law by virtue of s. 5(4) and paras 1 to 4 of Schedule 1 would affect accrued rights, by reason of s. 16(1) IA it is necessary to make the intended effect clear. That clarity is provided by para 39(1) of Sch 8 and, as expressed in the following terms of para 39, that retrospective application is carefully qualified to preserve accrued rights to a substantial extent. Hence para 39(2) and (3) state:

“(2) Section 5(4) and paragraphs 1 to 4 of Schedule 1 do not affect any decision of a court or tribunal made before IP completion day.

(3) Section 5(4) and paragraphs 3 and 4 of Schedule 1 do not apply in relation to any proceedings begun, but not finally decided, before a court or tribunal in the United Kingdom before IP completion day”.

And para 39(7) states:

“(7) Paragraph 4 of Schedule 1 does not apply in relation to any proceedings begun within the period of two years beginning with IP completion day so far as the proceedings relate to anything which occurred before IP completion day.”

109. Therefore, the exclusion of claims under the Charter of Fundamental Rights by s. 5(4) and the exclusion of the right to claim *Francovich* damages by para 4 of Schedule 1 (see para 95 above) do not apply to decisions made or proceedings begun prior to IPCD; and further, the exclusion of a right to claim *Francovich* damages which accrued prior to IPCD does not apply at all provided that this right is asserted by proceedings commenced within two years of IPCD. These provisions in the sub-paragraphs of para 39 are notably framed as a *disapplication* of those provisions of the statute.
110. The second way in which accrued rights may be affected is by post-IPCD case-law of the EU courts: para 103(2) above. That is in my view expressly addressed by the 2018 Act at s. 6, which provides, insofar as relevant:
- “(1) A court or tribunal—
- (a) is not bound by any principles laid down, or any decisions made, on or after IP completion day by the European Court, ...
- (2) Subject to this and subsections (3) to (6), a court or tribunal may have regard to anything done on or after IP completion day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal. ...”
111. I consider that, in accordance with s. 16(1) IA, the 2018 Act thereby expresses the clear intention that insofar as the interpretation of an accrued right or obligation may be affected by a post-IPCD judgment or ruling of the CJEU, only the prior interpretation of that right is necessarily preserved as binding, although the UK courts may “have regard” to subsequent EU jurisprudence in the interpretation of that right.
112. It is true that the 2018 Act does not appear to address expressly the question of retrospective application of its provisions in any other respect from those discussed above. But in my view that is because this was unnecessary. It is only where the repeal of the 1972 Act would affect accrued rights and obligations that, having regard to s. 16(1) IA, the 2018 Act makes clear whether, and if so to what extent, the repeal was intended to affect those rights and obligations. Save in the respects which I have discussed, the ‘conversion’ (or replacement) of rights under EU law into (or with) rights under retained EU law



by ss. 2-4 does not affect the substance of the right or obligation, and therefore s. 16(1) IA is not engaged.

113. Furthermore, it was common ground between the parties that, post-IPCD, the UK courts and tribunals can no longer make a reference to the CJEU for a preliminary ruling.<sup>147</sup> Section 6(1)(b) states:

“(1) A court or tribunal—

...

(b) cannot refer any matter to the European Court on or after IP completion day.”

Consistent with their approach to the 2018 Act, counsel for the Umbrella Proceeding Claimants submitted that this provision addressed the position only in the context of retained EU law: i.e. as regards matters that are relevant to retained EU law. As regards matters arising in respect of EU law as applicable prior to IPCD, they contended (by a written note to the Tribunal) that the cessation of the ability to make a reference arose by reason of the UK’s withdrawal from the EU, since any such reference was made pursuant to Article 267 TFEU and on withdrawal the EU Treaties ceased to apply to the UK: Article 50(3) of the Treaty on European Union (“TEU”). However, that argument proves too much. If the UK’s withdrawal in itself removed the ability of a UK court to make a reference to the CJEU, then that would be the position for questions arising in proceedings based on matters which occurred post-IPCD just as much as for questions arising in proceedings based on matters which occurred pre-IPCD. On that basis, s. 6(1)(b) would be superfluous. I consider that s. 6(1)(b) means what it says: UK courts and tribunals are thereby precluded from making any reference to the CJEU as from IPCD, and since a reference can only be made as regards a question of EU law (not domestic law) that is the case whether that question of EU law concerns a right which accrued before or after IPCD. Article 50(3) TEU concerns the jurisdiction of the CJEU as a matter of EU law. It does not directly address the position of the UK court.

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<sup>147</sup> Save in the limited circumstances provided for in the UK-EU Withdrawal Agreement: s. 6(6A) of the 2018 Act.

114. Since s. 6(1)(b) therefore applies not only in the context of questions in relation to matters arising post-IPCD but also in the context of questions in relation to matters arising pre-IPCD, in my view it is manifest that s. 6(1)(a) should be given the same interpretation. And that is the provision which declares that a decision of the CJEU given on or after IPCD is not binding on the UK courts and tribunals: see para 111 above. Moreover, the heading of s. 6 is: “Interpretation of retained EU law.” Section headings are a permissible aid to interpretation, although not binding: *R v Montila* [2004] UKHL 50 at [34]. Indeed, counsel for the Umbrella Proceedings Claimants relied on the heading to s. 6 in support of their contention that s. 6(1) concerns retained EU law. Indeed, the Court of Appeal in *Lipton* held that s. 6(1) addresses retained EU law, and that is binding on this Tribunal: see paragraph 69(5)(i) above.<sup>148</sup> But for the reasons I have given, this supports the conclusion that retained EU law is not confined to matters arising, or rights which accrue, only after IPCD.
115. This construction of the 2018 Act accords with the way rights arising under Articles 101 and 102 TFEU are treated under the secondary legislation made pursuant to s. 8. As noted above, these provisions of the Treaty create direct rights and accordingly would come into retained EU law pursuant to s. 4(1). However, pursuant to s. 8, regulations were made to provide that those rights were no longer available in domestic law. This was of course expected. It would not be appropriate to retain in domestic law, post-Brexit, provisions which depend on there being an adverse effect on trade between Member States of the EU and, in the case of Article 101 TFEU, address a restriction or distortion of competition within the internal market of the EU. Protection of competition in the UK is achieved through the analogous provisions of UK competition law contained in the Competition Act 1998 (the “CA”).
116. The relevant regulations are the Competition (Amendment etc.) (EU Exit) Regulations 2019 (the “2019 Regulations”) which came into force on IPCD. Reg 62 is entitled “Cessation of Treaty Rights and Obligations” and provides that:

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<sup>148</sup> For further discussion of *Lipton*, see paras 121-122 below.

“Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which –

(a) continue by virtue of section 4(1) of the European Union (Withdrawal) Act 2018; and

(b) are derived from Articles 101, 102 ... of the Treaty of [sic] the Functioning of the European Union ...

cease to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly) on the coming into force of these Regulations.”

Schedule 4 to the 2019 Regulations is entitled “Saving and transitional provision”, and provides by para 14(2):

“Where an EU competition infringement occurs before IP completion day, on and after IP completion day a person may—

(a) continue any claim (or defence to a claim) in relation to that infringement in proceedings before a court or tribunal in the United Kingdom, and

(b) make any claim (or defence to a claim) in relation to that infringement in proceedings before a court or tribunal in the United Kingdom which the person could have made before IP completion day.”

However, if retained EU law related only to rights accruing post-IPCD, para 14(2) would be otiose. On that assumption, reg. 62 would operate only prospectively and would not affect the right to make a claim based on an infringement of EU competition law which occurred prior to IPCD (i.e. an accrued right). The fact that it was necessary to provide a saving for such rights and claims shows that the removal of the EU competition provisions that were otherwise brought into retained law by s.4(1), without more, would have retrospective effect. As Mr Salzedo KC correctly submitted, it is by reason of para 14(2) of Schedule 4 to the 2019 Regulations that the present claims can be pursued.

117. Furthermore, this construction of the 2018 Act and of retained EU law avoids various difficulties which would otherwise arise.

(1) If EU law continued to apply in the UK as regards rights arising pre-IPCD, UK courts and tribunals would be applying an autonomous body of law without the ability to refer questions to the CJEU, the body with supreme authority on the interpretation of EU law. That would be a

curious position, especially where such engagement between national courts and the CJEU, through the reference procedure under Article 267 TFEU, is integral to the EU law regime.

- (2) As pointed out in the judgment of the majority, if retained EU law concerned only matters arising after IPCD, that has the potential to create significant problems where a claim is made for an infringement of rights arising under EU law over a period which spans IPCD. That could easily arise in a number of areas, but pursuing the competition law example set out in para 103(2) above, suppose X continued to charge the allegedly excessive price until 2022. That is a continuous infringement for which a cause of action arises each time an excessive price is paid. It would be most unsatisfactory if the claim in respect of the period pre-IPCD was governed by EU law (as to which a post-IPCD judgment of the CJEU is binding) whereas the claim in respect of the period post-IPCD was governed by retained EU law (as to which a post-IPCD judgment of the CJEU is not binding). It is difficult to ascribe such an intention to the drafters of the legislation.
- (3) Specifically in the field of competition law, if claims for rights which accrued pre-IPCD were governed by EU law not retained EU law, that would create an anomaly. For damages suffered from competition infringements prior to IPCD, claimants frequently allege a breach of UK competition law alongside a breach of EU competition law. Indeed, the UK merchants in the Umbrella Proceedings Claimants have done so here. Prior to IPCD, a decision on a question concerning the Chapter I and Chapter II prohibitions under UK competition law was to be made consistently with any relevant decision of the EU Courts on a corresponding question under EU competition law, by reason of s. 60 CA. This was the so-called “consistency principle” which governed the interpretation and application of UK competition law. With effect from IPCD, s. 60 CA has been repealed and replaced by s. 60A CA. There are no transitional or saving provisions and s. 60A therefore has effect as regards proceedings that were pending on IPCD. However, s. 60A modifies the consistency principle, so as to require that a decision on the

provisions of UK competition law is consistent only with a decision of the EU courts *made prior to IPCD*. If a pending claim for breach of Article 101 or 102 TFEU was not subject to a similar qualification, this creates the potential for different outcomes in the parallel claims asserting accrued rights under EU and UK competition law based on identical facts, where the CJEU has given a post-IPCD judgment that changes the previous understanding of EU law.<sup>149</sup>

**(5) Authorities**

118. I have reached the conclusion above without consideration of the authorities that were cited to us, since in only one of them was the question of the law governing a right which accrued under EU law prior to IPCD contested, and even there this was not the subject of the sustained and fully developed argument deployed before us. Nonetheless, it is of course necessary and appropriate to consider them.

119. *News Corp UK & Ireland Ltd v HMRC* [2023] UKSC 7 concerned the interpretation of EU VAT directives as applied to the digital editions of newspapers. The case concerned a period of some 6½ years ending in December 2016, and therefore falling entirely before IPCD. Lords Hamblen and Burrows, in their judgment with which Lords Hodge and Kitchin agreed, said at [7]:

“It is common ground between the parties that the withdrawal of the UK from the European Union (“EU”) has no impact at all on the issues in this case. While the UK was part of the EU, VAT was governed by EU Directives and those Directives were implemented in the UK by domestic statutes, in particular by the VAT Act. By reason of the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020, the relevant EU law and EU derived domestic legislation is “retained EU law” after the implementation completion day (31 December 2020) but, in any event, the

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<sup>149</sup> There is power to disregard the consistency obligation, as so prescribed by s. 60A(2) CA, where the court or tribunal considers it “appropriate to act otherwise” in the light of a subsequent decision of the EU courts: s. 60A(7)(e). That broadly corresponds to s. 6(2) of the 2018 Act. However, that is only an enabling power whereas if the claim were governed by EU law in the manner urged by the Umbrella Proceedings Claimants, for that EU claim a post-IPCD decision of the EU courts would be absolutely binding. The present claims, where the Tribunal will not apply a Cessation Requirement to the start of the limitation period in respect of the claims under the Chapter I prohibition, would be a striking example of the resulting inconsistency.

period with which this case is concerned expired before the implementation completion date.”

120. Ms Kreisberger sought to place great emphasis on this passage as indicating that the EU legislation insofar as it is being applied prior to IPCD does not constitute retained EU law. However, although any statement by the Supreme Court is of course of great weight, I do not regard it as having the implication which Ms Kreisberger sought to draw from it. No post-IPCD decision of the CJEU is referred to in the judgment, and I think this introductory statement is simply an acknowledgment of the fact that the UK’s withdrawal from the EU had no impact on the case and that the period with which the case was concerned expired before IPCD. Since it was common ground that Brexit had no impact, the scope of the concept of retained EU law was irrelevant and I therefore cannot imagine that the Supreme Court would have heard any argument on the point.
121. *Lipton v BA City Flyer Ltd* [2021] EWCA Civ 454 (“*Lipton*”), concerned a passenger’s claim for compensation for a cancelled flight under the relevant EU Regulation, i.e. Regulation 261/2004 (“the Regulation”). The alleged right to compensation arose on 30 January 2018 when the cancellation took place: i.e. before IPCD. Green LJ (with whose judgment the other members of the Court of Appeal agreed) addressed the implications of the UK’s withdrawal from the EU for the claim.
122. At [53], Green LJ noted that submissions and argument on the appeal proceeded very much as they would have done when the UK was a member of the EU or even during the implementation period. No post-IPCD decisions of the EU Courts were cited in argument or relied on. However, Green LJ proceeded to set out a detailed analysis of the way the 2018 Act operated as regards an EU Regulation. He held that as a result of the 2018 Act, by the time the case came before the Court of Appeal the status of the Regulation “had changed”. He explained how an EU Regulation came within s. 3 and therefore became part of domestic law on and after IPCD: see at [57]-[59]. He summarised the operation of many of the provisions of the 2018 Act. Most of that exposition is entirely consistent with the position of the Umbrella Proceedings Claimants here. But it is clear from Green LJ’s exposition that he considered that in applying the

Regulation to the claim before the Court, it was to be applied as retained EU law and the right being asserted was under the regime of that retained EU law and no longer a right under EU law that was unaffected by the repeal of the 1972 Act. That is clear from Green LJ’s “summary of basic principles” at [83], which is intended to be comprehensive. He prefaced those principles by stating:

“... In this case, the task of the court has been relatively straightforward since as of the date of this judgment the new legal regime has been in place for only a few months and nothing of relevance in the case law of the CJEU has changed. As time moves on, and the case law of the CJEU evolves, then the differences between the current state of EU law and that which the Court is to take account of might become more accentuated. At that stage the analysis might become more complex. ...”

123. *Lipton* gives powerful support to the analysis set out above, and I recognise that it comes close to being binding upon us, in which case my own analysis is redundant. But I note that counsel in that case agreed that the Regulation formed part of domestic law by reason of the 2018 Act, i.e. it was part of retained EU law: per Coulson LJ at [3]. So not only was the status of post-IPCD case law of the EU courts irrelevant in *Lipton* but there was no argument regarding the effect of the repeal of the 1972 Act on rights which had accrued under EU law. The appeal proceeded on the uncontested basis that it concerned the Regulation as retained EU law.

124. For that reason, it seems to me that the decision of the Court of Appeal in *Tower Bridge GP Ltd v HMRC* [2022] EWCA Civ 998 (“*Tower Bridge*”) is more pertinent. That was another VAT case where the transactions at issue took place in 2009, i.e. well before Brexit. The relevant VAT directive had been transposed into UK legislation but the argument concerning the right to deduct VAT turned on the application of EU jurisprudence as set out in a series of decisions of the CJEU. In that regard, the Court had to consider two post-IPCD decisions of the CJEU. Lewison LJ (with whose judgment Henderson and Snowden LJJ agreed), stated that the relevant UK implementing legislation of the VAT directives constitute EU-derived domestic legislation for the purpose of s. 2 of the 2018 Act, and that they therefore constituted retained EU law: [109]-[110]. He proceeded to hold that s. 6 of the 2018 Act applied to the interpretation of retained EU law and that it therefore governed the approach of the Court to the two post-Brexit decisions of the CJEU in the case before it. The

first of those decisions was held to be irrelevant to the matter before the Court: [114]. But the second case, *Kemwater*,<sup>150</sup> decided on 9 December 2021, was not distinguishable. As to that decision, Lewison LJ stated, at [119]:

“Because judgment in *Kemwater* was given after 31 December 2020 we are not bound by it, although we may have regard to it. In my judgment it is at odds with the previous jurisprudence of the court; proceeded to a decision without the benefit of an Advocate General’s opinion; does not explain why it applied a case in which no EU formalities were prescribed to one in which they were; and does not deal with the cases which only gave effect to corrected invoices, or where the taxable person ultimately supplied the information that the PVD required the invoice to contain. Although I have had regard to it, I do not consider that we should follow it.”

125. Ms Kreisberger submitted that this approach was wrong: since *Tower Bridge* concerned the right to deduct tax before IPCD, it was concerned with EU law, not retained EU law, and the CJEU decision in *Kemwater* was binding. That is a bold submission, but it was of course a necessary submission for the purpose of her argument. It can be said, however, that it appears that *Tower Bridge*, like *Lipton*, proceeded on the common assumption that the case was to be determined on the basis of retained EU law.
126. *TuneIn Inc v Warner Music UK Ltd* [2021] EWCA Civ 441 is in my view significant. That was a copyright case where the trial took place in 2019 and therefore concerned infringement alleged to have occurred before that date. The appeal was heard in February 2021. A major issue was the meaning of “communication to the public” in the relevant EU directive which had been transposed into UK law. This was the subject of a substantial body of EU jurisprudence, and when the case reached the Court of Appeal a major plank of the appellant’s case was that the Court of Appeal should exercise its power to depart from those decisions. For various reasons, the Court of Appeal was clear that it should not exercise that power in the circumstances. But what is relevant for present purposes is that all three members of the Court of Appeal (Sir Geoffrey Vos MR, Arnold and Rose LJJ) had no doubt that for the purpose of the case before them they had that power, pursuant to s. 6(5A) of the 2018 Act and the regulations made thereunder. Since s. 6 applies only as regards the interpretation of retained EU law, the facts of the case, concerning alleged

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<sup>150</sup> Case C-154/20 *Kemwater ProChemie s.r.o. v Odvolací finanční ředitelství*, EU:C:2021:989



infringement of copyright pre-IPCD, were regarded as coming within the scope of retained EU law. Moreover, as regards decisions of the CJEU given post-IPCD, Arnold LJ considered that it was not binding but that the court could “have regard” to it on the basis of s. 6(2), and on that basis he held that it was highly persuasive: [90]-[91]. This approach is of course entirely inconsistent with the proposition that for rights which accrued pre-IPCD, s. 6 has no application and subsequent decisions of the CJEU are binding.

127. Ms Kreisberger further relied on the very recent decision of the Court of Appeal in *Balogun v Secretary of State for the Home Dept* [2023] EWCA Civ 414 (“*Balogun*”). Since that was introduced only in her reply (the judgment was given just before the present cases were argued), the parties were permitted to put in written submissions upon it. This generated a flurry of notes to the Tribunal after the hearing. *Balogun* is an immigration case which concerned the right to reside in the UK conferred prior to IPCD by an EU directive. The main challenge in the appeal was to the Secretary of State’s decision to revoke the appellant’s EEA residence card on 19 April 2016. All the relevant facts occurred well before IPCD. The issues in the appeal concerned the interpretation of the directive, which had been transposed into UK law by regulations.
128. Much of the argument turned on the application of decisions of the CJEU, and the appellant submitted that some of the prior cases relied on by the Secretary of State had to be reconsidered in the light of a decision of the CJEU given on 2 September 2021, i.e. a post-IPCD decision (Case C-930/19 *X v Belgium*, EU:C:2021:657 (“*X*”). The significance of the judgment, in my view, is the way the Court dealt with *X*. In her judgment, Laing LJ (with whom the other members of the Court agreed) distinguished *X* as “an outlier” and held that it should be confined to cases under art. 13.2.c of the directive, which was not relevant to the appeal. There is no suggestion in the judgment that as a post-IPCD decision *X* was not binding, and that under s. 6(2) of the 2018 Act the Court could at most “have regard” to it, but was not even obliged to do that. Indeed, there is no reference to s. 6 in the judgment at all. It would appear that no argument on that basis was advanced by the Home Secretary as the respondent. Accordingly, *Balogun* seems to have proceeded on the implicit

assumption that the rights asserted under the directive were not affected by the repeal of the 1972 Act.

129. The one case cited where an argument about the effect of the Brexit legislation on accrued rights was addressed is *JJH Enterprises Ltd v Microsoft Corp* [2022] EWHC 929 (Comm). That was a ‘stand-alone’ competition damages claim brought under both UK and EU competition law. The defendants applied to strike out the claim and one of the grounds was that the second defendant (“Microsoft UK”) could not be liable in respect of licences entered into by another company in the Microsoft group. That was critical since Microsoft UK was the ‘anchor’ defendant for the purpose of establishing jurisdiction over the other, foreign defendants. Resisting this argument, the claimant relied on the decision of the CJEU in Case C-882/19 *Sumal SL v Mercedes Benz Trucks España SL*, EU:C:2021:800 (“*Sumal*”), decided on 6 October 2021. The defendant submitted that the court should not follow *Sumal* since it was a post-IPCD case, which was therefore not binding pursuant to s. 6(1) of the 2018 Act.
130. Picken J dismissed the strike-out application for several reasons and as regards the s.6(1) argument he said, at [46]:

“... there is at least a realistic possibility that s. 6(1) of the 2018 Act does not apply to the interpretation of Articles 101 and 102 of the TFEU insofar as [the claimant] relies on them (as part of English law) in its claims for the pre-Brexit period. This is an issue which was the subject of a recent article by Jack Williams, ‘*Accrued EU law rights: a guide for the perplexed*’, *EU Relations Law*, 5 January 2022 (<https://eurelationslaw.com/blog/accrued-eu-law-rights-a-guide-for-the-perplexed>); it is not an issue which is suitable for summary determination. However, in essence, the argument is that, insofar as [the claimant] seeks to rely directly on Articles 101 and 102 in respect of the pre-Brexit period, those are rights which are to be regarded as having arisen under s. 2(1) of the European Communities Act 1972 (and, during the implementation period, s. 1A of the 2018 Act). The 1972 Act having now been repealed, then, pursuant to s. 16 of the Interpretation Act 1978, the rights that [the claimant] had under the 1972 Act, whilst it was in force, fall to be treated as having now been accrued, so as to mean that [the claimant’s] claims for the pre-Brexit period are to be determined by reference to EU authority, whenever that authority is decided, since nothing in the Brexit legislation evinces a “*contrary intention*” and s. 6 of the 2018 Act is concerned only with the interpretation of “*retained EU law*” (i.e. such EU law as was incorporated, prospectively, into UK law on Brexit). ...”

That is of course in essence the argument advanced by the Umbrella Proceedings Claimants in the present cases. However, that judgment was given

on a strike-out application where the court held no more than that this proposition was arguable. Therefore I do not consider that it assists in determining the matter.

131. I note that the point about accrued rights was advanced by the defendant in *Varano v Air Canada* [2021] EWHC 1336 (QB) at [69], but the matter was not there addressed in any broad sense; since the case concerned the same Regulation as in *Lipton*, the deputy judge held that *Lipton* was binding on the question of which version of the Regulation applied; and, in any event, the point made no difference to the outcome. But see the observations of the deputy judge at [72].

132. I note also that the final appeal in *Harpur Trust v Brazel* [2022] UKSC 21 (“*Harpur*”), which was not cited to us, and which concerned a part-time worker’s right to statutory leave and holiday pay as regards the period 2011-2016, was heard and decided in the Supreme Court after IPCD. The case turned heavily on the interpretation of the EU Working Time Directive which had been transposed into UK law by regulations. The Supreme Court expressly stated that the implementing regulations were applicable as ‘retained EU law’ pursuant to s. 2 of the 2018 Act and that their interpretation in the case was therefore governed by s. 6: see at [2]. However the point now before us was not argued, and would have made no difference as no post-IPCD decision of the CJEU was relied on in *Harpur*.

133. Accordingly, although some of the authorities appear to me to point to the contrary, on balance I consider that they give powerful support to a construction of the 2018 Act whereby rights which accrued under EU law prior to IPCD thereby become rights under retained EU law, subject to the provisions of that statute.

## **(6) Conclusion**

134. I therefore find that the claims under Article 101 TFEU are, as from IPCD, to be regarded as claims under retained EU law. In consequence, s. 6 of the 2018 Act is engaged as regards the application of decisions of the CJEU given after

IPCD. Further, pursuant to s. 6(3), the principle of effectiveness, as a general principle of EU law, applies in respect of those claims as a “retained general principle of EU law”, i.e. as it had effect in EU law immediately prior to IPCD: see para 96 above.

135. It follows that if, contrary to the view of the Tribunal, the *Volvo* Decision is relevant in determining that a Cessation Requirement should apply to the start of the limitation period, we are not bound by it but may have regard to it, pursuant to s. 6(2). On that basis, I agree that we should not follow the *Volvo* Decision for the reasons set out at para 73 of the majority judgment.

Sir Marcus Smith  
President

The Hon Mr Justice Roth

Ben Tidswell

Charles Dhanowa OBE, KC (*Hon*)  
Registrar

Date: 26 July 2023