

Title: The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020	Impact Assessment (IA)
IA No: MoJ065/2020	Date: October 2020
RPC Reference No: N/A	Stage: Final
Lead department or agency: Ministry of Justice (MoJ)	Source of intervention: Domestic
Other departments or agencies: N/A	Type of measure: Secondary legislation
	Contact for enquiries: judicial_policy_correspondence@justice.gov.uk

Summary: Intervention and Options	RPC Opinion: Not Applicable
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Cost of Preferred (or more likely) Option (in 2019 prices)

Total Net Present Social Value	Business Net Present Value	Net cost to business per year	Business Impact Target Status
N/A	N/A	N/A	Not a regulatory provision

What is the problem under consideration? Why is Government action or intervention necessary?
 The UK's departure from the EU and the end of the Transition Period in December 2020 will bring about a fundamental change to the context within which retained EU law and retained EU case law is to be considered within the UK. In the same way that courts and tribunals can currently depart from their own case law, UK courts and tribunals need to be able to depart from the body of retained EU case law where appropriate. From 11pm on 31 December 2020, only the UK Supreme Court and High Court of the Judiciary (as the final criminal court of appeal in Scotland where there is no route of appeal to the UK Supreme Court) will be able to exercise the power to depart from retained EU case law. The Government has consulted on whether this power should be extended to additional courts and tribunals across the UK and intends to legislate to give effect to this policy. Government intervention is required as extending the power to depart from retained EU case law to additional courts and tribunals requires secondary legislation.

What are the policy objectives of the action or intervention and the intended effects?
 The policy objective of extending the power to depart from retained EU case law to additional courts and tribunals is to provide greater scope for the interpretation of retained EU law to evolve to recognise the UK's changing status. The interpretation of the law by courts and tribunals does not remain static over time – case law evolves, and our understanding of the law evolves with it. In addition, if only two senior courts are able to depart from retained EU case law, cases may take longer to consider. The ability to depart from retained EU case law is important to ensure that the interpretation of this case law remains flexible and appropriate to the UK's situation following its departure from the EU. In exercising the power to make Regulations, the Government is seeking to strike a balance between enabling timely departure from retained EU case law where appropriate and maintaining legal certainty across the UK.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)
 The following options are considered in this Impact Assessment:

- Option 0: Do nothing. The Government will not exercise the power to make Regulations to enable additional courts and tribunals to depart from retained EU case law.
- Option 1: Make Regulations to extend the power to depart from retained EU case law to the Court of Appeal of England and Wales, and its closest equivalents in other UK jurisdictions, with those courts applying the same test as that applied by the UK Supreme Court when considering whether to depart from its own case law.
- Option 2: Make Regulations to extend the power to depart from retained EU case law to the High Court of Justice of England and Wales, and its closest equivalents in the other UK jurisdictions, with those courts applying the same test as that applied by the UK Supreme Court when considering whether to depart from its own case law.

Option 1 is preferred as it best meets the policy objectives.

Will the policy be reviewed? Yes. Post-legislative scrutiny of the EU (Withdrawal) Act 2018. **Review date:** 2025

Does implementation go beyond minimum EU requirements?	N/A			
Is this measure likely to impact on international trade and investment?	No			
Are any of these organisations in scope?	Micro No	Small No	Medium No	Large No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)	Traded: N/A		Non-traded: N/A	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY: _____ Date: _____ 12 October 20

Summary: Analysis & Evidence

Policy Option 1

Description: Make Regulations to extend the power to depart from retained EU case law to the Court of Appeal of England and Wales and its closest equivalents in other UK jurisdictions.

FULL ECONOMIC ASSESSMENT

Price Base Year 2019	PV Base Year 2020	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate			

Description and scale of key monetised costs by 'main affected groups'

None. It is not possible to monetise the costs as there is no way of knowing the extent and nature of litigation which could be pursued as a result of this option, or the extent to which courts would decide to depart from retained EU case law.

Other key non-monetised costs by 'main affected groups'

Court users (Government, businesses, and individuals) may face increased costs and delays as a result of bringing litigation or in ensuring compliance with changes to the law. The impact will depend on the types of cases brought and the decision of the courts. There is also a likely increase in case volumes to the Court of Appeal requiring additional sitting days and increased court and judicial costs. There may be an impact on the legal aid fund from increased litigation. The higher likelihood of litigation may increase uncertainty for court users and others which may delay key decisions or force them to make riskier decisions. As this will extend to courts in the Devolved Administrations, there is a risk of divergence in the interpretation of case law. This risk is mitigated at Court of Appeal level, where the jurisdictions tend to have regard for each other's decisions, although they are not strictly binding, thereby minimising the risk of "forum shopping" as litigants seek to bring proceedings in the jurisdiction which they believe will lead to the most favourable outcome. Therefore, the risk of legal uncertainty is less than in Option 2 because the extension of the power to depart will be restricted to Court of Appeal level whose decisions are binding on the courts and tribunals beneath them.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate			

Description and scale of key monetised benefits by 'main affected groups'

None. We are unable to monetise the benefits for the reasons explained above.

Other key non-monetised benefits by 'main affected groups'

This option will provide more opportunity for litigants to argue for departure from retained EU case law. As the decisions of these appeal courts are binding on those beneath them, this will help litigants and others affected by a decision to plan for the future. These courts are also more accessible to potential litigants than the UK Supreme Court and High Court of Justiciary in Scotland, so this option will better promote access to justice. This option will allow greater flexibility in the evolution of law to reflect the UK's new status following our departure from the EU and potentially reduces the burden on the UK Supreme Court and High Court of Justiciary in Scotland, with cases being determined at a lower level. In the event of a further appeal to these courts, it is likely these courts will be assisted by the conclusions of the appeal court in making a final determination which will potentially enable cases to be considered more rapidly.

Key assumptions/sensitivities/risks	Discount rate (%)	N/A
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We assume that there will be an increase in the number of cases to these courts although it has not been possible to quantify this. Higher cases volumes would impact the overall length of the proceedings if there is a further appeal to the UK Supreme Court or High Court of Justiciary in Scotland. This risks legal uncertainty whilst awaiting determination of this litigation. There is also a risk of increased volumes on lower courts as a result of a decision to depart from retained EU case law with individuals seeking similarly favourable outcomes. However, this again depends on the nature and scope of the Court's decision.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs:	Benefits:	Net:	

Summary: Analysis & Evidence

Policy Option 2

Description: Make Regulations to extend the power to depart from retained EU case law to the High Court of Justice of England and Wales and its closest equivalents in other UK jurisdictions.

FULL ECONOMIC ASSESSMENT

Price Base Year 2019	PV Base Year 2020	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate			

Description and scale of key monetised costs by 'main affected groups'

None. It is not possible to monetise the costs as there is no way of knowing the extent and nature of litigation which could be pursued as a result of this option or the extent to which courts would decide to depart from retained EU case law.

Other key non-monetised costs by 'main affected groups'

This option will make the courts more accessible compared to Option 1, and there is likely to be a noticeable increase in the number of applications to this level of court. Demand on the justice system might be further exacerbated as parties seek to appeal these decisions to the higher appeal courts, with cases taking longer to resolve and increased costs to the parties. As decisions of courts at this level are not necessarily binding on themselves, there is a risk of conflicting decisions on similar legal issues both within, and across, the three legal systems of the UK which would result in legal uncertainty and affects the capability of litigants and others affected by a decision to plan for the future. As this brings a risk of greater legal uncertainty than Option 1, there is also an increased risk of "forum shopping" as litigants seek to bring proceedings in the jurisdiction which they believe will lead to the most favourable outcome. The consequences of all these impacts means that legal uncertainty risks undermining the UK's reputation as a leading forum in which to settle international disputes.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate			

Description and scale of key monetised benefits by 'main affected groups'

None. We are unable to monetise the benefits for the reasons explained above.

Other key non-monetised benefits by 'main affected groups'

This option would create more opportunities to diverge from EU case law compared to Option 1, with judges being able to make decisions to address questions as to how retained EU law should be treated, although it could take longer to settle via appeal. Therefore, this option would provide more individuals with the opportunity to argue to diverge from decisions of the Court of Justice of the European Union and provide the greatest opportunity for the evolution of law to reflect the UK's new status following our departure from the EU. This option potentially reduces the burden on the UK Supreme Court, High Court of Justiciary in Scotland and courts at Court of Appeal level, although we anticipate that there will still be cases appealed to these courts. As these courts are also more accessible to potential litigants than the UK Supreme Court, High Court of Justiciary in Scotland, and Court of Appeal (and its equivalents across the UK) this option will better provide more access to the courts for potential litigants.

Key assumptions/sensitivities/risks	Discount rate (%)
<p>We assume that there will be an increase in the number of cases to these courts although it has not been possible to quantify this. There is a risk that this policy will result in an increase in case volumes and consequently impact the overall length of the proceedings if there is a further appeal to the UK Supreme Court or High Court of Justiciary in Scotland. This risks legal uncertainty whilst awaiting determination of this litigation. There is also a risk of increased volumes on lower courts as a result of a decision to depart from retained EU case law with individuals seeking similarly favourable outcomes. However, this again depends on the nature and scope of the Court's decision.</p>	

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs:	Benefits:	Net:	

Evidence Base

A. Background

1. Section 6 of the European Union (Withdrawal) Act 2018 (“the 2018 Act”) (as amended) specifies that UK courts and tribunals cease to be bound by principles laid down by the Court of Justice of the European Union or any decisions made by that court, after the end of the Transition Period (11pm on 31 December 2020). It further provides that retained EU law, as far as that law is unmodified on or after the end of the Transition Period, and as far as is relevant to it, is to be interpreted in accordance with retained case law.
2. Retained case law is comprised of retained domestic case law and retained EU case law. Retained domestic case law means the principles and decisions laid down by UK courts and tribunals before the end of the Transition Period in relation to EU law which is retained under the 2018 Act (subject to certain exceptions). This includes such case law as modified by UK law after the end of the Transition Period. Retained EU case law means the principles and decisions laid down by the Court of Justice of the European Union in relation to EU law which is retained under the 2018 Act (subject to certain exceptions), which were applicable on or before the end of the Transition Period, as modified in UK law.
3. Our departure from the EU and the end of the Transition Period in December will bring a fundamental change to the context within which retained EU law and retained EU case law is to be considered. In the same way that courts and tribunals can currently depart from their own case law, UK courts and tribunals need to be able to depart from the body of retained EU case law where appropriate. The 2018 Act vests that power in the UK Supreme Court and the High Court of Justiciary (as the final criminal court of appeal in Scotland in cases where there is not a route of further appeal to the UK Supreme Court).
4. Although the power to depart from retained EU case law may result in greater uncertainty (as it allows litigants to challenge matters that have been settled in Court of Justice of the European Union case law), not allowing an adequate number of courts to depart from retained EU case law presents the following risks:
 - Courts would have less flexibility to meet new legal challenges arising out of the UK’s departure from the EU and how retained EU case law ought to be treated;
 - if the interpretation of retained EU law were to become so outdated and irrelevant, this could lead to a loss of public confidence in the justice system.
5. Extending the power to depart from retained EU case law to additional courts and tribunals would provide greater scope for the interpretation of case law to evolve to recognise the UK’s changing status. There is a risk that, if only the UK Supreme Court or the High Court of Justiciary in Scotland retain this power, cases may take longer to consider and the law becomes “*fossilised*”, given the more limited capacity of these courts. However, the lower the level of court at which the power to depart from retained EU case law is set, the more attractive it will be to bring litigation which could affect a large number of people, resulting in increased risk of legal uncertainty.
6. The Government has recently consulted on this issue and this Impact Assessment considers the impacts of extending the power to depart from retained EU case law beyond the UK Supreme Court or the High Court of Justiciary in Scotland to the Court of Appeal of England and Wales and its closest equivalents across the UK. We believe that this approach achieves the best balance between the benefit of enabling case law to evolve more quickly where appropriate and the risks associated with increased legal uncertainty.

B. Rationale & Policy Objectives

Rationale

7. The conventional economic approaches to Government intervention are based on efficiency or equity arguments. Government may consider intervening if there are strong enough failures in the way markets operate (e.g. monopolies overcharging consumers) or there are strong enough failures in existing Government interventions (e.g. waste generated by misdirected rules) where the proposed new interventions avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and distributional reasons (e.g. to reallocate goods and services to more vulnerable groups in society).
8. In this case, the primary rationale for intervention is efficiency: extending the power to depart from retained EU case law will allow UK law to evolve more quickly to reflect its new legal status while placing less pressure on the highest courts in each jurisdiction to bring about such changes.

Policy Objectives

9. Extending the power to additional courts will help achieve our aim of enabling retained EU case law to evolve more quickly than otherwise might have been achieved. Furthermore, this approach will provide greater scope for the interpretation of retained EU law to evolve to recognise the UK's changing status. The interpretation of the law by courts and tribunals does not remain static over time – case law evolves, and our understanding of the law evolves with it. However, if only two senior courts are able to depart from retained EU case law, cases may take longer to consider.
10. Extending the power to additional courts would also help mitigate the operational impacts on the UK Supreme Court and High Court of Justiciary in Scotland which would arise if the power were reserved solely to those courts; and there will be benefits to the UK Supreme Court in being assisted by a prior judicial dialogue on these complex issues.
11. In exercising the power to make Regulations, the Government is also aiming to strike a balance between enabling timely departure from retained EU case law where appropriate and maintaining legal certainty across the UK

C. Affected stakeholder groups, organisations and sectors

12. The following groups would be most affected by the options presented in this Impact Assessment:
 - The UK Supreme Court, the High Court of Justiciary in Scotland and the higher appeal courts of the three UK jurisdictions;
 - The judiciary sitting in these courts;
 - HM Courts and Tribunal Service (HMCTS) who administer the courts in England and Wales and the similar bodies in Scotland & Northern Ireland;
 - The providers of Legal Aid in each of the three domestic jurisdictions;
 - Court users, especially litigants such as Governments, businesses and individuals, and others who will make decisions based on the outcomes of legal cases;
 - The suppliers of legal services.

D. Description of options considered

13. Legal certainty and predictability are important so that individuals, businesses and organisations are clear on what the legal position is on important issues for the future. In considering whether to exercise the power to make Regulations, the Government is seeking to strike a balance between enabling timely departure from retained EU case law whilst maintaining legal certainty across the UK. Three options were identified that could potentially strike the right balance between these objectives:
 - **Option 0: Do nothing. The Government will not exercise the power to make Regulations to enable additional courts and tribunals to depart from retained EU case law.**
 - **Option 1: Make Regulations to extend the power to depart from retained EU case law to the Court of Appeal of England and Wales and its closest equivalents in other UK jurisdictions, with those courts applying the same test as that applied by the UK Supreme Court when considering whether to depart from its own case law.**
 - **Option 2: Make Regulations to extend the power to depart from retained EU case law to the High Court of Justice of England and Wales and its closest equivalents in the other UK jurisdictions with those courts applying the same test as that applied by the UK Supreme Court when considering whether to depart from its own case law.**
14. Option 1 is the preferred option as it best meets the policy objectives by balancing the desire for greater evolution of the law with the desire to reduce uncertainty and inconsistency.

Option 0: Base Case/Do nothing

15. Under this option, the Government will not exercise the power to make Regulations to enable additional courts and tribunals to depart from retained EU case law. This means that from 11pm on 31 December, only the UK Supreme Court and the High Court of Justiciary in Scotland will have the power to depart from retained EU case law.

Option 1: Make Regulations to extend the power to the Court of Appeal and its closest equivalents in other UK jurisdictions with those courts applying the same test as that applied by the UK Supreme Court when considering whether to depart from its own case law.

16. Under this option, the Government will exercise the power in Section 6 of the Withdrawal Act 2018 (as amended) to make Regulations to extend the power to depart from retained EU case law to the Court of Appeal of England and Wales and its closest equivalents in other UK jurisdictions. The full list of courts in scope of this option are the:

- Court of Appeal of England and Wales;
- Court Martial Appeal Court;
- Court of Appeal of Northern Ireland;
- High Court of Justiciary in Scotland when sitting as a court of appeal in relation to a compatibility issues or a devolution issue;
- Inner House of the Court of Session in Scotland;
- Land Valuation Appeals Court in Scotland; and
- Registration Appeal Court in Scotland.

17. This option would allow a greater opportunity for the law to evolve than the do-nothing option, while providing less risk of legal uncertainty than Option 2. As the decisions of these appeal courts are binding on those beneath them, this will help litigants and others affected by a decision to plan for the future. As these courts are also more accessible to potential litigants than the UK Supreme Court and High Court of Justiciary in Scotland, this option will better promote access to justice.

Option 2: Extend the power, in addition to the Court of Appeal and equivalent courts, to the High Court of Justice of England and Wales and its closest equivalents in other UK jurisdictions with those courts applying the same test as that applied by the UK Supreme Court when considering whether to depart from its own case law.

18. Under this option, the Government will exercise the power in Section 6 of the Withdrawal Act 2018 (as amended) to make Regulations to extend the power to depart from retained EU case law to the High Court of Justice of England and Wales and its closest equivalents in other UK jurisdictions. The list of courts in scope of this option (as set out in the consultation document) are the:

- Court of Appeal of England and Wales;
- Court Martial Appeal Court;
- Court of Appeal of Northern Ireland;
- High Court of Justiciary in Scotland when sitting as a court of appeal in relation to a compatibility issues or a devolution issue;
- Inner House of the Court of Session in Scotland;
- High Court of England and Wales;
- Outer House of the Court of Session in Scotland;
- Sheriff Appeal Court in Scotland;
- High Court of Justiciary in Scotland sitting at first instance; and
- High Court in Northern Ireland.

19. Under both options, it is assumed that:

- The courts to which the power is extended should be bound by decisions of higher courts where those courts had already considered the question of whether to depart from retained EU case law after the end of the Transition Period, in the normal operation of precedent.
- The courts would not be permitted to depart from retained domestic case law which relates to retained EU case law in circumstances where they would not otherwise be able to because they are bound by another UK court (as permitted by 6(5B)(b) and (c) of the 2018 Act). Retained domestic case law relating to retained EU case law could be, for example, a domestic judgment given before the end of the Transition Period applying a ruling of the Court of Justice of the European Union.

E. Cost and Benefit Analysis

20. This Impact Assessment follows the procedures and criteria set out in the Impact Assessment Guidance and is consistent with the Her Majesty's Treasury Green Book.

21. Where possible, Impact Assessments identify both monetised and non-monetised impacts on individuals, groups and businesses in Great Britain with the aim of understanding what the overall impact on society might be from the proposals under consideration. Impact Assessments place a strong focus on monetisation of costs and benefits. There are often, however, important impacts which cannot sensibly be monetised. Impacts in this Impact Assessment are therefore interpreted broadly, to include both monetisable and non-monetisable costs and benefits, with due weight given to those that are not monetised.
22. The costs and benefits of the options are compared to Option 0, the counterfactual or 'do nothing' option. As the counterfactual is compared to itself, the costs and benefits are necessarily zero, as is its net present value.

Level of analysis used in the Impact Assessment (proportionality)

23. It is not possible to ascertain how many cases dealt with in the courts and tribunals have an EU case law factor as this data is not routinely collated. Likewise, it is not possible to determine to what extent the courts might depart from retained EU case law in making their judgements.
24. Therefore, it has not proven to be possible to quantify or monetise any of the impacts in this Impact Assessment. Some of the more specific reasons for this include:
- a. HMCTS and other Government Departments hold data on caseload volumes in England and Wales. Similarly, the courts service in Scotland and Northern Ireland hold data on case volumes in their respective jurisdictions. However, that data does not breakdown how many cases (active or concluded) refer to EU case law or how many cases resulted in referral to the Court of Justice of the European Union or the jurisdiction in which the referral occurred. We have however, provided a table at the end of this Impact Assessment which shows the total number of referrals made to the Court of Justice of the European Union from the UK over the years for context.
 - b. Option 0 is in itself an uncertain baseline in terms of likely impacts as it does not come into force until the end of the Transition Period. There is therefore the additional challenge of assessing impacts relative to an uncertain baseline position.
 - c. There is currently no negotiated position for the UK leaving the EU, and therefore it is not possible to calculate an increase of cases without knowing the conditions on which the UK will leave the EU.
 - d. Given that no other country has left the EU before, it is not possible to predict how the UK's departure from the EU will affect caseloads, the supply of legal services and the attractiveness of the legal services sector or businesses and individuals reliant on EU law in any way.
 - e. Furthermore, it is not possible to predict caseload increase in either Option 1 or 2, due to the considerable uncertainty about judicial and litigant behaviour. There is considerable uncertainty at every stage of the process; it is uncertain what areas are particularly reliant on principles of retained EU case law (see point a), if cases are brought before a judge, it is uncertain whether judges would exercise the power to depart from retained EU case law and it is uncertain in how many cases this would occur. Any departure from retained EU case law would then allow others to bring similar cases, in the lower courts, of an uncertain number. It is further uncertain how many of these would succeed.
 - f. The way in which case law may diverge across the UK is unclear. If the High Court in Scotland and/or Northern Ireland and the High Court in England and Wales have a similar case but result in different judgments, there is no binding precedent at that level to determine which judgment should be upheld in the absence of an appeal to the Court of Appeal. Ultimately, this could lead to an increase of appeals to a higher court.
25. Therefore, given the above points, it has been deemed reasonable to describe the impacts in qualitative terms only, as there is too much uncertainty and speculation on future behaviour and too little data for a robust quantitative approach.
26. However, while it is not possible to fully quantify the monetised and non-monetised costs and benefits of each option for the reasons outlined above, having considered the consultation responses we believe the costs and benefits can be summarised as follows.

Option 1: Make Regulations to extend the power to the Court of Appeal and its closest equivalents in other UK jurisdictions

Costs of Option 1

27. There will be costs to HMCTS (and similar bodies in Scotland and Northern Ireland) due to an increase in the number of cases. This could arise due to an increased incentive to re-litigate. If this were to occur, it will lead to an increase in sitting days and in the associated administration and judicial costs. It is not possible to estimate the extent of these costs due to considerable uncertainty around the future and data. However, it is very unlikely that the increase in caseloads will be enough to warrant extra building costs or increased IT infrastructure although, if it were, some of these costs may be off-set by extra court fees.
28. There will be increased legal uncertainty arising out of new arguments on previously settled and established case law. As well as leading to an increase in the volume of cases before the courts, this could result in cases taking longer to process through the courts. However, in addition to the risk that legal uncertainty may result in more litigation which takes longer to conclude it may also have an adverse economic impact if confidence in the UK as a place to do legal business is undermined. Where decisions to depart from retained EU case law are made by any of the courts with the power to depart from retained EU case law, depending on the outcome, this could generate further litigation on these points in the lower courts as people seek to benefit from those judgments.
29. This legal uncertainty could affect some businesses, and this uncertainty may affect business confidence outside the legal sector and impact their decision-making. The impact on businesses cannot be quantified because it will be heavily influenced by litigant behaviour in bringing proceedings but also judicial behaviour in respect of the nature and decision in response to the issues in the case. Although there is a risk of increased costs to businesses, we consider that this will be outweighed by the benefits of having some issues potentially impacting them determined sooner, where they are resolved at Court of Appeal level, than waiting lengthy periods whilst such issues are determined in the UK Supreme Court.
30. As this option includes courts in the Devolved Administrations, there is a risk of divergence in the interpretation of case law between the jurisdictions within the UK. This risk is mitigated at Court of Appeal level where the jurisdictions tend to have regard to each other's decisions, although they are not strictly binding.
31. There may be costs to Legal Aid authorities in the three jurisdictions if any of the additional cases brought are eligible. However, it is not possible to estimate how many cases would be eligible for legal aid.

Benefits of Option 1

32. The main benefit of this option will be that it will provide more opportunity for the law to develop to reflect new legal issues and questions as to how retained EU case law should be treated compared to the base case.
33. This option will also reduce the burden on the UK Supreme Court. By extending the power to the level of court below the UK Supreme Court, more capacity will be provided for these cases to be dealt with in a timely way.
34. In the event of an appeal to the UK Supreme Court, that court is likely to be assisted by a prior consideration of the issue by the Court of Appeal and its equivalents which should lead to cases being resolved more quickly.
35. Court of Appeal level decisions across the UK are routinely published. There is therefore greater transparency and clarity of legal decisions so the public will be clear of the legal position.

Option 2: Extend the power, in addition to the Court of Appeal and equivalent courts, to the High Court of Justice of England and Wales and its closest equivalents in other UK jurisdictions

Costs of Option 2

36. The costs of Option 2 would be similar in nature to Option 1 but likely to be greater in magnitude.
37. The potential increase in cases is likely to lead to additional costs to HMCTS (and the similar bodies in Scotland and Northern Ireland) due to additional sitting days and the associated administrative and judicial costs. It is not possible to say what the extent of these costs would be due to considerable uncertainty around the future and data. Similarly, there could be an increase in delays resulting in additional costs to the various parties. It is very unlikely that the increase in caseloads would be enough to warrant extra building costs or increased IT infrastructure but, if it were, some of these costs may be off-set by extra court fees.
38. Where decisions to depart from retained EU case law are made by any of the courts with the power to depart from retained EU case law, depending on the outcome, this could generate further litigation on these points in the lower courts as people seek to benefit from those judgments. In Option 2, this impact will be significantly increased as there would not only be people bringing litigation to give effect to decisions from more senior courts, but such litigation could result in further appeals to the Court of Appeal level or the UK Supreme Court.

39. There would be an increase in legal uncertainty compared to the base case and Option 1 because it is more attractive and accessible to litigate in lower courts. The legal uncertainty, arising out of new arguments on previously settled and established case law, may have an adverse economic impact if confidence in the UK as a place to do legal business is undermined.
40. Additionally, if two courts have a similar case and make different judgments, there would be legal difficulties in deciding which judgment is upheld. This will ultimately be resolved on appeal to a higher court but will take some time, especially if parties decide not to appeal.
41. This legal uncertainty could affect some businesses, and this uncertainty may affect business confidence outside the legal sector which would impact their decision-making. The impact on businesses cannot be quantified because it is heavily influenced by litigant behaviour in bringing proceedings but also judicial behaviour in respect of the nature and decision in response to the issues in the case. This risk of increased costs to businesses is likely to be greater than in Option 1 as at the High Court level, litigation may be encouraged in a bid to seek more favourable outcomes based on competing interests.
42. As this option would extend to courts in the Devolved Administrations, there is a risk of divergence in the interpretation of case law between the jurisdictions of the UK, which may lead to more decisions being appealed. This would also lead to cases taking longer to settle and also result in higher litigation costs as the case goes through the appeal process.

Benefits of Option 2

43. The benefits of Option 2 would be similar in nature to Option 1 but likely to be greater in magnitude.
44. The main benefit of Option 2 compared to Option 1 would be that first decisions on whether to depart from retained EU case law would be reached more quickly. An additional benefit would be that this level of court is more easily accessible to individuals as a court of first instance and the costs of accessing that court are lower.
45. There would also be a reduction of the burden on the UK Supreme Court, notwithstanding that there may be some cases which are appealed to this court. By extending the power to more levels of court below the UK Supreme Court, more capacity would be provided for these cases to be dealt with in a timely way. This is likely to be greater with Option 2 as there are more courts in scope to share the burden of any increased case volumes.
46. However, the UK Supreme Court, in the event of a further appeal to that court, is likely to be assisted by a prior consideration of the issue by the Court of Appeal which again might lead to cases being resolved more quickly – that would occur under both Option 1 or 2.

Summary and preferred option with description of implementation plan

47. The responses received to the consultation are summarised in the Government's consultation response document which is published at the same time as this Impact Assessment.
48. Having carefully considered all the responses, and the impacts outlined in this Impact Assessment, the Government will be proceeding with Option 1 because it strikes the best balance in meeting the policy aim of enabling cases to be considered more quickly and maintaining legal clarity and certainty across the UK. The flexibility for the law to evolve is better met through Option 1 than Option 0, and Option 2, which, among other issues, increases the impacts of legal uncertainty which is highly likely to result in negative operational and economic impacts. The operational benefits of alleviating pressure on the UK Supreme Court outweighs any potential adverse impacts of legal uncertainty which is mitigated by restricting this power to senior appellate courts.
49. The Government will therefore make Regulations extending the power to depart from retained EU case law to the: Court of Appeal of England and Wales; Court Martial Appeal Court; Court of Appeal of Northern Ireland; High Court of Justiciary in Scotland when sitting as a court of appeal in relation to a compatibility issues or a devolution issue; Inner House of the Court of Session in Scotland; Land Valuation Appeals Court in Scotland; and Registration Appeal Court in Scotland.
50. In making such decisions, the test to be applied by these courts is the same test currently used by the UK Supreme Court in deciding whether to depart from its own case law.

51. The Government is satisfied that this approach maintains the balance between timely departure from EU law to support the evolution of law within the UK as well as maintaining legal certainty.
52. The Regulations are to be made through the draft affirmative procedure in Parliament and will come into effect at the end of the Transition Period.

F. Risks and assumptions

53. For both options, we have assumed that there will be an increase in the number of cases to the courts. However, as the provisions conferring the power to depart from retained EU case law on the UK Supreme Court and High Court of Justiciary in Scotland have not yet taken effect, we have no baseline against which any increase in additional courts can be measured.
54. We have also concluded that in Options 1 and 2, the test to be used by these additional courts and tribunals in deciding whether to depart from retained EU case law is the same as that used by the UK Supreme Court in deciding whether to depart from its own case law, namely whether it is right to do so.
55. It is not possible to predict who will bring litigation seeking a departure from retained EU case law. Such litigation could be between organisations, businesses, individuals or against Government where a party has an interest in seeking a departure from retained EU case law. Where decisions to depart from retained EU case law are made either by the UK Supreme Court or a Court of Appeal level court, it is likely that this will generate further litigation on these points in the lower courts as people seek to benefit from those judgments. In Option 2, this impact will be significantly increased as there would not only be people bringing litigation to give effect to decisions from more senior courts, but such litigation could result in further appeals to the Court of Appeal or the UK Supreme Court. The key risk in this case is an impact on case timeliness as a result of these increased volumes, however the extent to which this is borne out is heavily dependent on litigant behaviour and the nature and scope of the Court's decision.

G. Wider impacts

Better Regulation

56. This proposal is not a regulatory provision defined at s27 (2) of the Small Business Enterprise and Employment Act 2015 and out of scope of the department's business impact target.

Equalities Impacts

57. An Equalities Statement has been prepared alongside this Impact Assessment.
58. This policy confers a power on the courts to depart from retained EU case law. Courts are not mandated to make such decisions, nor are individuals or businesses required to bring litigation to ask the courts to make such decisions. There is therefore no direct discrimination as everyone has equal access to the courts irrespective of any protected characteristics they identify with. The risk of indirect discrimination will be heavily dependent on the nature of the litigation brought and the scope of the decision.

Monitoring and Evaluation

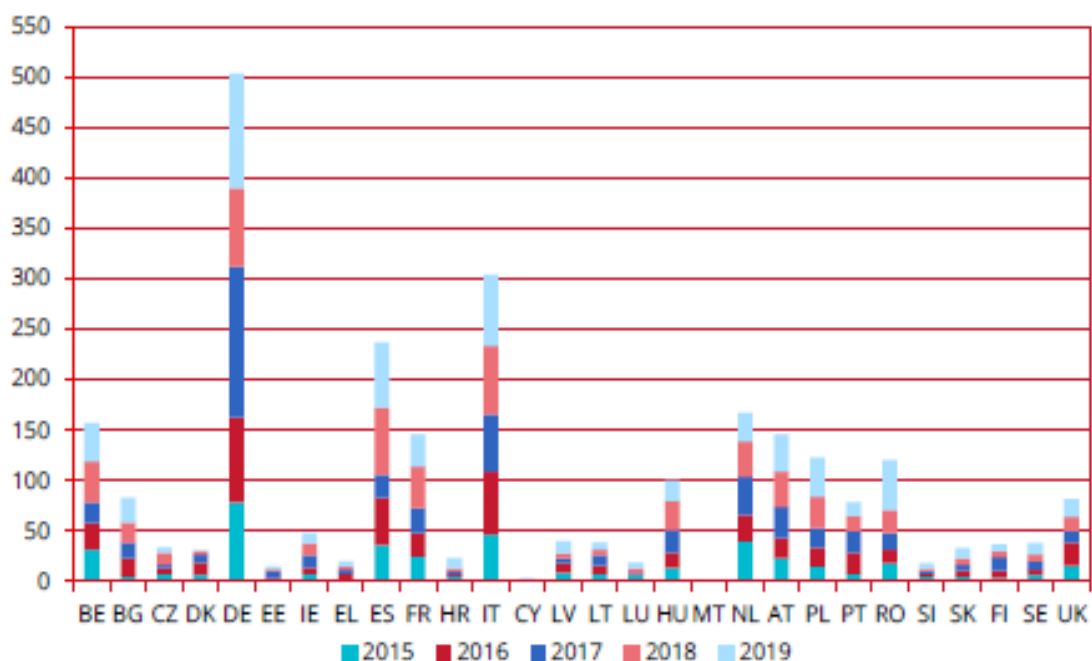
59. Currently data is not reliably collated to distinguish the number of cases which either involve EU law or where issues pertaining to decisions of the Court of Justice of the European Union are raised in the proceedings.
60. To measure the impact of these measures accurately, we are working with HMCTS, the UK Supreme Court and the Devolved Administrations to allow for this data to be collated. The intention is for this to be implemented from 1 January 2021 and data collated thereafter can be used as part of any post-legislative scrutiny of these provisions.

Post Legislative Scrutiny

61. These proposals will be reviewed as part of the post legislative scrutiny of the European Union (Withdrawal Agreement) Act 2018 which will be led by Cabinet Office as the policy owners for that legislation.

As mentioned in paragraph 24 above, the tables below show the total number of referrals made to the Court of Justice of the European Union by member states over the years which shows that the UK is mid-range in respect of the number of referrals made.

V. New cases — References for a preliminary ruling by Member State (2015-2019)



	2015	2016	2017	2018	2019	Total
Belgium	32	26	21	40	38	157
Bulgaria	5	18	16	20	24	83
Czech Republic	8	5	4	12	5	34
Denmark	7	12	8	3	1	31
Germany	79	84	149	78	114	504
Estonia	2	1	7	2	3	15
Ireland	8	6	12	12	10	48
Greece	2	6	4	3	5	20
Spain	36	47	23	67	64	237
France	25	23	25	41	32	146
Croatia	5	2	3	3	10	23
Italy	47	62	57	68	70	304
Cyprus				1	1	2
Latvia	9	9	5	5	12	40
Lithuania	8	8	10	6	7	39
Luxembourg	7	1	1	4	6	19
Hungary	14	15	22	29	20	100
Malta		1			1	2
Netherlands	40	26	38	35	28	167
Austria	23	20	31	35	37	146
Poland	15	19	19	31	39	123
Portugal	8	21	21	15	14	79
Romania	18	14	16	23	49	120
Slovenia	5	3	3	2	5	18
Slovakia	5	6	6	6	10	33
Finland	4	7	13	6	7	37
Sweden	7	5	8	7	11	38
United Kingdom	16	23	11	14	18	82
Others ¹	1					1
Total	436	470	533	568	641	2 648

1] Case C-169/15, *Montis Design* (Cour de Justice Benelux/Benelux Gerechtshof).