

reduction of 45% in global CO₂ emissions in 2030 relative to 2010, and a net reduction of 100% in 2050” (at [4.4.38]). According to the court, RDS has “leeway to develop its particular reduction pathway and to differentiate as it sees fit” but an important consequence “may be that [it] will forgo new investments in the extraction of fossil fuels and/or will limit its production of fossil resources” (at [4.4.39]). Finally, although the responsibility to respect human rights applies to all corporations, the court considered that “the scale and complexity of the means through which enterprises meet that responsibility may vary according to [their size, sector, operational context, ownership and structure] and with the severity of [their] adverse human rights impacts”. Given its past emissions, its global dominance, and its policy-setting role, “much may be expected of RDS” (at [4.4.16]). Such an approach could ensure that there is a fairer distribution of responsibility among corporations.

The extent to which this judgment is enforceable, or whether it will be overturned on appeal, remains to be seen. Nevertheless, this is a groundbreaking decision, not just because a national court was willing to do the heavy lifting to find a major transnational corporation responsible for reducing its CO₂ emissions – throughout its group and value chain – but also because it did so by drawing substantially on “soft law” international law standards and targets, and “scientific consensus”. This is a case about the responsibility of private actors, but it is also an example of how non-state actors play a crucial role in shaping international standards that other sub-state actors can adopt with the force of domestic law. Whether we will see similar decisions by the courts of other states will largely turn on whether they feel comfortable – in constitutional terms but also politically – to develop domestic tort law by drawing on international standards and common goals. *Milieudefensie* will make that task easier, potentially paving the way for “bottom up” multilateralism.

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INTERPRETING THE POST-BREXIT LEGAL FRAMEWORK

A NEW post-Brexit legal framework is now in force. On implementation period (“IP”) completion day – namely 31 December 2020 at 11 p.m. – UK laws implementing EU law as well as directly effective provisions of EU law became a new category of domestic law: “retained EU law”. Defined by the EU (Withdrawal) Act 2018 (“EUWA”) as amended, retained EU law is essentially a snapshot of all EU(-related) law in force on IP completion day and aims at ensuring legal continuity. Creating

additional layers in the framework, the Withdrawal Agreement and the Trade and Cooperation Agreement (“TCA”) are given domestic effects by the EU (Withdrawal Agreement) Act 2020 and the EU (Future Relationship) Act 2020 (“EUFRA”). Two recent Court of Appeal judgments – *Lipton v BA Cityflyer* [2021] EWCA Civ 454 and *TuneIn v Warner* [2021] EWCA Civ 441 – offer a helpful starting point in deciphering this complex legislative framework. Taken together, the cases make clear the important and continuing role of past and future CJEU case law in the UK as well as the breadth of the section 29 EUFRA power granted to courts to implement the TCA.

Lipton concerned compensation for a flight cancellation; the flight’s captain called in sick shortly before the appellants were due to fly from Milan to London City Airport in 2018. Under Regulation 261/2004 (OJ L 46, p.1) – as applicable at the time – passengers are entitled to compensation for flight cancellations unless the operating air carrier can show “extraordinary circumstances” (art. 5). The case was not decided as it would have been in 2018 when the UK was a Member State; Green L.J. held at the outset that in 2021 “a new set of legal arrangements are in place” and so the court “must apply the new approach” (at [53]).

A prior issue was the domestic status of Regulation 261/2004. Retained EU law encompasses “EU-derived domestic legislation” (s. 2 EUWA), “direct EU legislation” (s. 3 EUWA) and any other directly effective “rights, powers, liabilities, obligations, restrictions, remedies and procedures” (s. 4 EUWA). Direct EU legislation includes “any EU regulation ... as it has effect in EU law immediately before [31 December 2020]” (s. 3(2)(a)). Regulation 261/2004 fell within this last category; Green L.J. noted that Regulation 261/2004 as “a typical ‘regulation’ ... was operative prior to IP completion day and therefore continues to have force” as retained EU law (at [57], [60]).

Once categorised as retained EU law, a consequence was that “the doctrine of supremacy applies” and Regulation 261/2004 “takes precedence over any other measure of domestic law which might be inconsistent” with it (at [62]). Section 5(2) EUWA specifies that “the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day”. The judgment offers little analysis on the nature of the supremacy principle, but there is much to unpack. The supremacy principle found in the EUWA is not the EU principle; according to CJEU case law, supremacy affects past *and* future domestic enactments (*Van Gend en Loos*, Case 26/62, EU:C:1963:1). Regardless, the supremacy principle never explained the effects of EU law in the UK; the majority of the Supreme Court in *Miller* [2017] UKSC 5 held that “EU law enjoys its automatic and overriding effect only by virtue of the 1972 [European Communities] Act”

(at [61]). It is thus perhaps simplistic to refer to the supremacy principle as “applying”.

Framing supremacy as meaning retained EU law takes precedence is also rather narrow and overlooks the more wide-ranging implications of the principle. In *Poplawski*, C-573/17, EU:C:2019:530, the CJEU referred to the supremacy principle as requiring “courts to interpret, to the greatest extent possible, their national law in conformity with EU law and to afford individuals the possibility of obtaining redress where their rights have been impaired by a breach of EU law attributable to a Member State” (at [57]). The latter possibility for redress – commonly known as *Francovich* damages – was abolished by paragraph 4 to Schedule 1 of the EUWA. What is still unclear is whether the requirement of consistent interpretation – the so-called *Marleasing* principle – remains (as suggested in the Explanatory Notes). If so, what must be interpreted consistently with what? Must domestic courts interpret non-retained domestic law consistently with EU-derived domestic legislation (potentially incorrectly implementing a directive) or the EU directive itself?

As there was no CJEU “authority at all dealing with staff illness” (at [24]), the Court of Appeal in *Lipton* had to interpret Regulation 261/2004 in accordance with retained case law namely domestic and CJEU decisions pre-IP completion day (s. 6(3) EUWA). *Lipton* demonstrates how this interpretative obligation does not just entail the application of specific interpretations of EU measures, but also requires UK courts to emulate the reasoning style of the CJEU. Coulson L.J. in *Lipton* began by outlining the CJEU’s interpretative method: “the meaning and scope of terms . . . must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part” (at [13] citing *Wallentin-Hermann v Alitalia*, C-549/07, EU:C:2008:771, at [17]). He then proceeded to go through each stage – literal, contextual, purposive – before concluding that “the captain’s non-attendance for work due to illness was inherent in the air carrier’s activity” (at [50]).

Coulson L.J.’s approach shows how difficult it will be for UK courts to replicate the CJEU’s reasoning style. The CJEU in fact rarely follows such a regimented analysis: literal arguments are far less conclusive and purposive criteria are frequently employed (see G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford 2013)). There are also aspects of CJEU reasoning which UK courts are ill-equipped to emulate. In *Greenaway v Parrish & Ors* [2021] EWHC 1506 (QB), Spencer J. referred to the “nightmare” for domestic courts of having to apply “the EU principle whereby the correct interpretation incorporates and encompasses all the various language versions of the directive” without the resources of the CJEU (at [44]). Furthermore, the meta-teleological aspects of CJEU reasoning that draw on the EU’s overall goals (as in e.g. *Van Gend*

en Loos) no longer seems appropriate in a former Member State. The requirement to disapply national procedural rules to secure the effectiveness of (retained) EU rights (*Factortame*, C-213/89, EU:C:1990:257) may offer an illustration. Divergence is thus likely to emerge between the retained EU law and EU law despite the aims of continuity.

Lipton also concerned the relationship between the retained Regulation 261/2004 and the TCA. Article 438 (formerly AIRTRN.22) of the TCA refers to the need to “ensure that effective and non-discriminatory measures are taken to protect the interests of consumers in air transport” including “compensation in case of denied boarding, cancellation or delays”. This provision lacks direct effect (TCA, art. 5, formerly art. COMPROV.16(1)) and the EUFRA does not specifically implement the provision. However, this does not “mean that it is not implemented” (at [77]). According to section 29(1) EUFRA, “[e]xisting domestic law has effect on and after the relevant day with such modifications as are required” to comply with the TCA. Section 29 is available when domestic law leaves an “inconsistency, daylight or a lacuna” when compared with the TCA (at [82]). The “process of modification is automatic i.e. it occurs without the need for further intervention by Parliament” and includes the “amendment, repeal or revocation” of domestic law (at [78]). Green L.J. notes that the mechanism “does not lay down a principle of purposive interpretation (such as is found in Human Rights Act 1998, s.3) but amounts to a generic mechanism to achieve full implementation” such that “domestic law on a particular issue now means what the TCA says it means, regardless of the language used” (at [78]). The implication is that there is no limit on what courts can do to secure compliance with the TCA. This is unlike the rule that domestic courts cannot contradict a “fundamental feature” of legislation when attempting to interpret it compatibly with the Human Rights Act (*Ghaidan v Godin-Mendoza* [2004] UKHL 30).

The decision in *TuneIn* [2021] EWCA Civ 441 complements *Lipton* as it focuses the new statutory criteria governing when UK courts may depart from CJEU case law as well as on the relevance of new and future CJEU decisions. *TuneIn* is a website and app that aggregates and curates links to radio stations worldwide. Warner Music and Sony Music alleged that *TuneIn*’s service infringed their copyright as it amounted to a “communication to the public” contrary to section 20 of the Copyright, Designs and Patents Act 1988 (“CDPA”). As section 20 implements Article 3 of the Information Society Directive (Directive 2001/29, OJ L 167, p. 10) it is EU-derived domestic legislation (EUWA, s.2(1)) and forms part of retained EU law.

Following Regulation 3(b) of the EU Withdrawal Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, the Court of Appeal (alongside the Supreme Court and other higher courts) has the power to depart from retained EU case law. In doing so, the Court of Appeal

“must apply the same test as the Supreme Court would apply in deciding whether to depart from the case law of the Supreme Court” (EUWA, s. 6(5)) i.e. when it appears right to do so” (1966 *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234). The main argument put forward by TunelIn – and unanimously rejected – was that the Court of Appeal should depart from CJEU case law on the meaning of communication to the public or at least from the case law on hyperlinking (at [76]).

Arnold L.J. set out eight reasons for not departing. First, the domestic law remained unchanged (at [78]). Second, there is a need for consistency given that an international legislative framework – including the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty and the Berne Convention – underlies the Information Society Directive and the CDPA (at [79]). Third, he pointed to the “difficult task” of interpreting the concept of a “communication to the public” and the CJEU’s “unrivalled experience in confronting this issue in a variety of factual scenarios” (at [80]). Fourth, academic criticism goes both ways (at [81]). Fifth, comparative analysis of the approach in other jurisdictions (Australia, Canada and the US) is unhelpful as “the statutory framework differs in those countries and the case law cannot be said to offer settled or consistent guidance” (at [82]). Sixth, the danger of legal uncertainty caused by a “return to the drawing board” (at [83]). The final two reasons concerned the narrower argument to depart from specific cases. Arnold L.J. did not consider this option sensible since TunelIn would still be liable (at [87]). Sir Geoffrey Vos M.R. offered just two reasons. First, he also emphasised that copyright law derives from international treaties and “courts of the states that accede to such treaties should, wherever possible, be striving to achieve harmonious interpretation of them, not individualistic disharmony” (at [198]). Second, he commented on the high threshold for departing from earlier decisions found. It is not enough that the court would decide the case differently. When the CJEU’s approach “is neither impeding nor restricting the proper development of the law, nor is it leading to results which are unjust or contrary to public policy” (at [201]), departure “would create legal uncertainty for no good reason” (at [202]).

The implication is that the Court of Appeal will exercise the power to depart from CJEU case law cautiously. Both judgments stress the importance of legal certainty, but the Master of the Roles perhaps set a more stringent test. In referring to academic literature and the practice of other jurisdictions, Arnold L.J. suggests that policy arguments may have some sway in areas less embedded in an international framework or where domestic courts have greater experience. There is not necessarily a tension in the reasoning, but when a decision of the CJEU can be said to be contrary to public policy or “restricting the proper development of the law” is likely to become an important threshold in future litigation.

Having concluded that departure from CJEU case law was inappropriate, there was a question over the relevance of a 2021 CJEU decision. Section 6 (2) of the EUWA permits all courts to “have regard” to decisions of the CJEU handed down after IP completion day. Arnold L.J. considered the new case should be treated as “highly persuasive” as – not only was it relevant to the case – it was a Grand Chamber decision closely related to and refining an extensive body of retained EU case law from which the Court of Appeal has decided not to depart (at [91]). New CJEU decisions are thus likely to remain influential.

Importantly, the EUWA does not upset the domestic judicial hierarchy as membership of the EU did. All courts can have regard to new CJEU decisions, but lower courts will remain bound by decisions of the Court of Appeal. Returning to *Lipton* briefly, in any future litigation the High Court will be bound to treat staff illness as an inherent risk in an air carrier’s activity (see on a related point *Varano v Air Canada* [2021] EWHC 1336 (Q.B.)). In this regard, Rose L.J. raised a concern about the comprehensive statement of CJEU case law by Arnold L.J. Her concern was that the ability of lower courts “to have regard to such future CJEU judgments should not be hindered by the fact that the pre-existing, retained law has been described in a judgment of this court, even though a decision of this court would, in general, be binding on that court or tribunal” (at [183]).

Where *Lipton* and *TuneIn* are perhaps in tension is as regards the appropriate legal regime for cases where the facts arose before IP completion day. In *Lipton*, the cancellation occurred in 2018 but the Court of Appeal decided the case as one of retained EU law. Whereas in *TuneIn* the copyright breach was ongoing for several years – from while the UK was a member of the EU, during the transitional period and after IP completion day – but the judgment proceeds on the basis that departure from CJEU jurisprudence was only possible from 1 January 2021 and as such would not affect any financial penalties accrued prior to that date (at [76]).

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APPLYING CONVENTION RIGHTS TO STATUTORY DEFENCES

IN *Director of Public Prosecutions v Ziegler and others*, protestors against the arms trade blocked an access road to the venue for an international arms fair for about 90 minutes. They were charged with wilfully obstructing the highway without lawful authority or excuse contrary to Highways Act 1980, s. 137(1). District Judge Hamilton decided that convicting them would interfere with the exercise of their rights to freedom of expression