

Written Briefing on Retained EU Law for the Scottish Parliament's Constitution, Europe, External Affairs and Culture Committee

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Retained EU law as a category of domestic law

1. Retained EU law is a distinct category of domestic law that finds its origins in the UK's obligations as an EU Member State to comply with, and give domestic effect to, EU law.
2. As a category, retained EU law is complex; it reflects the different sources of EU law and the various ways EU law took effect in the UK. According to the EU (Withdrawal) Act (EUWA) 2018, retained EU Law encompasses three strands:
 - *EU-derived domestic legislation*: Acts of Parliament and secondary legislation that gave effect to, or related to, the UK's EU law obligations.¹
 - *Direct EU legislation*: directly effective EU law including regulations, decisions and non-legislative acts.²
 - *Other EU law*: other directly effective provisions of Union law such as rights found in the EU Treaties, general principles of EU law, and some non-implemented directives.³
3. Retained EU law does not map neatly onto existing categories of domestic law.
 - a. EU-derived domestic law keeps the same status as before Brexit (either an Act of Parliament or secondary legislation). What is problematic is that the decision to implement an EU provision via an Act of Parliament or via secondary legislation does not reflect the rank of that EU provision in the EU's hierarchy of norms or its method of adoption in EU law. For instance, the Working Time Regulations 1998 (UK secondary legislation) implement the Working Time Directive,⁴ whereas the Equality Act 2010 (UK primary legislation) implements several directives.⁵
 - b. Direct EU legislation is not given the status of either UK primary or secondary legislation. Instead, direct EU legislation is categorised as either *retained direct principal EU legislation*,⁶ or *retained direct minor EU legislation*.⁷ It is easier to use secondary legislation to amend retained direct minor EU legislation. Other EU law retained by section 4 of the EUWA 2018 is not categorised as principal or minor, but has specific rules for its

¹ EUWA 2018, sections 1B(7), 2.

² EUWA 2018, section 3.

³ EUWA 2018, section 4.

⁴ Directive 2003/88/EC concerning certain aspects of the organisation of working time.

⁵ Including Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation; Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services; and Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

⁶ EUWA 2018, section 7(2).

⁷ EUWA 2018, section 7(3).

amendment.⁸

4. Falling within the category of retained EU law, generates several specific legal consequences.
 - a. *Interpretation.* Distinct interpretative principles apply to the whole category of retained EU law. The meaning of retained EU law is to be determined with reference to ‘retained case law’, ‘retained general principles of EU law’ and with regard to the limits of EU competences.⁹
 - b. *Amendment.* The UK Government and the devolved authorities have the power to amend retained EU law in order ‘to prevent, remedy or mitigate ... any failure ... to operate effectively, or ... any other deficiency’.¹⁰
 - c. *Conflicts.* The ‘principle of the supremacy of EU law continues to apply’ to retained EU law in relation to measures adopted before the end of the transitional period.¹¹ In practice, this means that retained EU law will only be impliedly repealed by post-Brexit UK legislation.¹²

Existing mechanisms exist for changing retained EU law in devolved areas

5. Retained EU law is sometimes described as a ‘snapshot’ of the EU-derived law in force taken at the end of the transitional period. This description is somewhat misleading. What falls within the category of retained EU law has already changed, and will change further, even without a new amendment mechanism. This possibility is noted explicitly in the EUWA 2018, which defines retained EU law ‘as that body of law *[as it] is added to or otherwise modified* by or under this Act or by other domestic law *from time to time*’ (emphasis added).¹³
6. Several mechanisms currently exist for amending retained EU law.
 - a. *EUWA 2018.* Under section 8 of the EUWA 2018, the UK Government has the power to correct ‘any failure of retained EU law to operate effectively’ or ‘any other deficiency in retained EU law’ using secondary legislation. This includes the power for the UK Government to amend retained EU law that falls within devolved competence, although the consent of the devolved administration is sought in such instances. There is also an identically phrased power for the Scottish Government, and the Scottish and UK Governments acting together, to amend retained EU law in areas of devolved competence through the use of secondary legislation.¹⁴
 - b. *Acts of Parliament.* Acts of the UK and Scottish Parliament adopted from 1 January 2021 onwards can expressly or impliedly repeal retained EU law in areas of devolved competence. The principle of supremacy does not apply in relation to Acts adopted after

⁸ EUWA 2018, section 7(4).

⁹ EUWA 2018, section 6(3).

¹⁰ EUWA 2018, section 8 and Schedule 2 paragraphs 1-2.

¹¹ EUWA 2018, section 5(2). Section 5(1) clarifies that ‘[t]he 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]’.

¹² *Thoburn v Sunderland City Council* [2003] QB 151.

¹³ EUWA 2018, section 6(7).

¹⁴ EUWA 2018, Schedule 2 paragraphs 1-2.

the end of the transitional period.¹⁵

- c. *Delegated Legislation*: Depending on the status of retained EU law it may also be amended by secondary legislation. New Acts of the UK and the Scottish Parliaments include provisions delegating powers to amend retained EU law, including in areas of devolved competence. The Agriculture (Retained EU Law and Data) (Scotland) Act 2020 confers powers on the Scottish Ministers to amend retained EU law relating to the Common Agricultural Policy.¹⁶

Proposed changes for facilitating the amend of retained EU law

7. The UK Government plans to introduce a 'Brexit Freedoms Bill' that 'will enable law inherited from the European Union to be more easily amended'.¹⁷ To monitor future changes, the UK Government published a Retained EU Law Dashboard that maps retained EU law across '300 unique policy areas and 21 sectors of the UK economy'.¹⁸ The 'catalogue is not intended to provide a comprehensive account of [retained EU law] that sits with the competence of the devolved administrations'.
8. It is unclear how Brexit Freedoms Bill will make it easier to amend retained EU law. One concerning possibility is that the Brexit Freedoms Bill will attempt to introduce a broad delegated lawmaking power to amend *all* types of retained EU law across *all* sectors, including UK primary law. There is a real risk that any such power would delegate important policy choices to the UK Government and contribute to the general shift of power away from the UK Parliament to the UK Government. Parliamentary oversight of secondary legislation remains weak.
9. One concern motivating the Bill is the notion that retained EU law is too burdensome to amend. The briefing notes to the 2022 Queen's speech suggest a need for retained EU law 'to be changed more easily to suit the UK without taking decades of parliamentary time'.¹⁹ Jacob Rees-Mogg remarked similarly that the EUWA 2018 'preserved and incorporated too much EU-derived law at too high a status, giving much of it the same status as an Act of Parliament' noting that 'many changes to retained EU law require primary legislation'.²⁰ This concern is not born out in practice. The retained EU law dashboard suggests that only 152 (16%) of retained EU law has the status of primary law. There are also already many ways to amend retained EU law, even with the status of UK primary law, without adopting a new Act of Parliament. The general power to correct deficiencies remains a possibility until 31 December 2022 when it will expire. Some existing delegated legislative powers will be broad enough to cover amendments to retained EU law and when adopting new Acts of Parliament, the UK and Scotland have both included further powers to amend retained EU

¹⁵ E.g. Fisheries Act 2020, Schedule 11.

¹⁶ See also, Trade Act 2021, section 2.

¹⁷ [Queen's Speech](#), 10 May 2022.

¹⁸ Retained EU Law – [Public Dashboard](#).

¹⁹ [Queen's Speech 2022: background briefing notes](#), p 5.

²⁰ Jacob Rees-Mogg, [Statement on Retained EU Law](#), 22 June 2022.

law.²¹

10. The UK Government also appears concerned that the policy choices in retained EU law are no longer suitable for the post-Brexit UK.²² It is not clear that adopting new policies, or amending the UK's regulatory framework in different areas of the economy requires a *general* approach to retained EU law. A sectoral approach, with the adoption of Acts in specific policy areas, may be equally effective.
11. In terms of its impact on devolved administrations, it is possible that the Brexit Freedoms Bill will allow for changes to retained EU law in areas of devolved competence. This poses a real risk to common frameworks, although UK Government has said that it 'will not seek to make changes to retained EU law within Common Frameworks without following the ministerially agreed processes in each Common Framework.'²³ Presumably, the UK Government would still seek legislative consent for any UK secondary legislation falling within devolved competence. Devolved administrations would need to ensure adequate time and procedures for scrutiny.

Changing the status of retained EU law by removing the principle of supremacy

12. It is likely that the Brexit Freedoms Bill will seek to alter the relationship between retained EU law and domestic measures adopted before the end of the transitional period. The UK Government notes that the Brexit Freedoms Bill will assert 'the sovereignty of Parliament by removing the supremacy of retained EU law over UK law in our legal system.'²⁴
13. The principle of the supremacy, or primacy,²⁵ is a constitutional principle of EU law. According to the European Court of Justice, 'the primacy principle requires, inter alia, national courts to interpret, to the greatest extent possible, their national law in conformity with EU law'.²⁶ Only where consistent interpretation is not possible does the Court require domestic courts to refuse to apply 'any conflicting provision of national legislation, even if adopted subsequently'.²⁷ The UK courts have adopted a similar approach to ensuring the compatibility of domestic law with EU law.²⁸ The principle of supremacy is thus really a rule of interpretation and conflict resolution.
14. The principle of supremacy in the EUWA 2018 does not impact on Parliamentary sovereignty. The UK Parliament remains free to repeal—expressly or impliedly—any provision of retained EU law.
15. Removing the principle of supremacy, even prospectively, may be damaging for legal certainty throughout the UK. It is also unclear that removing the principle of supremacy will

²¹ See, Agriculture (Retained EU Law and Data) (Scotland) Act 2020; Trade Act 2021, section 2.

²² UK Government, *The Benefits of Brexit: How the UK is taking advantage of leaving the EU*, January 2022.

²³ [Letter from Neil O'Brien MP to Baroness Andrews concerning the Common Frameworks](#), 29 March 2022.

²⁴ [Queen's Speech 2022: background briefing notes](#), p 51.

²⁵ The CJEU does not use the term 'supremacy'.

²⁶ Case C-573/17 *Popławski II* EU:C:2019:53, para 57.

²⁷ *Popławski II*, para 58. The possibility of disapplying incompatible national legislation only arises where the provision of EU law is directly effective, *Popławski II*, paras 60-62.

²⁸ *Fleming v Revenue and Customs Commissioners* [2008] UKHL 2, [2008] 1 WLR 195, [25] per Lord Hope.

have more than a symbolic impact. In *Allied Wallet*, the High Court treated the principle of consistent interpretation as part of ‘retained case law’, which is binding on UK courts by when interpreting retained EU law.²⁹ Removing the principle of supremacy may thus only alter the possibility of disapplication, a power rarely used by UK courts.

²⁹ *Re Allied Wallet* [2022] EWHC 402 (Ch). See EUWA 2018, section 6(3).