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European Scrutiny Committee

Retained EU Law: Where next?

Fifth Report of Session 2022–23

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European Scrutiny Committee

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The constitutional importance of retained EU law and its impact on people's daily lives cannot be overstated. A novel and unique concept in our domestic law, it was created by the European Union (Withdrawal) Act 2018 as a stopgap to avoid holes in the statute book once EU law ceased to apply to the UK. Retained EU law often deals with day-to-day matters such as employment rights, food and farming, consumer protection, health and safety and data protection. The relationship between retained EU law and the devolution settlements also raises complex constitutional and legal issues.

We consider that retained EU law lacks the democratic legitimacy of UK statute. It was originally adopted under EU processes. Often this involved qualified majority voting in the Council of Ministers with limited transparency. The UK had a seat at the table but could rarely block unwelcome EU laws.

Against this backdrop, the Government has embarked on a review of retained EU Law and a Brexit Freedoms Bill is anticipated "by the summer of this year". The Bill is expected to include powers to change retained EU law by secondary legislation, but it is unclear what else it will do.

Our primary concern is that the Bill should remove the principle of supremacy as it applies to retained EU law. It should provide that retained EU law cannot trump *any* incompatible UK statute. Supremacy is incongruous in the post-exit domestic legal framework and undermines certainty by effectively creating a second statute book.

We support the use of secondary legislation to change the substance of retained EU law, given pressures on Parliamentary time. Wide amending powers should be carefully drawn and clearly conditioned. The Bill should include a 'sunset' provision with an ambitious timeframe after which all retained EU law is repealed. Thought should be given to replacement legislation needed to plug potential gaps in the statute book. A mid-point review in the Bill, coupled with clear prioritisation, could help keep tabs on progress.

The Bill may also make new provision for the interpretation of retained EU law by the courts. Changes should include revisiting the approach to retained general principles and abandoning the purposive approach of the EU Court of Justice.

It is vital that the public and businesses can see how retained EU law applies to them, including any changes. The recent publication of the Government's interactive dashboard of retained EU law is welcome, though we question whether it fully covers all categories of retained EU law and should feature consolidated texts.

The Government's task of reviewing and changing this body of law is immense. It will require effective and well-coordinated working across Government. In our view, the task will be better achieved if Government consults:

- Select Committees on the content of the Bill before introduction;
- this Committee on inclusion of Henry VIII powers in the Bill;

- parliamentary stakeholders on the scrutiny of amending powers such as European Statutory Instruments Committee and ourselves, given our expertise;
- senior judges on any proposal to extend the range of courts that can depart from retained EU case law; and
- devolved administrations on future legislation affecting changes to retained EU law, whilst also informing Parliament of any expected divergence between Northern Ireland and the rest of the UK.

1 Introduction

Background

1. Retained EU law ('REUL') is a new and unique concept in our domestic law and a constitutional novelty. The legal and constitutional significance of its creation cannot be overstated. It was created by the European Union (Withdrawal) Act 2018 (the 'EUWA') as a stopgap to avoid the 'large holes' in the statute book that would otherwise have resulted when EU law ceased to apply to the UK on exit from the EU.[1] In the context of the scale of the task, this process was undertaken at great speed with little time to consider the full ramifications of this new category of law for the UK's post-Brexit legal order.

2. Retained EU law affects people's daily lives. There is a significant body of retained EU law dealing with day-to-day matters such as employment rights,[2] food and farming,[3] consumer protection, health and safety and data protection. It also plays a role in regulating important areas of the economy, for example, financial services and chemicals.

3. During the UK's EU membership, the Committee followed the development of many of these laws; from proposal by the unelected European Commission to adoption by the European Parliament and Council of Ministers. The House's system of EU scrutiny included a dedicated role for the Committee, which assessed the legal and/or political importance of EU legislative proposals and held the Government to account for its dealings in the Council of Ministers.

4. Our predecessor in the 2015 Parliament raised concerns regarding the democratic legitimacy of the EU's law-making processes, specifically, with regard to the transparency of decision-making in the Council of Ministers.[4] We share its concerns.[5]

5. In September 2021, the Government announced two reviews into retained EU law: one on substance and one on status. What happens to retained EU law is a vital and fundamental part of the re-shaping of law and regulation post-EU exit. Against this background, we launched an inquiry into the future of retained EU law on 31 January 2022.

6. Our Report considers the proposals outlined in the key Government statements on the review of retained EU law and in its policy document, 'The Benefits of Brexit'.[6]

7. As part of our inquiry, we held four oral evidence sessions with legal experts.[7] In response to our call for written evidence, we received 27 submissions from a broad range of stakeholders, including lawyers, academics and professional representative organisations.

1 Department for Exiting the European Union, 'Legislating for the United Kingdom's withdrawal from the European Union' Cm 9446 (March 2017) para 1.13.
2 Trades Union Congress (REU0006), para 2.
3 Organic Farmers & Growers CIC (REU0012).
4 See European Scrutiny Committee, 'Transparency of decision-making in the Council of the European Union', Second Report of Session 2016–17 (HC 128). For a detailed academic appraisal of these issues see Roland Vaubel, 'The European Institutions as an Interest Group: The Dynamics of Ever-Closer Union' (Institute of Economic Affairs, September 2009).
5 See, in particular, the evidence of Sir Jon Cunliffe CB to our predecessor on 8 May 2013 at Q388–430 and Professor Simon Hix on 12 June 2013 at Q431–477 (European Scrutiny Committee, 'Reforming the European Scrutiny System in the House of Commons' HC 109).
6 Cabinet Office, 'The Benefits of Brexit: How the UK is taking advantage of leaving the EU' (January 2022)
7 Oral evidence sessions were held on 9 February 2022, 2 March 2022, 30 March 2022 and 18 May 2022.

We have drawn on this evidence in preparing this Report, along with evidence from Rt Hon. Jacob Rees-Mogg MP, Minister for Brexit Opportunities and Government Efficiency, who appeared before us on 20 April 2022.[8]

What is retained EU law?

8. Retained EU law is a new and unique category of domestic law. Its workings are complex and we therefore begin with a brief overview of what exactly it is. Despite the name, it is not EU law. It is domestic law which retains certain features of EU law. This distinguishes it from 'traditional' domestic law.

9. Retained EU law was created as a stopgap to avoid a hole in the law that would have resulted from the UK leaving the EU.[9] This hole would have come about when the EU Treaties stopped applying to the UK and the European Communities Act 1972 (ECA) was repealed. The default position was that directly applicable EU law and UK law made under the ECA to give effect to EU obligations would fall away. This was a considerable volume of law, covering a wide range of areas including financial services, employment law, consumer protection and health and safety.

10. It was not practicable to replace this body of law with new domestic law in the period prior to exit. The then Government's solution was that directly applicable EU law and UK law made to give effect to EU obligations should be converted into retained EU law and continue for the time being as domestic law. The intention was to provide legal certainty and continuity. This was not intended to be a permanent state of affairs but rather a staging post. The policy intention from the outset was that retained EU law would be replaced over time with domestic legislative choices.[10]

11. The legislative vehicle for creating retained EU law was the European Union (Withdrawal) Act 2018 (later amended by the European Union (Withdrawal Agreement) Act 2020).

What are the categories of retained EU law?

12. Eleonor Duhs told us that there are three main categories of retained EU law:[11]

(1) EU-derived domestic legislation;

(2) Direct EU legislation; and

(3) Other EU rights and obligations - a so-called 'sweeper provision'.

EU-derived domestic legislation

13. In broad terms, EU-derived domestic legislation is domestic legislation which implemented EU obligations when the UK was an EU Member State.[12] This category includes:

8 European Scrutiny Committee, 'Oral evidence: Regulating after Brexit' HC 1262 (20 April 2022) Q1–43.
9 Eleonor Duhs, Partner, Bates Wells Q3.
10 Eleonor Duhs, Partner, Bates Wells Q3.
11 Eleonor Duhs Q4. See also Professor Catherine Barnard (Professor of EU Law and Employment Law at University of Cambridge) (REU0019), in particular, figure 2 for a visual representation.
12 Q4.

a) Acts of Parliament passed to give effect to EU obligations e.g. the Data Protection Act 2018[13]; and

b) Secondary legislation made to give effect to EU obligations.

Direct EU legislation

14. In broad terms, this category is made up of:

a) EU regulations (e.g. the General Data Protection Regulation) and decisions[14]; and

b) EU tertiary legislation.[15]

15. We heard that this was EU legislation that originally "applied directly in our domestic law through section 2(1) of the European Communities Act 1972" when the UK was a Member State and which was then converted into domestic law.[16]

Other EU rights and obligations

16. When the EU (Withdrawal) Bill was going through Parliament, the responsible Minister described this category as a 'sweeper provision'. Subject to certain exceptions, it catches all other EU rights and obligations that applied by virtue of section 2(1) of the European Communities Act 1972, the so-called 'conduit pipe' through which EU law applied in the UK. This category includes:

a) directly effective rights from the core EU Treaties e.g. the right to equal pay

b) directly effective rights from EU-third country agreements

c) directly effective rights in Directives, subject to qualifications.

What are the distinguishing features of retained EU law?

17. We heard evidence as to the features of retained EU law that distinguish it from other domestic law. For example, we heard that "[i]ts origins are as EU law created under the EU system of legislation and the EU legal framework".[17] We also heard that it has its own rules of interpretation which are different from those which apply to other domestic law. There are also particular rules relating to how it can be amended.

13 Q4.
14 Q4.
15 These are delegated acts made by the Commission and implementing acts usually made by the Commission but sometimes made by the Council e.g. Commission Regulation No 207/2012 on electronic instructions for use of medical devices.
16 Q4.
17 Sir Jonathan Jones Q6.

2 Supremacy

The principle of the supremacy of EU law

Government's proposal

18. As a matter of EU law, the principle of the supremacy of EU law means, in a nutshell, that EU law takes precedence over national law which conflicts with it.[18] The default position on the UK's exit from the EU was that the principle would fall away in relation to the UK. However, the EUWA kept a role for it.

19. In a written ministerial statement on 9 December 2021,[19] the Paymaster General (Rt Hon. Michael Ellis QC MP) explained how the Government was likely to proceed:

The EU concept of the 'supremacy of EU law' - which forces all other UK legislation to be interpreted so as to give way to EU law where there is a conflict (even if EU law was overridden by subsequent non-EU sourced UK law) - has been preserved by the 2018 Act so far as relevant to the interpretation, disapplication or quashing of domestic law passed or made before the end of the transitional period. This interpretative concept is alien to the UK legislative principles, whereby later parliaments (and their laws) can override earlier parliaments. This concept never sat well with our long established democratic and parliamentary traditions, and now we have left the EU is clearly no longer appropriate. We will consider the issue and it is likely that we will propose removing the concept from the statute book.

20. The Government's policy document, 'The Benefits of Brexit', published on 31 January 2022 put it in different terms:

> … we are looking at how to remove the continued effect of supremacy of EU law over domestic law which was made before the end of the transition period. Such a change will allow Parliament to more clearly define the relationship between retained EU law and UK law. We are considering what might be the most appropriate relationship between these two bodies of law in light of the need to promote legal certainty and whether any ancillary powers will be required for the courts for these purposes. This will provide an opportunity to consider creating a bespoke rule that would address cases where retained EU law came into conflict with domestic law, that had the benefit of specific authorisation by Parliament.[20]

Section 5 of the EUWA

21. The relevant sections of the EUWA which deal with the principle of the supremacy of EU law are sections 5(1)-5(3). Our predecessor Committee wrote to the Prime Minister[21]

18 Eleonor Duhs explained the principle in more detail at Q13.

19 HC Deb 9 December 2021, vol 75, col 18WS.

20 Cabinet Office, 'The Benefits of Brexit: How the UK is taking advantage of leaving the EU' (January 2022), page 32.

21 Letter of 19 December 2017 from Sir William Cash MP to the Rt Hon. Theresa May MP, Prime Minister.

during the passage of the European Union (Withdrawal) Bill to raise concerns about the inclusion of the principle of the supremacy of EU law in what became section 5 EUWA, concerns we still hold.

Box 1: Sections 5(1)-(3) EUWA

(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.

22. Under section 5(1) EUWA, an Act of Parliament made on or after 11.00 p.m. on 31 December 2020 (Implementation Period (IP) completion day) takes precedence over all earlier domestic law and this includes retained EU law. This means, for example, that an Act of Parliament made in 2022 takes precedence over an EU Regulation made in 2014 which has been converted into retained EU law.

23. Professor Alison Young explained[22] that section 5(2):

> … clarifies that the principle of the supremacy of EU law only applies to law enacted prior to IP completion date [31 December 2020]. Consequently, legislation enacted prior to that date continues to be interpreted in a manner that complies with retained EU law. Secondary legislation enacted prior to that date that contradicts retained EU law can be quashed. In addition, primary legislation enacted prior to that date which contradicts retained EU law can be disapplied.[23]

This means, for example, that if there is an incompatibility between an EU Regulation made in 1990 which has been converted into retained EU law and an Act of Parliament made in 2000, the inconsistent provisions of the Act would be disapplied.

24. Dr Emily Hancox explained that section 5(3) means that "even after amendment, a provision of retained EU law may still be granted supremacy… so long as this 'is consistent with the intention of the modifications'".[24] She notes that this formulation may make it difficult to identify when a provision of retained EU law "should no longer benefit from supremacy".

22 Professor Alison Young (Sir David Williams Professor of Public Law at University of Cambridge) (REU0018), para 26.

23 Professor Alison Young (REU0018), at para 25 explains the difference between disapplication and quashing.

24 Dr Emily Hancox (Lecturer in Law at University of Bristol) (REU0022), para 15.

Why was the principle originally included in the EUWA?

25. We heard evidence from former Government lawyers who worked on the EUWA that the 'principle of the supremacy of EU law' had originally been included in that Act as "part of the exercise in securing continuity, certainty and predictability of the law after Brexit".[25]

26. Professor Paul Craig told us in written evidence:[26]

> The thinking seems to have been that such UK legislation had hitherto always been subject to the supremacy of EU law, and that therefore legal certainty would be enhanced if this continued post-IP completion day. This was not logically demanded, it was a policy choice by the government.

27. Dr Martin Brenncke wrote that:[27]

> The rationale for retaining the principle of the supremacy of EU law was the strong principle of legal continuity that permeates the EUWA. However, the purpose of the EUWA to achieve legal continuity after Brexit does not require that the principle of the supremacy of EU law continues to apply after Brexit. The intended outcome of s. 5(2) EUWA could have been achieved without reference to the supremacy principle.

How might the principle be removed?

28. We invited evidence on how the principle might be removed. Martin Howe QC told us:[28]

> From my perspective, my overall view would be that the principle of supremacy within retained EU law can be modified and restricted to cases where it really is appropriate and necessary and, as a consequence, as it were, disposed of as a more general wider principle.

29. Sir Stephen Laws, former First Parliamentary Counsel, told us:[29]

> So far as the supremacy of EU law is concerned, for all cases before you decide to change its priority, it is right that it should have priority. But you can say that, in future, it is not to have priority. You will have different legal results, but that does not cause any injustice or uncertainty … I see no reason why EU law should not in future be given the same priority as it would have if it had been contained in domestic law so that it takes priority from its chronology and you look at it from the moment it became part of UK law.

25 Sir Jonathan Jones Q12.
26 Professor Paul Craig (Emeritus Professor of English Law at St John's College, Oxford) (REU0007), para 7a.
27 Dr Martin Brenncke (Senior Lecturer in Law at Aston University) (REU0004), pages 3–4.
28 Martin Howe QC Q20.
29 Sir Stephen Laws Q21.

30. Dr Martin Brenncke outlined four options for removing the principle of the supremacy.[30] The fourth option corresponds most closely to what was outlined in the Government's statement of 9 December 2021. It would:

> … take into account that incompatibilities between retained EU law and pre-IP completion day law will likely be rare. Therefore, it appears possible to simply remove the principle of supremacy from s. 5 EUWA. Any increase in legal uncertainty will likely be negligible. A new s. 5(1) could read: "The principle of supremacy of EU law is not part of domestic law on or after IP completion day." S. 5(2), (3) EUWA could be deleted. Rare incompatibilities between retained EU law and pre-completion day domestic law would be resolved by the courts based on conventional principles, including the doctrine of implied repeal.

31. In the view of Eleni Frantziou and Aileen McHarg, Durham Law School:[31]

> … the only constitutionally sound way to remove the supremacy of EU law from the statute book is to pass new primary legislation on each of the areas of law currently covered by retained EU law; in other words, by removing retained EU law itself from the statute book. This would undeniably be a very challenging undertaking, requiring an in depth examination of a voluminous body of legal rules, and a concomitantly large commitment of Parliamentary time. However, any alternative approach could be seriously damaging for legal certainty, and for the rule of law more widely.

32. Professor Barnard compared the Government's proposals from December 2021 and January 2022:[32]

> Lord Frost appeared to want to remove s.5(2) EUWA altogether: the Brexit Policy paper suggests something rather different: a bespoke rule. The question then is what form that bespoke rule might take. Could there be a carve out for a specific area of law (e.g. financial services) or would that be too difficult to achieve given the difficulty of defining scope? Could the rule be renamed as a conflicts rule to remove some of the heat around the word 'supremacy'? Apart from repealing s.5(2) altogether, the alternatives may create more problems than they solve.

33. Professor Alison Young explained that "Any legal system relies on a system of principles to resolve potential conflicts between different legal provisions". She told us that there are different ways in which this can be done, for example, by establishing a hierarchy "between different types of law" or "as concerns the content of laws - e.g. constitutionally important legislation… may be more important than legislation that does not contain these principles". She went on to explain that, given the different types of retained EU law and the complexity of their status, there was a "risk of creating potentially confusing rules to resolve possible conflicts between domestic and retained EU law".

30 Dr Martin Brenncke (REU0004), pages 4–5.

31 Professor Aileen McHarg (Professor of Public Law and Human Rights at Durham University) and Dr Eleni Frantziou (Associate Professor in Public Law and Human Rights at Durham University) (REU0011), page 7.

32 Professor Catherine Barnard (Professor of EU Law and Employment Law at University of Cambridge) (REU0019), paras 29–30.

34. Dr Emily Hancock highlighted certain issues that it would be necessary to clarify if the principle were to be removed.[33] For example, a decision would need to be made as to the date on which a law saved by section 3 or 4 EUWA should be treated as having been adopted. She points out that if the relevant date were taken to be when the relevant sections of the EUWA entered into force (i.e. 31 December 2020), this would potentially render the removal of the supremacy principle futile.

35. Barney Reynolds, a partner at Shearman & Sterling, told us:

> There is a democratic point in relation to the inherited EU law. There is a policy point, which is that it was made for 28 [EU Member States] rather than one at the end of the time we were in, and then there is then a methodological point, which is that the very methods are inferior and also somewhat alien to our system. Our system finds them difficult to grapple with … it is less democratic in its conception. Its purposes do not meet our current purposes.[34]

36. On the democratic deficiency point, Public Law Project told us:

> This does not recognise that there are many areas of European law where the UK took the lead in the formation of that law and succeeded in steering through changes that were in the UK's best interests. Additionally, more recent EU law has been made using ordinary law-making procedures where UK MEPs in the EU Parliament had a say.[35]

37. We also received evidence looking at the effect of removing the principle and expressing concerns regarding legal certainty if the principle were removed.[36] The Bar Council told us:[37]

> The effect of removing the principle would be to give priority to any subsequent domestic legislation that was inconsistent with the EU legislation that became REUL. In the absence of any detailed survey of such legislation, it is impossible to say whether the consequences of removing the principle in any particular case would reduce the clarity of the law or change its effect, but the overall effect could only be to reduce certainty and to lead to unpredicted (and perhaps entirely undesirable) consequences.

38. The Minister for Brexit Opportunities and Government Efficiency, Rt Hon. Jacob Rees-Mogg MP, told us:[38]

> The supremacy only applies to laws passed before we left the European Union, so every day we are out of the European Union, and more laws are passed, that supremacy is eroding regardless. I hope the retained EU law Bill can speed that process up, but it is something that is eroding naturally.

33 Dr Emily Hancox, University of Bristol (REU0022), para 22.
34 Q53 and Q69; also see Vaubel and European Scrutiny Committee (n 4).
35 Public Law Project, (REU0013) para 7.
36 See, for example, Faculty of Advocates, (REU0023) pages 5–6; Herbert Smith Freehills (REU0005), page 6; Employment Lawyers Association (REU0009) para 67; UK Environmental Law Association, (REU0020) para 28.
37 The Bar Council (REU0008), para 31.
38 Q31.

39. ***We consider the provisions of the Bill which deal with the principle of the supremacy of EU law to be of particular legal and political importance.***

40. ***It is regrettable that the Government has not given a firmer indication of what it proposes to do. It is unclear whether the Government is proposing:***

a) ***simply to remove the principle of the supremacy of EU law;***

b) ***to remove the principle and replace it with another rule; or***

c) ***to retain the effects of the principle but rename it.***

41. ***We urge the Government to consult us on its plans for this aspect of the Bill before introduction, as it undertook to do in December 2021.***[39]

42. ***We consider that the 'principle of the supremacy of EU law' should be removed. It is incongruous in the post-exit domestic legal framework. The 'principle of the supremacy of EU law' is part of an arrangement that was only ever intended to be temporary. The existence of retained EU law—with the trappings of the EU's legal order—alongside 'true' UK law is historically inappropriate and does not fit with our legal traditions and legal culture.***

43. ***The application of section 5(2) EUWA as it stands results in retained EU law prevailing over a later, incompatible Act of Parliament if that Act was made before 1 January 2021. However, retained EU law does not prevail over a later, incompatible Act of Parliament if that Act was made on or after 1 January 2021. The 'principle of the supremacy of EU law' undermines the principle that the most recent expression of Parliament's will prevails. Having a different rule where retained EU law is involved creates a second statute book in effect. This is untenable and not suitable for reasons of certainty and clarity. The Bill should give effect to the principle that, in the event of incompatibility, retained EU law should not take precedence over any Act of Parliament whether enacted before or after 1 January 2021.***

44. ***Retained EU law lacks the democratic legitimacy of an Act of Parliament. It was originally adopted under EU processes. In many cases, this involved qualified majority voting in the Council of Ministers behind closed doors without a transcript. Although the UK had a seat at the table, its scope to block the adoption of EU laws to which it objected was limited.***

39 HC Deb 9 December 2021, vol 75, col 17WS.

3 Changing retained EU law and parliamentary scrutiny

How can changes be made to the different categories of retained EU law?

45. Currently the way changes can be made to different categories of retained EU law depends on how the EUWA:

- assigns a 'status' to each category; and
- sets out the way each category can be modified.

46. The term 'status' is not a legal term of art, and it can mean different things in different contexts. The term is sometimes used to refer to whether legislation ranks as 'primary legislation' or 'secondary legislation'. Retained EU law does not fit neatly into either of these categories.[40] The term 'status' is used in section 7 EUWA to refer to the ways in which retained EU law can be amended. Section 7 on status deals with each different category of retained EU law in turn, as follows.

EU-derived domestic legislation

47. EU-derived domestic legislation (broadly, Acts of Parliament and secondary legislation made to implement EU obligations) has always been domestic legislation and the EUWA says that it continues in its original form when it becomes retained EU law. So, for example, the Pollution Prevention and Control Act 1999 continues to be an Act (primary legislation) and the Working Time Regulations continue to be regulations (secondary legislation). Section 7 does not expressly set out how EU-derived domestic legislation can be amended because this follows from its categorisation as primary legislation or secondary legislation.

EU direct legislation

48. For the purposes of status, the EUWA subdivides retained direct EU legislation into retained direct *principal* EU legislation and retained direct *minor* EU legislation.

49. In broad terms, retained direct *principal* EU legislation covers EU Regulations which are not EU tertiary legislation *e.g. the EU Passenger Rights Regulation.*[41]

50. Retained direct *minor* EU legislation covers:

- EU decisions which are not tertiary legislation; and

40 Professor Paul Craig (Emeritus Professor of English Law at St John's College, Oxford) (REU0007) makes this point, para 2(a). The Hansard Society (REU0001) highlight the diversity of retained EU law in para 11.-14. Also at Q4, Eleonor Duhs gave us a clear overview of the different categories of 'retained EU law'.

41 The example used by Professor Catherine Barnard (Professor of EU Law and Employment Law at University of Cambridge) (REU0019), para 13. See Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and repealing Regulation (EEC) No 295/91.

- EU tertiary legislation.[42]

51. Section 7 EUWA sets out the ways in which these two types of retained direct EU legislation can be modified.[43] They are not allocated the category 'primary legislation' or 'secondary legislation' but, in broad terms, the ways in which retained direct principal EU legislation can be modified resemble the ways in which primary legislation can be modified and the ways in which retained direct minor EU legislation can be modified resemble the ways in which secondary legislation can be modified.

52. Retained direct principal EU legislation can be amended by:

- An Act of Parliament; or
- Other primary legislation (e.g. an Act of the Scottish Parliament).

53. It can only be amended by secondary legislation in specified circumstances, for example, using:

- a power in the EUWA; or
- a 'Henry VIII' power.[44]

54. For the purposes of the Human Rights Act, there is an express provision in the EUWA which says that retained direct principal EU legislation is to be treated like primary legislation. This means that if a piece of retained direct principal EU legislation cannot be interpreted compatibly with the European Convention on Human Rights, a court cannot declare it invalid, but it can issue a declaration of incompatibility.

55. There are fewer restrictions on retained direct minor EU legislation being amended by secondary legislation.

'Sweeper' category

56. Retained EU law in the 'sweeper category' (section 4 of the EUWA) is modified in the same ways as retained direct principal EU legislation.[45]

Is primary legislation needed to amend retained EU law?

57. So at present in some cases it will be possible to amend retained EU law using secondary legislation. In other cases, primary legislation will be needed. It depends on the nature of the change and the category of retained EU law in question. As explained below, the EUWA contains a deficiencies-correcting power which can be used to make secondary legislation which amends retained EU law. The deficiencies-correcting power

42 EU tertiary legislation is comprised of 'delegated acts' and 'implementing acts'. Typically, these acts are made by the Commission and often deal with highly technical matters. EU tertiary legislation may be in the form of regulations or decisions. However, this kind of regulation and decision is to be differentiated from regulations and decisions made by the Council and European Parliament which are EU secondary legislation.

43 At Q23, Dr Tom West provided a comprehensive overview of these different categories of retained EU law and how currently they can be amended under the EUWA.

44 Professor Catherine Barnard (Professor of EU Law and Employment Law at University of Cambridge) (REU0019), para 13 (illustrates this point about amendment with the example of the EU Passenger Rights Regulation).

45 At Q4, Eleonor Duhs explained what is caught by this "sweeper category".

is widely drawn but, even so, the use to which it can be put is circumscribed and time-limited.[46] When the EU Withdrawal Bill was going through Parliament, Ministers said that the deficiencies-correcting power would not be used to make changes of substance.[47]

58. There are powers in the EUWA to make consequential and transitional provisions. Again, these will not cover major policy changes. To make changes of substance will require existing powers in primary legislation, new powers in primary legislation or new primary legislation which amends retained EU law directly.

Box 2: Example of powers in primary legislation to amend retained EU law

The Environment Act 2021 contains a new power allowing the Secretary of State to make regulations which amend the REACH Regulation which is retained EU law.48 There are limits in the Act on the breadth of the power. For example, the regulations must be consistent with the aim and scope of the REACH Regulation and the Secretary of State must publish an explanation of why he considers this has been met. The regulations are subject to the affirmative procedure.

What happens to retained EU law when it is amended?

59. Section 6 of the EUWA defines retained EU law as follows:

> 'retained EU law' means 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)* [emphasis added]

60. This means that the default position is that retained EU law is still classified as retained EU law when it is modified.[49] However, modification may have an impact on how it is interpreted.[50]

61. Retained EU law which is *unmodified* is to be interpreted:

a) in accordance with any retained case law and retained general principles of EU law, and

b) having regard to the limits, immediately before 31 December 2020, of EU competences.[51]

46 The power under section 8 is subject to a sunset clause, which expires on 31 December 2022.

47 HL Deb, 7 March 2018, vol 789 col 1212. Also see Steve Baker MP (then Parliamentary Under Secretary of State at the Department for Exiting the EU) at Q53, House of Lords Constitution Committee, EU Withdrawal Bill inquiry (13 December 2017).

48 Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency

49 Professor Aileen McHarg (Professor of Public Law and Human Rights at Durham University) and Dr Eleni Frantziou (Associate Professor in Public Law and Human Rights at Durham University) (REU0011), page 3.

50 Dr Tom West Q23,

51 Eleonor Duhs Q7.

62. When retained EU law has been modified, it does not have to be interpreted in this way, but it can be if that is "consistent with the intention of the modifications". Being able to determine what the intention of a modification actually is will therefore be key to how modified retained EU law is interpreted.[52]

63. ***Currently, when retained EU law is amended, it keeps the status of retained EU law. We recommend that when retained EU law is modified by domestic legislation, the Government ensures that the amending legislation clearly indicates whether the modified legislation is to keep the status of retained EU law. We consider that the status should not continue. This point is also pertinent in the context of our recommendations relating to the interpretation of retained EU law in Chapter 4.***

The Government's proposals for a fast-track mechanism

64. In an oral statement to the Commons on 16 September 2021,[53] the Paymaster General (Rt Hon. Michael Ellis QC MP) said that the Government's intention was "eventually to amend, replace or repeal all retained EU law that is not right for the UK". He said that the Government would look at

> developing a tailored mechanism for accelerating the repeal or amendment of retained EU law in a way that reflects the fact that laws agreed elsewhere have intrinsically less democratic legitimacy than laws initiated by the Government of this country.[54]

65. This suggests that the Government considers that such a mechanism would be capable of amending all retained EU law, regardless of its current status under EUWA and current restrictions on how some categories of retained EU law can be amended.[55]

66. Further detail was provided in the Minister's written statement on 9 December 2021.[56] The Government's review would consider giving retained EU law "a more appropriate status within the UK legal system for the purposes of amendment and repeal" and would also look at "whether, and if so, how, REUL could be amended or repealed by an accelerated process, with appropriate oversight, given the unsatisfactory nature of its original incorporation".

67. In its 'Benefits of Brexit' policy document of 31 January 2022, the Government identified as one of its key priorities "allowing changes to be made to retained EU law more easily". The policy document notes that "many changes to these retained EU laws require primary legislation" and says that "it not a good use of finite Parliamentary time to require primary legislation to amend all of these rules". Instead, the document points to a new "targeted power" which would "provide a mechanism to allow retained EU law to be amended in a more sustainable way".[57]

52 Dr Martin Brenncke (Senior Lecturer in Law at Aston University) (REU0004), discusses this at para 4(5).
53 HC Deb 16 September 2021, vol 700, col 1148.
54 Ibid.
55 Professor Catherine Barnard (Professor of EU Law and Employment Law at University of Cambridge) (REU0019), discusses this sort of "broad superpower" at para 11.
56 HC Deb 19 December 2021, vol 705, col 19WS.
57 The various references in this paragraph are to 'The Benefits of Brexit: How the UK is taking advantage of leaving the EU' (31 January 2022) pages 30 and 32.

68. According to the policy document, the Government plans to create new powers to amend retained EU law by way of secondary legislation. Again, it is unclear whether this amending power would apply regardless of the current legal status of the different categories of retained EU law. However the Government also says "We plan to simplify the complex status provisions that apply to retained EU law".[58]

69. The document also says that the Government will work with Parliament "on how to frame such a power and ensure its use has the appropriate levels of parliamentary scrutiny".[59]

How Parliament currently scrutinises changes to retained EU law

Deficiencies-correcting power

70. Currently, EUWA contains a broad power for Ministers to make regulations to change (or revoke) retained EU law so that it works in the context of the UK not being a Member State. The existing power is a 'Henry VIII' power so all retained EU law can be amended, even if contained in an Act of Parliament. The power ends on 31 December 2022.

71. When the EU (Withdrawal) Bill was going through Parliament, the then Government said that its intention was that the power would be used to make technical changes as opposed to substantive changes of policy. Over 600 statutory instruments, known as 'EU Exit SIs', have been made using the deficiencies-correcting power.

The European Statutory Instruments Committee

72. The EUWA allows Ministers a choice of procedure for making regulations. Most regulations are first laid as 'proposed negative instruments'. The Act also provides that committees in each House 'sift' these proposed negative instruments, to determine if any put forward for the negative procedure contain material that would be more appropriate to the affirmative procedure (requiring active approval by both Houses). The following table illustrates the important differences in procedure.

Table 1: Negative and Affirmative Procedures

Negative	Affirmative
An SI automatically becomes law unless there are objections to it within a specified period (usually 40 sitting days)	An SI must be actively approved before it becomes law (usually within 28 or 40 sitting days)
Unless motion tabled to annul, **no consideration** of SI by the House	Requires **active approval** (including debate*) by both Houses **Debated in a Delegated Legislation Committee or, less commonly, in the Chamber. Then the House decides whether to approve it*
No amendments can be made by either House: can only reject	No amendments can be made in either House: can only approve or reject

58 ibid, page 33. It is not clear if this applies to section 7 only or to the other provisions in the EUWA which deal with status in other ways.

59 ibid, page 33.

Negative	Affirmative
Parliament rarely rejects (annuls) an SI	Parliament rarely declines to approve an SI

73. Following the enactment of the EUWA, the European Statutory Instruments Committee (ESIC) was established in July 2018 by the House of Commons to 'sift' proposed negative instruments. The House of Lords has added this 'sifting' role to the work of the Secondary Legislation Scrutiny Committee.

74. The ESIC website explains the sifting process as follows:

> The committees have 10 sitting days, beginning the day after the proposed negative instrument is laid, to scrutinise the instrument and make their recommendations. If either of the committees recommend that a proposed negative should be upgraded to the affirmative procedure, the Minister may either accept the recommendation or reject it—in which case the Minister must make a written statement explaining why.
>
> Recommendations of the "sifting" committees appear in reports shortly after the committees have met. The statutory instruments are then laid before Parliament, under either the negative or affirmative procedure, and are subject to the normal scrutiny processes, including consideration by the Joint Committee on Statutory Instruments and the House of Lords Secondary Legislation Scrutiny Committee.[60]

75. To decide whether to recommend an upgrade from the negative to affirmative procedure, ESIC considers the legal and political implications of the instrument.

76. To inform ESIC in carrying out the 'sifting' process, the Committee established a public engagement tool on 14 November 2018.[61] This allows individuals and organisations that might be affected by changes to retained EU law under EUWA powers to submit comments to the Committee.

A new fast-track mechanism for amending retained EU law

77. We received a range of evidence on the proposed fast-track mechanism to change retained EU law by secondary legislation. Martin Howe QC recognised the "necessity" of wide delegated powers in this instance,[62] given "the sheer scale" of retained EU law. Sir Stephen Laws considered this would be in keeping with Parliament's role as the "critic" but not "author" of all legislation.[63]

60 European Statutory Instruments Committee, 'Role' (accessed 10 July 2022).
61 ESIC, 'Engagement Tool' (accessed 4 July 2022).
62 Martin Howe QC Q27.
63 Sie Stephen Laws QC (Hons) Q40.

78. Others expressed reservations[64] for a power as wide as "the reverse equivalent of the s2(2) of the European Communities Act 1972"[65] and urged use of primary legislation to amend retained EU law, where possible and where parliamentary debate is needed.

79. For example, Eleonor Duhs told us about the proposal in the report of the Taskforce on Innovation, Growth and Regulatory Reform (TIGRR) to remove the human review of automatic decision making in the UK GDPR which is retained EU law. Giving the example of the algorithm used to decide A-Level results during the pandemic,[66] she concluded:

> This is a really significant change that could potentially be made under the category of being minor and technical. It isn't minor and technical. It is really important that Parliament is able to scrutinise and debate this change. We are now at the start of the fourth industrial revolution, and all this automated decision making—this new technology—needs to be done in a way that earns the public's trust. I would have some concerns about these changes being made without proper parliamentary debate.[67]

80. It is relevant that the Government has subsequently chosen not to pursue the removal of human review of automatic-decision making. This is clear from its response[68] to the consultation on proposals that might form part of the Data Reform Bill announced in the Queen's Speech.[69]

81. We also note that the Minister for Brexit Opportunities and Government Efficiency was very cautious about the inclusion of Henry VIII powers in the Bill and said that they should be used "extraordinarily sparingly".[70]

82. ***Substantive changes to retained EU law by secondary legislation should be possible. A wide amending power is necessary in the Bill, described in written evidence we received as "the reverse equivalent of s2(2) European Communities Act 1972". This is necessary in the interests of speed and given the significant amounts of retained EU law on the statute book. Only allowing amendment by way of primary legislation would significantly slow the process of repealing retained EU law.***

83. ***Delegated powers providing for this should, however, be carefully drawn. We recommend that clear criteria are set out in the Bill as to when the powers can be used. The Government should exercise restraint before including Henry VIII powers in the Bill. We urge the Government to consult us on this specifically when consulting us more widely in advance of the publication of the Bill.***

64 For example, Hansard Society (REU0001), see points 3, 4, 5 of the summary and corresponding substantiation in their submission. Also, Public Law Project (REU0013), see points 4 and 5 of the summary and corresponding substantiation.

65 Professor Catherine Barnard (Professor of EU Law and Employment Law at University of Cambridge) (REU0019), para 11. Professor Barnard used these words in her written evidence, though she did not endorse the necessity of such a power.

66 For further background, see the statement by Rt Hon. Gavin Williamson CBE MP (the then Education Secretary), Department for Education Skills and Training.' (17 August 2020) (accessed 4 July 2022).

67 Eleonor Duhs Q16. She was supported in her point about the need for parliamentary debate for changes to certain important policy areas or questions by Sir Jonathan Jones KCB QC (Hons).

68 Department for Digital, Culture, Media and Sport 'Data: a new direction - GOV.UK (www.gov.uk)' (23 June 2022) (accessed 4 July 2022).

69 See Section 1.5 "AI and machine learning" on Article 22 GDPR.

70 Rt Hon. Jacob Rees-Mogg MP Q39.

Parliamentary scrutiny of future changes to retained EU law

84. We heard and received different views about 'appropriate' parliamentary scrutiny of new amendment powers in the Bill. Some have highlighted the likelihood that expert sectoral scrutiny will be needed and questioned Committee capacity for that.[71] Others have included that specialist sectoral input in their wider suggestions for enhanced scrutiny compared to that undertaken for EU Exit SIs (see the following box).

Box 3: Enhanced scrutiny suggestions

- scrutiny by relevant Select Committees or other specialists
- mechanisms to allow follow-up debates on an Instrument
- amendment of Instruments, not just approval or rejection
- longer time periods for scrutiny
- consultation requirements
- stronger requirements in relation to supporting documentation
- clearer requirements on the Government to assess the impact on the UK's international obligations and/or the devolution settlements

Source: Hansard Society7[2]

85. Others considered that the current model of scrutiny by ESIC under EUWA could be used or adapted[73] as a "precedent" with Sir Stephen Laws QC (Hon) commenting:

> I think ESIC provides a good model for doing the things that need to be done to provide the reassurance that what is coming forward for scrutiny is the important stuff. That Parliament would want to consider, and to ensure that there is a system that subjects what is going to be an enormous body of change to the discipline of adherence to technical standards. I think it is wrong to think of Parliament as the author of all legislation; its practical role is as a critic. Parliament cannot look at everything—it does not look at all primary legislation—but it needs to have its attention focused on the important bits, and it needs to look at things randomly so that people know that they have to get it all right[74]

86. Evidence we received from ESIC[75] addressed the question of whether it could be a model for Parliamentary scrutiny of powers under the Bill to change the substance of retained EU law:

> In summary, ESIC has been sifting only on the appropriateness of the affirmative and negative procedure, and only in respect of instruments that

71 Professor Catherine Barnard (Professor of EU Law and Employment Law at University of Cambridge) (REU0019), paras 17–18.

72 Taken from Hansard Society (REU0001), see summary point 6 and paragraphs 36–44. Supported in whole or part by further evidence: Q30 Dr West, Public Law Project (REU0013) paragraphs 25–31, Office of the City Remembrancer, City of London Corporation (REU0027), para 3. UK Trade Policy Observatory (REU0025), see "summary" bullet points.

73 Craig Mackinlay MP raised this possibility with Sir Stephen Laws QC(Hon) Q40.

74 Sir Stephen Laws QC (Hons) Q40 (Q30–32 also relevant).

75 European Statutory Instruments Select Committee (REU0028)

> remedy deficiencies in retained EU law arising from EU withdrawal, make consequential provision or implement the withdrawal agreement. It has not examined proposals to revise or amend the law, and while it considers whether the legal, political and/or wider significance of a proposal means it should receive further parliamentary debate, the Committee has not made judgments about the merits of the underlying policy.[76]

87. On the question of what future model of scrutiny might be appropriate under the Brexit Freedoms Bill, ESIC comments:

> As witnesses to the inquiry have noted, parliamentary scrutiny of measures to amend, replace or repeal provisions in the wider body of retained EU law is likely to require a range of mechanisms rather than a 'one-size-fits-all' approach. If any procedure designed for this purpose includes a requirement for a similar sifting mechanism, then the ESIC model–operating both by reference to technical criteria and by reference to political sensitivity and importance–may have a role to play. Considerable further thought and development will be required, however, to ensure the overall scrutiny system for such measures is rigorous, proportionate, and appropriate. The recognition of ESIC's work by witnesses to this inquiry is a mark of ESIC's effective use of its sifting powers, which have worked well for their intended purpose. The Committee would be open to discussion about how its role might develop and about the usefulness of sifting, where this may be relevant in implementing legislative changes to the complex wider body of retained EU law.[77]

88. ESIC concludes that it would "expect to be consulted about any proposal to change its remit or powers". It also considers there are other parliamentary stakeholders who should be consulted on scrutiny proposals: the Procedure Committee; the Secondary Legislation Scrutiny Committee; the Joint and Select Committees on Statutory Instruments; and the Liaison Committee.[78]

89. The Minister for Brexit Opportunities and Government Efficiency has also recognised our own expertise in matters relating to EU law and our role as his "primary scrutineer". However, when he appeared before us on 20 April, he was unable *at that time* to commit to consulting us or any other Committee on Parliamentary scrutiny processes. This was because he said he was consulting Government business managers about the "best ways" that "proper" scrutiny could be carried out "within the retained EU law Bill".[79]

90. ***We urge the Government to consult us and other stakeholders in Parliament on what form parliamentary scrutiny should take for amending powers in the Bill. We ask the Government to note ESIC's specific request to be consulted on any proposed change to its remit and/or powers.***

91. ***In the light of the significant experience and expertise of the European Scrutiny Committee, we expect the Government to involve us in any process designed to assess the policy implications of changes to retained EU laws.***

76 European Statutory Instruments Select Committee (REU0028), paragraphs 8–9.
77 European Statutory Instruments Select Committee (REU0028), paras 9–10.
78 European Statutory Instruments Select Committee (REU0028), para 11.
79 The Rt Hon. Jacob Rees-Mogg MP Qs 1 and 38.

Managing the substantial task of reviewing retained EU law

Sunset provision

92. We have heard evidence supporting a 'sunset' provision.[80] This would set a deadline by which all retained EU law, if not repealed or amended, would be repealed, and cleared from the statute book. Martin Howe QC told us:

> I would suggest that, in practice, you have to have a timetable for that. I would argue that you need a sunset clause, or cut-off date, which you would put on the statute book. At the end of that, all EU retained law is repealed, and, as the Chairman indicated, if you repeal retained EU law, the previous law, which existed in the United Kingdom before it was brought into force, is revived to fill the gaps. However, if you do that, you then need a programme—if you do not have a cut-off date, we will be 35 years down the line, and there will still be swathes of retained EU law. Law students will still be being taught EU law courses, judges will be practising it, and we will have all of those EU law principles still in our legal system.[81]

93. However, questions have also been raised during our inquiry which are relevant to the possible implications of a sunset provision:

- The Employment Lawyers Association,[82] Greener UK[83] and the Hansard Society[84] are concerned about legal 'vacuums'[85] created by the repeal of all retained EU law in the employment and environmental fields.
- Dr Tom West warned that while a timeframe was desirable to avoid an "open-ended process", there was a risk that changing and replacing retained EU law would be deferred so that "the cut-off point" is "pushed from that deadline going down the line".[86]
- The Bar Council considered that a sunset provision risked frustrating legislative priorities of future administrations.[87]
- Sir Stephen Laws highlighted the legal effects of a "repeal of a repeal" under sections 15–16 Interpretation Act 1978 (IA)).[88] Section 15 IA provides that a repeal of an enactment "does not revive any enactment previously repealed unless the Government legislates to the contrary". However we note Mr Howe's proposal in his written evidence that the Government should do just that, where appropriate.[89]

80 In addition to Martin Howe QC as cited in this paragraph Sir Stephen Laws QC (Hon). Q30 Sir Stephen Laws QC (Hon) and Q59 and Q73 Barney Reynolds.
81 Martin Howe QC Q26.
82 Employment Lawyers Association (REU0009), para 5.
83 Greener UK (REU0003), para 3.
84 Hansard Society (REU0001), para 29.
85 Faculty of Advocates (REU0023) draw an analogy with the launch of the devolution settlements and argue that any wholesale repeal in that instance of law under the previous constitutional arrangements would have resulted in "gaps in provision".
86 Dr Tom West Q30.
87 The Bar Council (REU0008), para 39.
88 Sir Stephen Laws QC Q34.
89 Martin Howe QC (REU0026), para 8.

94. After receiving that evidence, a press report[90] emerged on 30 May that the Government plans to introduce a five-year sunset deadline in the Bill for changing "1500 pieces of EU legislation", after which they would "expire".[91] This was after our evidence session with the Minister for Brexit Opportunities and Government Efficiency on 20 April, so we could not discuss it with him. Subsequently, there were further press reports of a sunset provision, expiring on 23 June 2026, the ten-year anniversary of the Brexit referendum.[92] In the light of those reports, the Minister was asked in the House on 22 June whether he could confirm whether a sunset provision was in the Bill. He declined to confirm either way.[93]

95. ***Subject to appropriate consulation, we urge that the Bill should include a 'sunset' provision with an effective timeframe under which all retained EU law is repealed, which provision must take effect on the date of Royal assent, which itself must be timed to take effect (if applicable) within the timeframe of the completion of the procedures prescribed under the Parliaments Acts 1911 and 1949. Careful consideration and sufficient human resources should therefore be given to any necessary replacement legislation to avoid gaps on the statute book and legal uncertainty.***

96. ***We draw to the Government's attention the evidence we have taken on the application of the Interpretation Act 1978 in relation to "repeal of repeals" in this respect and request that any "revived" legislation is "fit for purpose" in present times.***

97. ***We urge the Government to consider including a mid-point review in the Bill, in parallel with a sunset provision to meet the timeframe we propose in paragraph 95. This would focus on the Government assessing progress and identifying any potential legislative cliff-edges. It would also enable Parliament to assess how amending powers have been used and whether changes need to be made to the Government's approach.***

Prioritisation

98. The 'Benefits of Brexit' policy document sets out a list, according to policy subject matter, of potential areas of legislative reform. It also sets out areas where the Government has already legislated on a sectoral basis by primary legislation to amend retained EU law, for example the Environment Act 2021.[94] The Minister for Brexit Opportunities and Government Efficiency also referred to action already taken by the Government in his statement to the House of 22 June:[95] the points-based immigration system, establishing a UK internal market, allowing gene-editing of crops, and recognising professional qualifications.

99. While the Government notes in the Benefits of Brexit policy document that different approaches may be needed for different sectors of the economy, there is little concrete said about prioritisation of those areas or of initiatives within those areas. The statement at

90 The Times, 'Jacob Rees-Mogg calls for bonfire of EU rules to power Brexit innovations' (30 May 2022).

91 ibid.

92 The Guardian, 'Jacob Rees-Mogg faces Cabinet backlash over plan to axe ALL remaining EU laws on the 10th anniversary of the Brexit referendum' (14 June 2022) and The Daily Mail Online, 'Jacob Rees-Mogg plan to axe EU laws sparks cabinet row' (15 June 2022).

93 HC Deb 22 June 2022, vol 716, col 873. Mr Rees-Mogg MP told Hilary Benn MP "On the right hon. Gentleman's question, he will have to wait and see what the Bill has to say about that".

94 Greener UK (REU0003). See paragraph 1 where Greener UK commends the Government for having "sensibly" used the principles and concepts of retained EU law as the basis for new primary legislation and ensuring "high standards of environmental protection endure".

95 HC Deb 22 June 2022, vol 716, col 867.

page 31 that "The Government will now prioritise areas where reform of retained EU law can deliver the greatest economic gain" is vague. The Minister for Brexit Opportunities and Government Efficiency reinforced economic efficiency and lower costs of living as the driver for prioritisation.[96] He added "This is going to be things like AI. It is going to be GDPR. It is going to be clinical trials, which was specifically in the TIGRR[97] report and is being worked on".[98]

100. Alongside the Brexit Freedoms Bill, the 2022 Queen's Speech announced forthcoming legislation in the areas of agriculture, financial services, and data/Artificial Intelligence. The Minister for Brexit Opportunities and Government Efficiency also referred to transport and energy in his statement to the House on 22 June.[99] This at least represents some prioritisation, and we shall be looking at four of those legislative initiatives (excluding energy and transport) during our "Regulating after Brexit" inquiry.

101. The benefits of prioritising important areas of retained EU law on a sectoral basis, has been welcomed by our witnesses such as Dr Oliver Garner.[100] Martin Howe QC,[101] Barney Reynolds[102] and Professor Alison Young.[103] Dr Garner said:

> It is perhaps ironic that a contextual sector-by-sector approach, as you have mentioned, could actually better achieve regulatory efficiency, which the Government claims is its major purpose in the policy paper, rather than the general power that it proposes, precisely because when you have a sector, you will know how the law is operating and it is clearer what needs to be changed to fit priorities.

102. However Dr Garner did also caution about inconsistencies which had arisen where the Government had included powers in sectoral primary legislation to further amend retained EU law, saying that existing examples "demonstrate the risk of this ad hoc sector-by-sector approach, which is inconsistency between mechanisms used to amend retained EU law".[104]

103. We have heard and received evidence which has advocated for other areas of retained EU law to be prioritised for reform.[105] Others advocate for no prioritisation with no change or only considered change in relevant policy areas.[106] Some support keeping pace with or not falling behind areas of EU law.[107] Ultimately prioritisation for reform (including decisions

96 Rt Hon. Jacob Rees-Mogg MP Q17.
97 The Taskforce on Innovation, Growth and Regulatory Reform
98 ibid.
99 HC Deb 22 June 2022, vol 716, col 867.
100 Dr Oliver Garner Q35.
101 Martin Howe QC mentions financial services and data protection as priority areas at Q26.
102 Barney Reynolds at Q73 said "We could have blue-sky working groups of people with different aspects of expertise across an industry sector in all our main industry sectors" and "we should prioritise certain sectors, particularly where there is innovation". He then mentions Intellectual Property law or standards of manufacturing.
103 Professor Alison Young (Sir David Williams Professor of Public Law at University of Cambridge) (REU0018), para 4.
104 Dr Oliver Garner Q35.
105 For example, see the written evidence of Mr John Knight (REU0002) in which he advocates for the repeal of the Third Driving Licence Directive 2006/126/EC.
106 For example, the United Kingdom Environmental Law Association (REU0020) and Organic Farmers & Growers CIC (REU0012).
107 For example, DACS (REU0015), the Design and Copyright Society, Q3, third bullet. Also the Trades Union Congress (REU0006) para 7.

about what retained EU law to leave in place) will be a decision for the Government. In making those decisions, our witnesses have pointed to Government needing to take account of the UK's wider legal obligations,[108] the need to create favourable conditions for "maintaining trading and other relationships" with the EU[109] and consultation with stakeholders.[110]

104. ***We welcome the sectoral approach taken by the Government so far to amending retained EU law.***

105. ***We recommend that the Government identifies early on clear priorities in its task of reviewing and amending retained EU law. We encourage the Government to commit to amending the priority category within two years. This is irrespective of whether the Bill includes a 'sunset' provision.***

108 For example, if retained EU law is relevant to commitments under international agreements such as the level playing field aspects of the Trade and Cooperation Agreement. Hansard Society (REU0001), para 35;The Bar Council (REU0008) para 8; Trades Union Congress (REU0006) para 5; The Law Society of Scotland (REU0024) para 9.

109 Faculty of Advocates (REU0023).

110 Office of the City Remembrancer, City of London Corporation (REU0027), para 13(d). See also Public Law Project (REU0013), summary and para 29.

4 Role of the courts

The legal framework for the role of the courts

106. When the EUWA introduced the concept of retained EU law, it also tackled the question of how REUL should be interpreted by UK courts.

107. The 2017 White Paper that preceded the EUWA explained that the Government was prioritising "a common understanding of what the law means".[111] In line with this, and to achieve certainty and continuity, the EUWA sets out general rules for how to interpret retained EU law, including the following:

a) Retained EU law (where unmodified) is interpreted in accordance with retained case law and general principles;

b) UK courts are bound by decisions of the Court of Justice of the European Union (the 'CJEU') made before the end of the Withdrawal Agreement's implementation period (31 December 2020) when interpreting (unmodified) retained EU law; but

c) UK courts are not bound by CJEU decisions made after 31 December 2020, although they may have regard to them.[112]

108. The EUWA also includes exceptions to the general rules, including that:

a) While unmodified REUL is to be interpreted in accordance with retained case law and general principles, if it has been modified, UK courts may interpret it in accordance with retained case law and general principles if that is the "intention of the modification".[113]

b) In the case of UK courts being bound by CJEU decisions made before 31 December 2020, the EUWA allowed the Supreme Court and the High Court of Justiciary in Scotland (for specified criminal matters) to depart from CJEU decisions, where it appeared right to do so. This has now been expanded to allow Court of Appeal-level courts to depart from CJEU decisions where it appears right to do so.

The Government's proposals

109. In an oral statement to the House on 9 December 2021 on the Review of Retained EU law, the Paymaster General (Rt Hon. Michael Ellis QC MP) raised the question of whether the framework setting out how UK courts are to interpret REUL was correct.[114] He said:

> Even though we have left the EU, the UK courts are still required to interpret REUL in accordance with retained general principles of EU law, such as proportionality and the protection of legitimate expectations, so

111 Department for Exiting the European Union, 'Legislating for the United Kingdom's withdrawal from the European Union' Cm 9446 (March 2017). See the forward by the then Secretary of State for Exiting the European Union Rt Hon. David Davis MP.

112 See, for example, Eleonor Duhs Q3 and Q4; and Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland (REU0010) para 6.

113 See, for example, Dr Martin Brenncke (REU0004), page 3.

114 Oral Statement to the House by the Paymaster General (Rt Hon. Michael Ellis QC MP) 9 December 2021.

> far as those principles are relevant. […] But REUL is now UK law derived from EU sources, so we need to consider whether this new body of UK law should be interpreted under UK principles of interpretation, or under those that apply to the EU treaties and legislation developed for member states.

110. The Minister's statement raised two particular questions that we consider below:

a) whether it is appropriate, as currently provided for by the EUWA, that retained EU law (where unmodified) is interpreted in accordance with retained case law (which includes EU case law) and general principles of EU law; and

b) whether there should be a change in the range of UK courts that can depart from decisions of the CJEU (relevant for decisions made before 31 December 2020), and the basis according to which they can do so.[115]

Interpretation of retained EU law

111. We heard, and received in written evidence, a range of views on the question of whether the UK courts should be directed to take a different approach to the interpretation of retained EU law. We were reminded that to date there has only been a small amount of litigation involving retained EU law, meaning there is little by way of practical experience to draw on; and that CJEU decisions made after 31 December 2020 are not binding on UK courts (though they may be persuasive in the normal way).[116]

Retained EU law and differences in the interpretation of UK and EU law

112. When asked how the interpretation of retained EU law might differ from the interpretation of other domestic law, Sir Richard Aikens stated: "I am doubtful, personally, about whether there will be such a marked or clear distinction between interpretive methods used by judges in UK courts."[117]

113. When asked by Rt Hon. David Jones MP whether retained EU law should be interpreted in the same way as other domestic law, Sir Richard Aikens replied: "[i]t then begs the question of how you would interpret the UK domestic law. As I say, I am not convinced there is any great difference, in fact, so I am not sure it is necessary." He added that "you could perhaps put that into a statute. That would then have to be interpreted by the judges, and it would not necessarily always be interpreted in quite the same way."[118]

114. In response to the same question Barney Reynolds gave a different view, telling us that "in practice, it is a much bigger point than one might otherwise appreciate. It goes to legal certainty."[119] He explained that "the drafting [of EU law] is not one coherent whole in the way that our statute is, where there is a single intellectual owner and thread through the whole thing. People agree on the words in front of them and then they decide to vote on that. We do not get into the purposes that people had when they were voting on a

115 Oral Statement to the House by the Paymaster General (Rt Hon. Michael Ellis QC MP) 9 December 2021.
116 Employment Lawyers Association (REU0009) para 6.
117 Sir Richard Aikens Q56.
118 Sir Richard Aikens Q57.
119 Barney Reynolds Q57.

provision."[120] He said that "[l]eaving the inherited acquis as it is without having clear parliamentary instructions as to how it is to be interpreted is a recipe for legal uncertainty and an unnecessary weakening of our system." He suggested that the response should be "an update of the Interpretation Act, which sets out or reinforces the fact that the EU's methods are no longer to be followed", stating that "it is possible to draft legislation that would make clear what that means in practice".[121]

115. Sir Richard Aikens suggested that if there is concern about a "dual system" between domestic law and law inherited from another system, Parliament could pass a law requiring the courts not to take account of decisions of the CJEU or EU law principles when interpreting retained EU law.[122]

116. In response to that suggestion, Professor Alison Young highlighted that, if courts were not able to consider CJEU case law, they might have to re-consider questions that had previously been settled, which in some cases would amount to a policy choice. Using the example of the Working Time Regulations Professor Young explained that UK courts might, for example, have to consider what constitutes 'work' for an ambulance driver (a matter that the CJEU has considered) and posed the question:

> Do we want the courts to be choosing that as a policy choice or do we want the courts to be saying, "Previous case law has decided that this is work. It is not really for us to change this classification as this being work. That is better taken by Parliament as a policy choice"?[123]

Implications of changing the approach to interpretation

117. We received written evidence from the Bar Council, Faculty of Advocates and Law Society of Scotland which indicated that English and Scottish courts had addressed questions of interpretation of retained EU law and not encountered uncertainty in doing so,[124] and from stakeholders who gave views about the merits or risks of changing the current approach to interpretation.

118. For example, the Employment Lawyers Association (ELA) considered that changing the approach would be a significant risk, writing that:

> Departing from pre-IP Completion Day EU case law, whether from European or domestic courts, would mean that many principles of interpretation of and the meaning of employment law would cease to exist. Principles would need to be relitigated with much reduced certainty as to outcome for businesses along with the attendant cost of increased litigation as the Courts and Tribunals developed new principles. This damages the interests of both employers and employees.[125]

120 Barney Reynolds Q57. For a more detailed discussion, see Bennion on Statute Law (2nd Ed), in particular, chapter 9 'Existing Rules of Interpretation', pages 105–106.
121 Barney Reynolds Q57.
122 Sir Richard Aikens Q61.
123 Professor Alison Young Q65.
124 Bar Council (REU0008), para 24; Faculty of Advocates (0023) response to question 4 of the Committee's Call for Evidence; Law Society of Scotland (REU0024) response to question 4 of the Committee's Call for Evidence.
125 Employment Lawyers Association (REU0009), para 6.

119. Dr Martin Brenncke made a similar point in written evidence, indicating that changing the approach to interpretation would mean that previously settled interpretations of retained EU law would become open to debate, leading to legal uncertainty and an increase in litigation costs.[126]

120. The Bar Council written evidence also argued against changing the current approach, summarising its position by stating "we see no justification for, and huge dangers in, any general change in the rules of interpretation of REUL." It added that "it would undermine overriding principles of legal certainty for a Court that was subject to further appeal to be able to depart from established interpretation of EU law as long-since integrated into the fabric of UK domestic law. That would have a knock-on negative impact on the reputation of the United Kingdom as a jurisdiction of choice."[127]

121. However, suggesting that change is merited, Martin Howe QC, in written evidence, made the point that "[h]aving provisions of the law scattered over different texts which are interpreted according to different principles and wherein there is no unification of common concepts or definitions undoubtedly raises the cost to citizens and businesses of obtaining advice, and the costs and uncertainties of litigation."[128]

122. Similarly, when asked about the interpretation of retained EU law Sir Stephen Laws replied "The highest priority is for all retained EU law to be translated into a form in which it can exist as UK domestic law, subject to the principles of interpretation and application that apply to other UK domestic law."[129]

Courts that can depart from CJEU case law

Relevant context when considering which courts can depart

123. We were reminded by Sir Stephen Laws that the question of whether UK courts may depart from CJEU decisions is relevant to CJEU decisions made on or before 31 December 2020.[130]

124. We were also reminded that the Government had recently carried out a consultation on the departure from retained EU case law by UK courts and tribunals.[131] Following that consultation, the Ministry of Justice published its response in October 2020. This concluded that the correct approach, given the need to balance the need for legal certainty with a timely departure from retained EU law, was to broaden the right to depart from retained EU case law to all appellate courts but not to a wider range of higher courts and some tribunals.[132]

126 Dr Martin Brenncke (REU0004) response to question 6 of the Committee's Call for Evidence.
127 Bar Council (REU0008), para 40.
128 Martin Howe QC (REU0026), para 4.
129 Sir Stephen Laws Q39.
130 See, for example, Eleonor Duhs Q7.
131 Ministry of Justice, 'Response to the consultation on the departure from retained EU case law by UK courts and tribunals' CP 303 (October 2020).
132 Ministry of Justice, 'Response to the consultation on the departure from retained EU case law by UK courts and tribunals' CP 303 (October 2020); Herbert Smith Freehills (REU0005) section A.

Views on the Government's proposal

125. We heard a broad range of views on the question of which courts should be allowed to depart from CJEU decisions.

126. We were told that one could extend the ability to all courts to depart from decisions of the CJEU when interpreting retained EU law and that doing so would address the "deterrent effect" of needing to take a case to the Supreme Court or the Court of Appeal before a court can take a decision on departing from these CJEU decisions.[133]

127. When asked whether the current approach as to which courts may depart from the decisions and principles of the CJEU when interpreting retained EU law strikes the right balance, Barney Reynolds said that "[i]t would be mistaken to make the assumption that the existing situation gives rise to legal certainty".[134]

128. In contrast, we were also told that the current approach strikes the right balance and to change it risks greater litigation, costs and legal uncertainty.[135] Several contributors, in both written and oral evidence, explained that allowing tribunals to depart would lead to conflicting approaches to interpretation, leading to uncertainty.[136]

129. For example we were told that extending the right to depart from retained EU case law to a wider range of courts would be "a departure from our rules of precedent, which long pre-date membership of the EU" and that for case law of the CJEU to continue to have relevance in the interpretation of retained EU law is consistent with the "traditions of the UK legal system and for the benefit of the UK economy".[137]

130. We were reminded by the Bar Council that "in contrast to legislative change - which applies only to situations after it is enacted - any judicial departure from CJEU case law will apply retrospectively". Giving the example of areas such as VAT, the Bar Council explained:

> that could mean that the legal basis on which tax had been paid on certain classes of supplies over the previous few years became unsustainable, leading to potentially very large claims against HMRC and creating the inevitable risk of extensive litigation to resolve the legal and commercial uncertainty that would be created.[138]

131. Similarly, the Employment Lawyers Association explained that "Allowing lower courts to depart from domestic decisions regarding retained EU law interferes with the UK's long established principle of precedent. […] [A]llowing lower courts to do this would create uncertainty, delay, unmeritorious claims and defences, and have unintended consequences."[139]

133 Martin Howe QC Q26.
134 Martin Howe QC Q59 .
135 See, for example: Sir Richard Aikens and Professor Alison Young Q58; Bar Council (REU0008), paras 45–50; and Dr Martin Brenncke (REU0004) response to question 6 of the Committee's Call for Evidence.
136 See, for example, Professor Alison Young and Sir Richard Aikens Q58; Herbert Smith Freehills (REU0005) section A and response to question 7 of the Committee's Call for Evidence; and Bar Council (REU0008), paras 45–50.
137 Herbert Smith Freehills (REU0005) Section A(i) and Section C6.
138 Bar Council (REU0008), para 47.
139 Employment Lawyers Association (REU0009), para 6.

132. ***Given the direct impact on how the law is interpreted, we recommend that when retained EU law is modified, the Government ensures that the amending legislation clearly indicates whether the modified legislation is to keep the status of retained EU law. We consider that the status should not continue.***

133. ***We recommend that the Bill contains the requirement that, before deciding to extend the range of courts that can depart from retained EU case law, the Government consults senior members of the judiciary.***[140]

134. ***We support the Government's proposal to reconsider the role of retained general principles. We do not believe it is appropriate in the domestic legal context that retained EU case law is interpreted using the purposive approach adopted by the Court of Justice of the European Union.***

140 See section 6(5C) EUWA.

5 Devolution

The EUWA and devolution

135. The EUWA which created retained EU law extends to England and Wales, Scotland, and Northern Ireland. Retained EU law therefore operates throughout the UK. There are, however, specific provisions in the EUWA which relate to the devolved settlements.

The 'freezing power'

136. During the UK's membership of the EU, the Scotland Act 1998, the Government of Wales Act 2006, and the Northern Ireland Act 1998 prevented the devolved institutions from acting incompatibly with EU law. The EUWA removed these restrictions.

137. In place of these restrictions, the EUWA amended each statutory devolution settlement to give a Minister of the Crown the power to make regulations to prevent a devolved legislature from modifying (or conferring a power to modify) retained EU law in a specified area, commonly referred to as a 'freezing power'. The powers were available until 10.59pm on 31 January 2022. They have now been repealed without ever having been used.[141]

138. The Government's Explanatory Memorandum accompanying the regulations which revoked the freezing powers describes them as:[142]

> a temporary mechanism to prevent divergence by the devolved administrations from existing structures established in the UK by EU law while UK Common Frameworks were developed where needed. However, the powers have not been exercised and are no longer necessary.

The 'deficiencies-correcting power'

139. The EUWA created a power in section 8 to correct deficiencies in retained EU law so that it could operate in a UK context. This power could be used by devolved authorities acting alone, or by Ministers of the Crown and devolved authorities acting jointly. The power was time-limited and has now expired.

140. To take Scotland as an example of how concurrent powers have worked, Professor Wilson and Dr Taylor provided us with the following analysis, citing from their own research papers:[143]

141 The European Union (Withdrawal) Act 2018 (Repeal of EU Restrictions in Devolution Legislation, etc.) Regulations 2022 (SI 2022/375). See also: Professor Aileen McHarg (Professor of Public Law and Human Rights at Durham University) and Dr Eleni Frantziou (Associate Professor in Public Law and Human Rights at Durham University) (REU0011), in answer to question 8 of the Committee's Call for Evidence.

142 The European Union (Withdrawal) Act 2018 (Repeal of EU Restrictions in Devolution Legislation, etc.) Regulations 2022.

143 Their research papers are listed in Professor Adelyn Wilson (Professor of Law at University of Aberdeen) and Dr Robert Taylor (Senior Lecturer in Public Law at University of Aberdeen) (REU0014). They are: Brexit Statutory Instruments: Powers and Parliamentary Processes, SB 21–45, p.5; Brexit Statutory Instruments: Identifying the Challenges, SB 21–53, p.5; and Brexit Statutory Instruments: Impact on the Devolved Settlement and Future Policy Direction, SB 21–52, p.5.

> UK Exit SIs, made under the UK Government's section 8 power, were the primary mechanism for changing retained EU law on devolved matters in Scotland. Prior to IP Completion Day, "approximately 225 proposed UK Exit SIs were notified by the Scottish Government to the Scottish Parliament, although only approximately 200 UK Exit SIs were then subsequently laid by the UK Government." In comparison only approximately 70 Exit Scottish Statutory Instruments (SSIs) were made under equivalent powers given to the Scottish Ministers. Thus, "approximately three quarters of the secondary legislation passed to correct retained EU law on devolved matters were made by the UK Government rather than the Scottish Government".[144]

Scotland

Overview of the Scottish devolution settlement

141. The establishment of the Scottish Parliament and the Scottish Government is provided for in the Scotland Act 1998 (as amended by the Scotland Act 2012 and the Scotland Act 2016). Schedule 5 to the Act sets out those matters which are reserved to the UK Parliament. Matters not reserved are deemed to be devolved to the Scottish Parliament. It has the primary legislative power to pass acts.

142. The Scottish Parliament cannot legislate on reserved matters nor by Schedule 4 can it amend protected enactments, such as certain articles of the Act of Union. EUWA is itself a protected enactment.

143. The UK Parliament remains sovereign. However, this needs to be understood alongside the non-legally binding Sewel Convention. Although still a convention, it is set out in Section 28(8) Scotland Act 1998. It recognises "that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament".

144. In May 2018 the Scottish Parliament passed a motion not to consent to what was then the EU (Withdrawal) Bill. This was because the Scottish Parliament objected to the Bill returning to Westminster any EU powers to legislate in Scottish devolved areas. This was the first time that the UK Parliament had legislated without the consent of the Scottish Parliament in respect of devolved matters, having recognised that consent should be sought.[145]

The Scottish 'keeping pace with EU law' legislation

145. In December 2020 the Scottish Parliament passed the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. This Act provides Ministers with powers to help meet the Scottish Government's commitment that Scottish laws 'keep

144 Professor Adelyn Wilson (Professor of Law at University of Aberdeen) and Dr Robert Taylor (Senior Lecturer in Public Law at University of Aberdeen) (REU0014).

145 Official Report of the Meeting of the Scottish Parliament, 15 May 2018, Debate and Vote on withholding a Legislative Consent Motion, pages 74–76. See also Dr Robert Taylor Q83. Also, Professor Aileen McHarg (Professor of Public Law and Human Rights at Durham University) and Dr Eleni Frantziou (Associate Professor in Public Law and Human Rights at Durham University) (REU0011), in answer to question 8 of the Committee's Call for Evidence.

pace' with future developments in EU law where appropriate. This legislation enables Scotland to remain aligned with EU rules in devolved fields such as agriculture and the environment.[146]

146. An earlier attempt at legislation on similar lines (the Scottish Continuity Bill) was withdrawn after the Supreme Court ruled in 2018 that some provisions had been rendered unlawful by the EUWA as enacted after the Scottish Bill had been drawn up.[147] This was because the Scottish legislation could not amend the EUWA (which had become a protected enactment by that time) nor the Scotland Act 1998. However, the central idea of aligning Scottish law with the EU in devolved matters was held to be lawful.

147. The Scottish Government has now drafted two documents in relation to these 'keeping pace' powers, a Policy Statement[148] and an Annual Report[149]. The Policy Statement refers to the need to consider the effect on any provisions of retained EU law of the keeping pace commitment. The Annual Report shows that during the relevant reporting period (29 March 2021 and 31 August 2021) no use had been made of the powers in the Act by Scottish Ministers and that there were "no current plans" to use the powers in the next reporting period (until 31 August 2022).

148. However, as the draft policy statement explains, there is no direct co-relation between the non-use of the powers and continued alignment or willingness to align. This is because some EU legislation or provisions may not be relevant to third countries and, in particular, the policy areas devolved to Scotland or it may be that non-legislative means could be used.[150] When asked by Margaret Ferrier MP why the power had not yet been used, Dr Taylor agreed that other options were open to the Scottish Government such as secondary legislation. He also said "The suggestion is that it is for things like environmental protection, animal health and welfare and so on. It might be those opportunities have not come up yet".[151]

Wales

Overview of the Welsh devolution settlement

149. The Government of Wales Act 1998, followed by the Government of Wales Act 2006 ('GoWA') provided for the establishment of a separate legislature (the National Assembly for Wales or Senedd) and executive (the Welsh Assembly Government).

146 United Kingdom Environmental Law Association (REU0020), para 8.

147 THE UK WITHDRAWAL FROM THE EUROPEAN UNION (LEGAL CONTINUITY) (SCOTLAND) BILL – A Reference by the Attorney General and the Advocate General for Scotland (Scotland) [2018] UKSC 64

148 Draft Statement of Policy by the Scottish Ministers in the exercise of the power In Section 1 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (29 October 2021)

149 Draft report by the Scottish Ministers in exercise of the power in section 1(1) of the UK withdrawal from the European Union (Continuity) (Scotland) act 2021 for the reporting period 29 March 2021 – 31 August 2021 and the intended future use of the power under section 1(1) in the upcoming reporting period (October 2021).

150 Letter from Angus Robertson MSP to the Constitution, Europe, External Affairs and Culture Committee of the Scottish Parliament, 1 June 2022.

151 Dr Robert Taylor Q82.

150. Schedule 7A to GoWA defines the scope of the Assembly's legislative competence to make Assembly Acts. Schedule 7A sets out the areas of policy on which only Parliament can legislate. Any area not listed in Schedule 7A is devolved to the National Assembly for Wales.[152]

151. Like the Scottish Parliament, the Senedd cannot legislate on reserved matters or amend protected enactments, including the EUWA. The Senedd also benefits from the Sewel Convention as set out in Section 2 of the Wales Act 2017. However, as points of difference:

- Following agreement by the Senedd to amendments made to the devolution provisions of the EU (Withdrawal) Bill, the Senedd approved a motion to consent to the Bill in May 2018.
- A reference to the UK Supreme Court concerning the Welsh Continuity Bill, similar to that made in relation to the first Scottish Continuity Bill, was then withdrawn.

152. Unlike Scotland, Wales has not since pursued further continuity legislation to keep pace with EU law.

The Welsh devolution settlement post- Brexit

153. On 19 January 2021, the Counsel General for Wales applied for permission to bring a judicial review against the Government in respect of the Internal Market Act 2020 (IMA). The main basis of the claim is that the mutual recognition principle in the IMA means that the Senedd cannot impose legislative requirements on the sale of goods in Wales that are additional to the requirements elsewhere in the internal market. So for example Wales could not ban the sale of additional single use plastics. However, environmental protection is a devolved matter. In his statement of that date,[153] the Counsel General said the Act impliedly repeals parts of the GoWA, so reducing the Senedd's legislative competence. He also argued that Henry VIII powers under the Act could be used by UK Ministers to amend the GoWA, so further cutting down the devolution settlement.

154. However, both the High Court and Court of Appeal have refused permission for the judicial review on the grounds that the claim has been brought prematurely and could not be decided hypothetically.[154] There needed to be specific Senedd legislation at issue, affected by the IMA in the way submitted by the Counsel General. The Counsel General has applied to the Supreme Court for leave to appeal but there has been no confirmation whether it has been granted yet.[155]

152 Further devolution of powers to the Welsh executive and legislature was made by the Wales Acts of 2014 and 2017.

153 Written Statement in the Senedd: Legal challenge to the UK Internal Market Act 2020, Jeremy Miles MS, Counsel General and Minister for European Transition, 19 January 2021.

154 R (The Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy, [2022] EWCA Civ 118.

155 Paras 83–87, Counsel Generals' evidence to the Welsh Legislation, Justice and Constitution Committee.

Implications of the Bill for Wales and Scotland

155. The legislative history of the EUWA shows that deficiency-correcting amending powers posed challenges for devolved legislatures. For the first time ever, the Government had to legislate in areas of devolved competence without the consent of the Scottish Parliament.

156. We heard that a new Bill with powers to amend the substance of retained EU law in areas of devolved competence may engage the Sewel Convention and so pose similar challenges to the EUWA.[156] The issue of how a future Bill might affect devolved competences and the question of the engagement of the Sewel Convention is also explained by Professor McHarg and Dr Frantziou. Noting that EUWA is a protected statute which the devolved institutions cannot modify, they comment that this "means that [the devolved institutions] cannot make any *general* provision for the status or interpretation of retained EU law that is inconsistent with the terms of the Withdrawal Act (*Scottish Continuity Bill Reference* [2018] UKSC 64)".[157]

157. They add:

> It follows that any wholesale repeal of the concept of retained EU law (and hence repeal of the relevant provisions of the Withdrawal Act) would have the effect of increasing devolved legislative freedom, unless any further amendment to the devolution statutes was made in its place. The Supreme Court confirmed in the *Scottish Continuity Bill Reference* that, but for the designation of the Withdrawal Act as a protected statute, it would have been within the competence of the Scottish Parliament to make its own provision for the continuity of EU law in respect of devolved matters … .[158]

158. This also means that "any wholesale abolition of the concept of retained EU law" would engage the Sewel Convention as it would affect the scope of devolved competence.[159]

159. Other witnesses considered that while the UK's exit from the EU had affected devolved competence, retained EU law and EUWA was of lesser concern to restrictions on legislative competence contained in other statutes, primarily the United Kingdom Internal Market Act 2020.[160]

160. Common Frameworks are also a relevant consideration. According to the Government a UK Common Framework is " … an agreed common approach to policy areas that were previously governed by EU law, and intersect with areas of devolved competence".[161] They are designed to "ensure that coherent approaches to regulation are maintained across the UK".[162] Since the enactment of EUWA, over 30 active Common Frameworks have been developed in areas of devolved competence, though only some of those have been agreed.[163]

156 Dr Robert Taylor Q83, Professor Jo Hunt Q86, and Professor Aileen McHarg (Professor of Public Law and Human Rights at Durham University) and Dr Eleni Frantziou (Associate Professor in Public Law and Human Rights at Durham University) (REU0011), pages 1 and 10.

157 Professor Aileen McHarg (Professor of Public Law and Human Rights at Durham University) and Dr Eleni Frantziou (Associate Professor in Public Law and Human Rights at Durham University) (REU0011).

158 ibid.

159 ibid.

160 For example, see Faculty of Advocates (REU0023).

161 HM Government, 'UK Government's Frameworks Analysis 2021' (9 March 2018).

162 ibid.

163 Professor Jo Hunt Q88.

More may follow. We were also told that as Common Frameworks are "very much built"[164] on retained EU law and "their purpose is to ensure a common approach to retained EU law"[165], so "any process written into" the Bill "would need to consider the frameworks".[166] The need for consistency with Common Frameworks was highlighted by the Law Society of Scotland:

> It is important that the principles relating to Common Frameworks are followed by all parties to ensure that the functioning of the UK internal market is enabled, while acknowledging policy divergence, compliance with international obligations is ensured and the UK can negotiate, enter into and implement new trade agreements and international treaties.[167]

161. If a Bill contained sweeping powers to change retained EU law, we heard that:

- there would be a "big picture" concern about "instances in which the concurrent use of powers by UK Ministers may cut across the competence" of the Senedd;[168] and
- that might affect the Scottish Government's political commitment to keep pace with EU law, where possible, since there would be less of a base of retained EU law on which to build.[169]

162. We also received evidence on how Wales and Scotland had scrutinised UK-wide Exit SIs under EUWA. There is no direct form of scrutiny for the devolved legislatures. Instead:

- in the case of Wales, in addition to scrutiny by the Senedd's Legislation, Justice and Constitution Committee of Welsh ministers' use of powers, there is a 2018 intergovernmental agreement and process applying between the Welsh and UK Governments relating to UK Ministers legislating in devolved areas—the Welsh Government's consent is required[170].
- the Scottish Parliament has engaged in indirect scrutiny of UK Minister Exit SIs changing retained EU law in devolved areas. This was via a process agreed between the Scottish Executive and Parliament, but dependent on facilitation by the UK Government. Often not enough time was allowed for that scrutiny nor prior sight of draft instruments. The key to future effective scrutiny would therefore be timing of engagement of the devolved legislatures.[171]

164 Professor Jo Hunt Q79.
165 Professor Adelyn Wilson Q88.
166 Professor Jo Hunt Q79.
167 The Law Society of Scotland (REU0024), para 9.
168 Professor Jo Hunt Q86.
169 Dr Robert Taylor Q81.
170 Professor Jo Hunt Q75.
171 Professor Adelyn Wilson (Professor of Law at University of Aberdeen) and Dr Robert Taylor (Senior Lecturer in Public Law at University of Aberdeen) (REU0014); and Dr Robert Taylor Q79.

Northern Ireland

Overview of Northern Ireland devolution settlement

163. The establishment of the Northern Ireland Assembly in its current form dates back to the 1998 Belfast (Good Friday) Agreement and the Northern Ireland Act 1998. These provide for and set out the competences of a separate legislature (the Northern Ireland Assembly) and the executive (the Northern Ireland Executive).

164. Section 4 of the Northern Ireland Act 1998 refers to transferred (equivalent to devolved in Scotland and Wales), excepted, and reserved matters, to distinguish the different areas of devolved power in the Northern Ireland settlement.

Northern Ireland devolution settlement post Brexit

165. As part of the UK/EU Withdrawal Agreement, the UK and EU agreed the Protocol on Ireland/Northern Ireland (the Protocol), which creates bespoke arrangements that apply to and in the UK in respect of Northern Ireland.[172]

166. These include provisions that applies EU law to the regulation and sale of goods in Northern Ireland (Articles 5, 7–10 and 12(2), essentially, EU customs and single market provisions and related oversight provisions) as implemented in domestic law by the EUWA (as amended by the European Union (Withdrawal Agreement) Act 2020).[173]

Potential implications of the Brexit Freedoms Bill for Northern Ireland

167. In considering the potential implications of the Brexit Freedoms Bill for Northern Ireland, we were told that there is a distinction to be made between those areas where the Protocol applies, and those where it does not. Where the Protocol does not apply, the overarching considerations for retained EU law are, broadly, as for Wales and Scotland.

168. We were told and received written evidence to explain that where the Protocol does apply, there are specific considerations to be taken into account. In particular, where EU law applies by virtue of Articles 5 and 7–10 of the Protocol, where retained EU law might otherwise apply, instead EU law applies on a dynamic basis and with oversight from the CJEU.[174]

169. We were told that "a wholesale removal of retained EU law that does not take into account its relationship with […] [Articles 5 and 7–10 of the Protocol] could unintentionally lead to […] divergence with the rest of the UK".[175]

170. We received written evidence from the Employment Lawyers Association that considered the impact of the Northern Ireland devolution settlement. It noted that while

172 The discussion of the Protocol in this report is based on the terms of the existing text of the Protocol as agreed in October 2019 and as applied in domestic law under the terms of the EUWA. The UK Government is seeking significant changes to parts of the Protocol, as set out in its July 2021 Command Paper-HM Government, 'Northern Ireland Protocol: the way forward' CP502 (July 20201)-and has introduced the Northern Ireland Protocol Bill, which would alter the UK's implementation of the Protocol as a matter of domestic law.

173 Professor Christopher McCrudden Q76.

174 Professor Christopher McCrudden Q76; and Professor David Phinnemore and Dr Lisa Claire Whitten (REU0017).

175 Professor Christopher McCrudden Q76–77. A point also made in written evidence by Professor David Phinnemore and Dr Lisa Claire Whitten (REU0017), para 6.

employment law is a reserved matter in Scotland and Wales, "Northern Ireland does have the power to modify employment laws, including retained EU law". The ELA notes that, now that the freezing powers have been revoked, while Northern Ireland's competence in relation to employment law has expanded, it is "constrained by the Northern Ireland Protocol" and associated provisions of the Northern Ireland Act.[176]

Consultation on the Bill and changes to retained EU law

171. On 10 February, Allan Dorans MP asked the Attorney General about the proposed Bill from the perspective of the devolved administrations. He said:

> On Friday 28 January, Ministers of the three devolved Administrations were called to a meeting with the Attorney General at very short notice—the very next day, in fact—to discuss the so-called Brexit freedom Bill, which will have significant impact on hundreds of areas controlled by the devolved Governments. The meeting has been described as "a rushed exercise … with nothing more than a vague verbal briefing", with "no effort by the UK government to properly consult devolved governments on the details of the plans nor seek their views on their impacts on devolved areas of policy and law".[177]

172. He then asked the Attorney General to make an unequivocal commitment that the devolved Administrations would be "consulted extensively before any further decisions are taken that would affect their existing policies, and specifically in relation to retained EU law"[178].

173. The Attorney General replied that there would be "continued and meaningful engagement with all the devolved Administrations in this process". She added "It is an important opportunity and an important moment for our whole United Kingdom, and I very much look forward to the input of all the DAs."[179]

174. Similar issues concerning consultation of the devolved administrations and their cooperation with the Government's review were discussed during a plenary of the Senedd on 9 February (see in particular paragraphs 82–83 of the Senedd Record).[180]

175. At our evidence session with the Minister for Brexit Opportunities and Government Efficiency on 20 April, Margaret Ferrier MP pursued this issue further, both in relation to the Bill and also to any future changes to retained EU law. The Minister indicated that there would be the usual "very good official-level discussion between the Scottish Government and Her Majesty's Government".[181]

176 Employment Lawyers Association (REU0009), paras 8 and 89–93.
177 HC Deb 10 February 2022, vol 705, OQ905577.
178 ibid.
179 ibid.
180 Record of the Senedd Plenary, 9 February 2022.
181 Q35–7.

176. Many of our witnesses have also highlighted the need to consult devolved administrations in a timely way.[182]

177. ***We urge the Government to consult the devolved administrations as early as possible on the content of the Bill. This may mean going beyond usual practice in intergovernmental relations. Early consultation will help the Government to anticipate some of the complex constitutional, legal and Common Frameworks issues flagged in the evidence we received from legal experts on devolved matters.***

178. ***Likewise, we ask the Government to confirm that devolved administrations will be similarly consulted early on specific changes to retained EU law within devolved competence.***

179. ***We recommend that, until a satisfactory long-term resolution to the impact of the Protocol is achieved, the Government ensures that any future legislation to change the functioning of retained EU law includes provisions to ensure that Parliament is informed if changes to retained EU law could lead to divergence between Northern Ireland and the rest of the UK.***

182 For example, see: UK Trade Policy Observatory (REU0025) 'summary'; Professor Adelyn Wilson (Professor of Law at University of Aberdeen) and Dr Robert Taylor (Senior Lecturer in Public Law at University of Aberdeen) (REU0014) and, in particular, Dr Robert Taylor Q79; Greener UK (REU0003), para 5; Hansard Society (REU0001); Planning and Environment Bar Association (REU0016), para 8; and Professor David Phinnemore (Professor of European Politics at Queen's University Belfast) and Dr Lisa Claire Whitten (Research Fellow at Queen's University Belfast) (REU0017), 'summary' bullet points and para 39 onwards.

6 Transparency - accessibility of retained EU law and consultation

Accessibility of retained EU law

Government's proposals on accessibility

180. The 'Benefits of Brexit' policy document includes a proposal on the accessibility of retained EU law. It says:

> Building on the legislative mapping completed to prepare the statute book for Brexit, the review into the substance of retained EU law is working with departments to deliver an authoritative assessment of where retained EU law is concentrated on the statute book and across sectors of our economy. Once all retained EU law has been categorised, we will make this catalogue public and any subsequent changes to retained EU law accessible. The public has a right to know where EU-derived law is still on the UK statute book. The public will be able to track government's progress as we reform retained EU law.[183]

181. We heard evidence on the importance of public access to up-to-date versions of retained EU law. Martin Howe QC gave us an example relating to the law on industrial designs.[184] He explained that the EU Community Designs Regulation[185] had become part of retained EU law and had then been amended by statutory instrument. He said that while the Government had published the regulation as it stood at the end of the transition period (31 December 2020), it had not published an up-to-date version incorporating the changes that had been made since then. He said that "if you are a member of the public and want to know how the designs regulation now stands as part of our law, it is an absolute nightmare."[186]

182. Stephen Laws told us "Inaccessible law is a clear contravention of the rule of law. If people don't know what the law is, they can't organise their affairs to comply with it".[187]

183. We received evidence from Greener UK that:

> There is a significant public interest in REUL because of the wide scope of law that it covers. There are already several accessibility issues in relation to REUL. For example, GOV.UK still has copies of EU laws on it which do not form part of REUL, which can be confusing for stakeholders as there is nothing to indicate which laws (or parts of laws when they came into effect at different times) are on the statute book, and which are just a copy of a law applying to the EU which is legally irrelevant to the UK.[188]

183 Cabinet Office. 'The Benefits of Brexit: How the UK is taking advantage of leaving the EU' (January 2022) page 31.
184 Q44 and (REU0026), paras 2–5.
185 Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs [2002] OJ L 3/1.
186 Q44.
187 Q45.
188 Greener UK (REU0003), part 4.

184. Herbert Smith Freehills submitted evidence that said:

> Neither the UK Government nor Parliament publishes a full consolidation of UK legislation … This means that ordinary citizens and business do not easily have access to the laws of the UK in any up-to-date or intelligible format, yet there is a legal presumption that they know the law. This is damaging in many ways, including in relation to business certainty, transparency, fairness, access to justice and democracy. While the legislation.gov website is making headway in the updating of UK legislation, particularly in the field of primary legislation, in far too many cases there is no consolidation of the legislation available, except for an unauthorised version available from expensive paid for legal know how services, such as WestLaw, which the ordinary citizen or smaller business has no access to.[189]

185. The Bar Council's written evidence made the following point:

> Accessibility of the law is essential so that: natural and legal persons are aware of their rights and obligations; regulators can enforce those rights and obligations; practitioners can advise on the law; and so that the judiciary can apply the law. The complexity and, on occasion, inaccessibility of REUL is therefore a serious problem.[190]

186. However, these views were not universal. The evidence submitted by the Faculty of Advocates said "Were it to be suggested that access is difficult for lay people, we are not convinced that this is any more true for EU-derived law than it is for the thousands of other pieces of legislation that apply to citizens of the UK".[191]

187. Some of our witnesses acknowledged the practical difficulties in compiling a database of retained EU law[192]. Dr Garner noted the particular challenge of cataloguing retained EU law saved under section 4 EUWA (the 'sweeper category') because it is "not found in a defined legislative form - a textual form - at the moment". He also suggested that a database which "contained proposed amendments in a kind of "track changes" form" would assist MPs and Committees "to be proactive in their scrutiny".

188. We heard from the Minister for Brexit Opportunities and Government Efficiency that work was underway on a catalogue of retained EU law. He said:

> I would like to make the interactive version available, because it is much more useful than simply giving you a catalogue. I cannot promise that, because it is simply a technologically complex thing to do, but I am very keen that that should be provided and should be provided around the time the Bill is published, ideally before, but we want to get as much information out as possible.[193]

189 Herbert Smith Freehills (REU0005), pages 3–4.
190 The Bar Council (REU0008), para 19.
191 Faculty of Advocates (REU0023), page 2.
192 Sir Stephen Laws and Dr Oliver Garner Q46.
193 Q40.

189. On 22 June 2022, the Government launched a catalogue of retained EU law and interactive dashboard which is available on gov.uk. The Minister described it as an "authoritative catalogue of over 2,400 pieces of legislation, spanning over 300 individual policy areas".[194]

190. In a Written Statement published on 28 June 2022,[195] Mr Mick Antoniw, the Welsh Government Counsel General and Minister of the Constitution, noted that "[t]he dashboard contains no information about which instruments of REUL are in devolved areas, despite requests for this being made by the Devolved Governments".

191. ***We welcome the Government's publication of the catalogue of retained EU law and interactive dashboard. It improves the accessibility of retained EU law and will be a useful tool for tracking and evaluating the progress of the Government's programme for amending or replacing retained EU law.***

192. ***We ask the Government to clarify whether the catalogue contains a comprehensive list of the retained EU law in the category defined in section 4 of the EUWA, the 'sweeper' provision.***

193. ***We note that the catalogue does not address the concerns we heard about the lack of a publicly available database of the up-to-date consolidated legal text of pieces of REUL. For as long as REUL remains, we consider that there is value in having such a database in the interests of legal certainty and transparency. We encourage the Government to look into the feasibility of this.***

Consultation

Government's statements on consultation on the Brexit Freedoms Bill

194. In his Written Ministerial Statement of 9 December 2021,[196] the Paymaster General referred to a process of consultation on proposed changes to REUL which would involve Parliament before legislation was introduced. He said:

> We will incorporate Parliament's views, including through targeted engagement with select committees, to ensure the outcomes of the review into REUL status are robust.

195. The Rt Hon. Lord Frost, then Minister of State in the Cabinet Office, gave the following assurance on consultation with Parliament:

> I and other responsible Ministers are of course ready to engage with Parliament in an appropriate way—for example, directly with this House, with interested Select Committees and with noble and learned Lords who have a particular interest in this question. Of course, we wish to establish proposals which are likely to be acceptable to the largest possible number of parliamentarians while achieving our policy aims.[197]

194 HC Deb 22 June, vol 716, col 866.
195 Welsh Government, 'Written Statement: Retained EU Law Interactive Dash Board' (27 June 2022).
196 HC Deb 9 December 2021, vol 75, col 18WS.
197 HL Deb 16 December 2021, vol 817, col 435.

196. More recently, the Minister for Brexit Opportunities and Government Efficiency told us:

> I cannot at the moment commit to consulting this Committee or any particular Committee, because I am currently talking to the business managers about the best ways of ensuring that this scrutiny is carried out… We are not going to lose the fundamental things. We may lose some of the additional attractive things. At the moment, I am in the phase of pushing for as much as we can possibly get written into the Bill.[198]

197. ***The Committee regrets that the Government's commitments to consult select committees on the content of the Bill have not materialised. However, it is not too late to consult prior to introduction. It is an important and worthwhile exercise because of the breadth and volume of law that will be affected.***

198. ***The Committee notes that, even after cutting out a consultation stage, the Government has indicated that it might not address all of the changes it identified in the Benefits of Brexit policy document because of its self-imposed legislative timetable. We welcome the offer of the Brexit Opportunities Minister to return to the Committee once the Bill has been published to explain what he described as the "trade-offs" between the timeliness of the Bill and its scope.***

199. ***We urge the Government to begin consultation on the content of the Bill immediately and to introduce the Bill as soon as possible after that. Adequate time must be allowed for the parliamentary stages of the Bill.***

200. ***We also urge the Government to ensure that there is effective and well-coordinated cross-Government working on the review and matters covered by the Bill.***

198 Q43. See also para 88 of this Report.

Conclusions and recommendations

Supremacy

1. We consider the provisions of the Bill which deal with the principle of the supremacy of EU law to be of particular legal and political importance. (Paragraph 39)

2. It is regrettable that the Government has not given a firmer indication of what it proposes to do. It is unclear whether the Government is proposing:

   a) simply to remove the principle of the supremacy of EU law

   b) to remove the principle and replace it with another rule

   c) to retain the effects of the principle but rename it. (Paragraph 40)

3. *We urge the Government to consult us on its plans for this aspect of the Bill before introduction, as it undertook to do in December 2021.* (Paragraph 41)

4. *We consider that the 'principle of the supremacy of EU law' should be removed. It is incongruous in the post-exit domestic legal framework. The 'principle of the supremacy of EU law' is part of an arrangement that was only ever intended to be temporary. The existence of retained EU law—with the trappings of the EU's legal order—alongside 'true' UK law is historically inappropriate and does not fit with our legal traditions and legal culture.* (Paragraph 42)

5. *The application of section 5(2) EUWA as it stands results in retained EU law prevailing over a later, incompatible Act of Parliament if that Act was made before 1 January 2021. However, retained EU law does not prevail over a later, incompatible Act of Parliament if that Act was made on or after 1 January 2021. The 'principle of the supremacy of EU law' undermines the principle that the most recent expression of Parliament's will prevails. Having a different rule where retained EU law is involved creates a second statute book in effect. This is untenable and not suitable for reasons of certainty and clarity. The Bill should give effect to the principle that, in the event of incompatibility, retained EU law should not take precedence over any Act of Parliament whether enacted before or after 1 January 2021.* (Paragraph 43)

6. *Retained EU law lacks the democratic legitimacy of an Act of Parliament. It was originally adopted under EU processes. In many cases, this involved qualified majority voting in the Council of Ministers behind closed doors without a transcript. Although the UK had a seat at the table, its scope to block the adoption of EU laws to which it objected was limited.* (Paragraph 44)

Changing retained EU law and parliamentary scrutiny

7. *Currently, when retained EU law is amended, it keeps the status of retained EU law. We recommend that when retained EU law is modified by domestic legislation, the Government ensures that the amending legislation clearly indicates whether the*

modified legislation is to keep the status of retained EU law. We consider that the status should not continue. This point is also pertinent in the context of our recommendations relating to the interpretation of retained EU law in Chapter 4. (Paragraph 63)

8. *Substantive changes to retained EU law by secondary legislation should be possible. A wide amending power is necessary in the Bill, described in written evidence we received as "the reverse equivalent of s2(2) European Communities Act 1972". This is necessary in the interests of speed and given the significant amounts of retained EU law on the statute book. Only allowing amendment by way of primary legislation would significantly slow the process of repealing retained EU law.* (Paragraph 82)

9. *Delegated powers providing for this should, however, be carefully drawn. We recommend that clear criteria are set out in the Bill as to when the powers can be used. The Government should exercise restraint before including Henry VIII powers in the Bill. We urge the Government to consult us on this specifically when consulting us more widely in advance of the publication of the Bill.* (Paragraph 83)

10. *We urge the Government to consult us and other stakeholders in Parliament on what form parliamentary scrutiny should take for amending powers in the Bill. We ask the Government to note ESIC's specific request to be consulted on any proposed change to its remit and/or powers.* (Paragraph 90)

11. *In the light of the significant experience and expertise of the European Scrutiny Committee, we expect the Government to involve us in any process designed to assess the policy implications of changes to retained EU laws.* (Paragraph 91)

12. *Subject to appropriate consulation, we urge that the Bill should include a 'sunset' provision with an effective timeframe under which all retained EU law is repealed, which provision must take effect on the date of Royal assent, which itself must be timed to take effect (if applicable) within the timeframe of the completion of the procedures prescribed under the Parliaments Acts 1911 and 1949. Careful consideration and sufficient human resources should therefore be given to any necessary replacement legislation to avoid gaps on the statute book and legal uncertainty.* (Paragraph 95)

13. *We draw to the Government's attention the evidence we have taken on the application of the Interpretation Act 1978 in relation to "repeal of repeals" in this respect and request that any "revived" legislation is "fit for purpose" in present times.* (Paragraph 96)

14. *We urge the Government to consider including a mid-point review in the Bill, in parallel with a sunset provision to meet the timeframe we propose in paragraph 95. This would focus on the Government assessing progress and identifying any potential legislative cliff-edges. It would also enable Parliament to assess how amending powers have been used and whether changes need to be made to the Government's approach.* (Paragraph 97)

15. *We welcome the sectoral approach taken by the Government so far to amending retained EU law.* (Paragraph 104)

16. *We recommend that the Government identifies early on clear priorities in its task of reviewing and amending retained EU law. We encourage the Government to commit to amending the priority category within two years. This is irrespective of whether the Bill includes a 'sunset' provision.* (Paragraph 105)

Role of the courts

17. *Given the direct impact on how the law is interpreted, we recommend that when retained EU law is modified, the Government ensures that the amending legislation clearly indicates whether the modified legislation is to keep the status of retained EU law. We consider that the status should not continue.* (Paragraph 132)

18. *We recommend that the Bill contains the requirement that, before deciding to extend the range of courts that can depart from retained EU case law, the Government consults senior members of the judiciary.* (Paragraph 133)

19. *We support the Government's proposal to reconsider the role of retained general principles. We do not believe it is appropriate in the domestic legal context that retained EU case law is interpreted using the purposive approach adopted by the Court of Justice of the European Union.* (Paragraph 134)

Devolution

20. *We urge the Government to consult the devolved administrations as early as possible on the content of the Bill. This may mean going beyond usual practice in intergovernmental relations. Early consultation will help the Government to anticipate some of the complex constitutional, legal and Common Frameworks issues flagged in the evidence we received from legal experts on devolved matters.* (Paragraph 177)

21. *Likewise, we ask the Government to confirm that devolved administrations will be similarly consulted early on specific changes to retained EU law within devolved competence.* (Paragraph 178)

22. *We recommend that, until a satisfactory long-term resolution to the impact of the Protocol is achieved, the Government ensures that any future legislation to change the functioning of retained EU law includes provisions to ensure that Parliament is informed if changes to retained EU law could lead to divergence between Northern Ireland and the rest of the UK.* (Paragraph 179)

Transparency–accessibility of retained EU law and consultation

23. *We welcome the Government's publication of the catalogue of retained EU law and interactive dashboard. It improves the accessibility of retained EU law and will be a useful tool for tracking and evaluating the progress of the Government's programme for amending or replacing retained EU law.* (Paragraph 191)

24. *We ask the Government to clarify whether the catalogue contains a comprehensive list of the retained EU law in the category defined in section 4 of the EUWA, the 'sweeper' provision.* (Paragraph 192)

25. *We note that the catalogue does not address the concerns we heard about the lack of a publicly available database of the up-to-date consolidated legal text of pieces of REUL. For as long as REUL remains, we consider that there is value in having such a database in the interests of legal certainty and transparency. We encourage the Government to look into the feasibility of this.* (Paragraph 193)

26. *The Committee regrets that the Government's commitments to consult select committees on the content of the Bill have not materialised. However, it is not too late to consult prior to introduction. It is an important and worthwhile exercise because of the breadth and volume of law that will be affected.* (Paragraph 197)

27. *The Committee notes that, even after cutting out a consultation stage, the Government has indicated that it might not address all of the changes it identified in the Benefits of Brexit policy document because of its self-imposed legislative timetable. We welcome the offer of the Brexit Opportunities Minister to return to the Committee once the Bill has been published to explain what he described as the "trade-offs" between the timeliness of the Bill and its scope.* (Paragraph 198)

28. *We urge the Government to begin consultation on the content of the Bill immediately and to introduce the Bill as soon as possible after that. Adequate time must be allowed for the parliamentary stages of the Bill.* (Paragraph 199)

29. *We also urge the Government to ensure that there is effective and well-coordinated cross-Government working on the review and matters covered by the Bill.* (Paragraph 200)

Formal minutes

Monday 18 July 2022

Members present:

Sir William Cash, in the Chair

Jon Cruddas

Richard Drax

Margaret Ferrier

Mr Marcus Fysh

Mr David Jones

Craig Mackinlay

Gavin Robinson

Greg Smith

Draft Report (*Retained EU Law: where next?*), proposed by the Chair, brought up and read.

Motion made, and Question proposed, That the draft Report be read a second time, paragraph by paragraph.—(*The Chair.*)

Amendment proposed, to leave out from "That" to the end of the Question and insert "this Committee declines to read the Report a second time because the conclusions and recommendations do not reflect the balance of evidence taken by the Committee."—(*Jon Cruddas.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 1	Noes, 5
Jon Cruddas	Richard Drax
	Mr Marcus Fysh
	Mr David Jones
	Craig Mackinlay
	Greg Smith

Question negatived.

Main Question put and agreed to.

Ordered, that the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 3 read and agreed to.

Paragraph 4 read.

Amendment proposed, to leave out paragraph.—(*Jon Cruddas.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 1	Noes, 5
Jon Cruddas	Richard Drax
	Mr Marcus Fysh
	Mr David Jones
	Craig Mackinlay
	Greg Smith

Question negatived.

Paragraph agreed to.

Paragraphs 5 to 9 read and agreed to.

Paragraph 10 read.

Amendment proposed, in line 7, at the end of the paragraph to add "During EU exit, the May Government was clear that Brexit would not be used as an opportunity to reduce environmental, employment or consumer protections."

Footnote: 'In the area of employment protections, this commitment was evidenced in the publication of draft 'non-regression' clauses to the Withdrawal Agreement Bill. See Department for Business, Energy and Industrial Strategy, 'Protecting and Enhancing Workers Rights after the UK Withdrawal from the European Union' CP66 (6 March 2019). The current Government has stated that Brexit "…allows us [the UK] to be a standard-setter and protect and enhance UK workers' rights." See Financial Times, 'UK workers' rights at risk in plans to rip up EU labour market rules' (14 January 2021) [paywall].'—(*Jon Cruddas.*)

Question proposed, That the Amendment be made:—Amendment, by leave, withdrawn.

Amendment proposed, in line 7, at the end of the paragraph to add "The UK's withdrawal from the EU is opportunity to build on standards and protections across all sectors of the economy."—(*Jon Cruddas.*)

Question proposed, That the Amendment be made:—Amendment, by leave, withdrawn.

Paragraph agreed to.

Paragraphs 11 to 41 read and agreed to.

Paragraph 42 read.

Amendment proposed, in line 3, to leave out from "that" to the end of the paragraph and insert "the Government should give careful thought to removing the principle of supremacy of retained EU law. The evidence we received on removing the principle was not conclusive and strong arguments were made regarding its importance for legal certainty and clarity."—(*Jon Cruddas.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 1	Noes, 5
Jon Cruddas	Richard Drax
	Mr Marcus Fysh
	Mr David Jones
	Craig Mackinlay
	Greg Smith

Question negatived.

Amendment proposed, in line 5, to leave out "does not fit" and insert "rests uneasily"—(*Jon Cruddas.*)

Question proposed, That the Amendment be made:—Amendment, by leave, withdrawn.

Paragraph agreed to.

Paragraph 43 read.

Amendment proposed, in line 6, to leave out from "prevails" to the end of the paragraph and insert "Careful consideration should be given to the long term consequences of this arrangement for the UK's post-Brexit legal order."—(*Jon Cruddas.*)

Question proposed, That the Amendment be made:—Amendment, by leave, withdrawn.

An amendment made.

Paragraph, as amended, agreed to.

Paragraph 44 read.

Amendment proposed, to leave out paragraph.—(*Jon Cruddas.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 1	Noes, 5
Jon Cruddas	Richard Drax
	Mr Marcus Fysh
	Mr David Jones
	Craig Mackinlay
	Greg Smith

Question negatived.

Paragraph agreed to.

Paragraphs 45 to 81 read and agreed to.

Paragraph 82 read.

Amendment proposed, in line 1, after "should" insert "not"—(Jon Cruddas.)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 1	Noes, 5
Jon Cruddas	Richard Drax
	Mr Marcus Fysh
	Mr David Jones
	Craig Mackinlay
	Greg Smith

Question negatived.

Amendment proposed, in line 2, to leave out from "possible" to the end of the paragraph and insert "It should only be possible to make substantive changes to retained EU law by way of primary legislation. Secondary legislation is not an appropriate vehicle for major policy changes that impact peoples' lives and the running of businesses."—(*Jon Cruddas.*)

Question proposed, That the Amendment be made:—Amendment, by leave, withdrawn.

Paragraph agreed to.

Paragraph 83 read.

Amendment proposed, in line 1, leave out from "powers" to "be" and insert "provided in the Bill should."—(*Jon Cruddas.*)

Question proposed, That the Amendment be made:—Amendment, by leave, withdrawn.

Paragraph agreed to.

Paragraphs 84 to 94 read and agreed to.

Paragraph 95 read.

Amendment proposed, in line 1, leave out from "The" to "which" in line 2 and insert "Government should give careful consideration to including a 'sunset' provision after"—(*Jon Cruddas.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 1	Noes, 5
Jon Cruddas	Richard Drax
	Mr Marcus Fysh
	Mr David Jones
	Craig Mackinlay
	Greg Smith

Question negatived.

Amendment proposed, in line 2, leave out from "with" to "Careful" in line and insert "an effective timeframe under which all retained EU law is repealed, which provision must take effect on the date of Royal assent, which itself must be timed to take effect (if applicable) within the timeframe of the completion of the procedures prescribed under the Parliament Acts 1911 and 1949."—(*Mr David Jones.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 5	Noes, 1
Richard Drax	Jon Cruddas
Mr Marcus Fysh	
Mr David Jones	
Craig Mackinlay	
Greg Smith	

Question agreed to.

Amendment proposed, in line 6, after "consideration" insert "and sufficient human resources"—(*Mr David Jones.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 5	Noes, 1
Richard Drax	Jon Cruddas
Mr Marcus Fysh	
Mr David Jones	
Craig Mackinlay	
Greg Smith	

Question agreed to.

Amendment proposed, in line 6, leave out from "should" to "on" in line and insert "be given to the implications of including a sunset clause"—(*Jon Cruddas.*)

Question proposed, That the Amendment be made:—Amendment, by leave, withdrawn.

An amendment made.

Paragraph, as amended, agreed to.

Paragraph 96 read and agreed to.

Paragraph 97 read.

Amendment proposed, to leave out paragraph.—(*Jon Cruddas.*)

Question proposed, That the Amendment be made:—Amendment, by leave, withdrawn.

Amendment proposed, in line 2, after "provision" insert "to meet the timeframe we propose in paragraph 95."—(*Mr David Jones.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 5	Noes, 1
Richard Drax	Jon Cruddas
Mr Marcus Fysh	
Mr David Jones	
Craig Mackinlay	
Greg Smith	

Question agreed to.

Paragraph, as amended, agreed to.

Paragraphs 98 to 133 agreed to.

Paragraph 134 read.

Amendment proposed, in line 2, to leave out from "principles" to the end of the paragraph.—(*Jon Cruddas.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 1	Noes, 5
Jon Cruddas	Richard Drax
	Mr Marcus Fysh
	Mr David Jones
	Craig Mackinlay
	Greg Smith

Question negatived.

Paragraph agreed to.

Paragraphs 135 to 200 read and agreed to.

Summary agreed to.

Resolved, That the Report, as amended, be the Fifth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Adjournment

Adjourned till Wednesday 7 September 2022 at 1.45 pm

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the inquiry publications page of the Committee's website.

Wednesday 9 February 2022

Sir Jonathan Jones QC (Hon), Senior Consultant, Linklaters LLP; **Ms Eleonor Duhs**, Partner, Bates Wells — Q1–16

Wednesday 2 March 2022

Sir Stephen Laws QC, Senior Research Fellow, Policy Exchange's Judicial Power Project; **Dr Oliver Garner**, Maurice Wohl Research Fellow in European Rule of Law, Bingham Centre for the Rule of Law; **Dr Tom West**, Researcher, Hansard Society; **Martin Howe QC** — Q17–46

Wednesday 30 March 2022

Barney Reynolds, Head of Financial Institutions, Shearman & Sterling LLP; **Professor Alison Young**, Professor, Cambridge University; **Sir Richard Aikens**, Arbitrator, Brick Court Chambers, Visiting Professor, Queen Mary Univerity of London, Visiting Professor, Kings College London — Q47–73

Wednesday 18 May 2022

Professor Jo Hunt, Professor in Law, Cardiff University School of Law and Politics; **Professor Adelyn Wilson**, Dean for International Stakeholder Engagement, Aberdeen University; **Dr Robert Taylor**, Senior Lecturer in UK Public Law, Aberdeen University; **Professor Christopher McCrudden**, Professor of Human Rights and Equality Law, School of Law, Queen's University Belfast — Q74–88

Published written evidence

The following written evidence was received and can be viewed on the inquiry publications page of the Committee's website.

REU numbers are generated by the evidence processing system and so may not be complete.

1 Barnard, Professor Catherine (Professor of EU Law and Emplyment Law, University of Cambridge) (REU0019)

2 Brenncke, Dr Martin (Senior Lecturer in Law, Aston University) (REU0004)

3 Craig, Professor Paul (Emeritus Professor of English Law, St John's College, Oxford) (REU0007)

4 DACS (REU0015)

5 Employment Lawyers Association (REU0009)

6 European Statutory Instruments Select Committee (REU0028)

7 Faculty of Advocates (REU0023)

8 Greener UK (REU0003)

9 Hancox, Dr Emily (Lecturer in Law, University of Bristol) (REU0022)

10 Hansard Society (REU0001)

11 Herbert Smith Freehills (REU0005)

12 Howe QC, Martin (REU0026)

13 Knight, Mr John (REU0002)

14 McHarg, Professor Aileen (Professor of Public Law and Human Rights, Durham University); and Frantzioum, Dr Eleni (Associate Professor in Public Law and Human Rights, Durham University) (REU0011)

15 Northern Ireland Human Rights Commission; and Equality Commission for Northern Ireland (REU0010)

16 Office of the City Remembrancer, City of London Corporation (REU0027)

17 Organic Farmers & Growers CIC (REU0012)

18 Phinnemore, Professor David (Professor of European Politics, Queen's University Belfast); and Whitten, Dr Lisa Claire (Research Fellow, Queen's University Belfast) (REU0017)

19 Planning and Environment Bar Association (REU0016)

20 Public Law Project (REU0013)

21 The Bar Council (REU0008)

22 The Law Society of Scotland (REU0024)

23 Trades Union Congress (REU0006)

24 UK Trade Policy Observatory (REU0025)

25 United Kingdom Environmental Law Association (REU0020)

26 Wilson, Professor Adelyn (Professor of Law, University of Aberdeen); and Taylor, Dr Robert (Senior Lecturer in Public Law, University of Aberdeen) (REU0014)

27 Young, Professor Alison (Sir David Williams Professor of Public Law, University of Cambridge) (REU0018)

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website.

Session 2022–23

Number	Title	Reference
1st	Documents considered by the Committee on 11 May 2022	HC 119-i
2nd	Documents considered by the Committee on 25 May 2022	HC 119-ii
3rd	Documents considered by the Committee on 8 June 2022	HC 119-iii
4th	Documents considered by the Committee on 22 June 2022	HC 119-iv

Session 2021–22

Number	Title	Reference
1st	Documents considered by the Committee on 12 May 2021	HC 121-i
2nd	Documents considered by the Committee on 26 May 2021	HC 121-ii
3rd	Documents considered by the Committee on 9 June 2021	HC 121-iii
4th	Documents considered by the Committee on 23 June 2021	HC 121-iv
5th	Documents considered by the Committee on 7 July 2021	HC 121-v
6th	Documents considered by the Committee on 19 July 2021	HC 121-vi
7th	Documents considered by the Committee on 8 September 2021	HC 121-vii
8th	Documents considered by the Committee on 22 September 2021	HC 121-viii
9th	Brexit divorce bill and UK participation in EU programmes: how much and who pays?	HC 815
10th	Documents considered by the Committee on 20 October 2021	HX 121-ix
11th	Documents considered by the Committee on 3 November 2021	HC 121-x
12th	Documents considered by the Committee on 17 November 2021	HC 121-xi
13th	Documents considered by the Committee on 1 December 2021	HC 121-xii
14th	Documents considered by the Committee on 8 December 2021	HC 121-xiii
15th	Documents considered by the Committee on 12 January 2022	HC 121-xiv
16th	Documents considered by the Committee on 26 January 2022	HC 121-xv

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17th	Documents considered by the Committee on 9 February 2022	HC 121-xvi
18th	Documents considered by the Committee on 23 February 2022	HC 121-xvii
19th	Documents considered by the Committee on 9 March 2022	HC 121-xviii
20th	Documents considered by the Committee on 30 March 2022	HC 121-xix
21st	Documents considered by the Committee on 28 April 2022	HC 121-xx

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None	30th—Documents considered by the Committee on 25 November 2020	HC 229-xxvi
1st	The EU's mandate for negotiating a new partnership with the UK	HC 218
2nd	COVID-19 pandemic: the EU's policy response and its implications for the UK	HC 275
3rd	Documents considered by the Committee on 26 March 2020	HC 229-i
4th	Documents considered by the Committee on 23 April 2020	HC 229-ii
5th	The EU's mandate for negotiating a new partnership with the UK: outcome of Select Committee consultation	HC 333
6th	Documents considered by the Committee on 30 April 2020	HC 229-iii
7th	Documents considered by the Committee on 7 May 2020	HC 229-iv
8th	Documents considered by the Committee on 14 May 2020	HC 229-v
9th	Documents considered by the Committee on 21 May 2020	HC 229-vi
10th	Documents considered by the Committee on 4 June 2020	HC 229-vii
11th	Documents considered by the Committee on 11 June 2020	HC 229-viii
12th	UK-EU Joint Committee: Decision of 12 June 2020 amending the Withdrawal Agreement	HC 465
13th	Documents considered by the Committee on 18 June 2020	HC 229-ix
14th	Documents considered by the Committee on 25 June 2020	HC 229-x
15th	Documents considered by the Committee on 2 July 2020	HC 229-xi
16th	Documents considered by the Committee on 9 July 2020	HC 229-xii
17th	Documents considered by the Committee on 16 July 2020	HC 229-xiii
18th	Documents considered by the Committee on 23 July 2020	HC 229-xiv
19th	Documents considered by the Committee on 3 September 2020	HC 229-xv
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21st	Documents considered by the Committee on 16 September 2020	HC 229-xvii
22nd	Documents considered by the Committee on 24 September	HC 229-xviii
23rd	Documents considered by the Committee on 1 October 2020	HC 229-xix
24th	Documents considered by the Committee on 8 October 2020	HC 229-xx
25th	Documents considered by the Committee on 15 October 2020	HC 229-xxi
26th	Documents considered by the Committee on 21 October 2020	HC 229-xxii
27th	Documents considered by the Committee on 4 November 2020	HC 229-xxiii
28th	Documents considered by the Committee on 11 November 2020	HC 229xxiv
29th	Documents considered by the Committee on 19 November 2020	HC 229-xxv
31st	Documents considered by the Committee on 3 December 2020	HC 229-xxvii
32nd	Documents considered by the Committee on 9 December 2020	HC 229-xxviii
33rd	Documents considered by the Committee on 16 December 2020	HC 229-xxix
34th	Documents considered by the Committee on 20 January 2021	HC 229-xxx
35th	Documents considered by the Committee on 3 February 2021	HC 229-xxxi
36th	Brexit: The future operation of the Channel Tunnel Fixed Link	HC 1062
37th	Documents considered by the Committee on 10 February 2021	HC 229-xxxii
38th	Documents considered by the Committee on 24 February 2021	HC 229-xxxiii
39th	Documents considered by the Committee on 10 March 2021	HC 229-xxxxiv
40th	Documents considered by the Committee on 17 March 2021	HC 229-xxxv
41st	Northern Ireland Protocol: Withdrawal Agreement Joint Committee Decisions and declarations of 17 December 2020	HC 1343
42nd	Documents considered by the Committee on 24 March 2021	HC 229-xxxvi

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43rd	Documents considered by the Committee on 14 April 2021	HC 229-xxxvii
44th	Documents considered by the Committee on 21 April 2021	HC 229-xxxviii