Written Evidence Submitted to the House of Commons European Scrutiny Committee's Inquiry into *Retained EU Law: Where Next*

Summary

- Retained EU law is not a distinct and unitary category of domestic law. Rather, the EU (Withdrawal) Act 2018 creates three distinct sub-categories of retained EU law, each of which poses definitional, interpretive and operational difficulties, thus creating significant new areas of complexity in the UK's domestic legal orders. From the perspective of coherence and legal certainty, it would be preferable if the different elements of retained EU law followed the same rules as those applicable to ordinary primary and secondary legislation, subject to the proviso that these measures enjoy primacy in respect of law that predates the end of the Implementation Period.

- Whether individual principles and concepts of EU law provide a suitable basis for legislation in the post-Brexit UK is ultimately a matter of political judgement. However, we counsel against a blanket assumption that they are *not* suitable solely by virtue of their European origin.

- There are compelling reasons of legal certainty for retaining the principle of the supremacy of retained EU law in relation to domestic law in force prior to the end of the Implementation Period. Removal of the supremacy of retained EU law in a blanket fashion would have a number of problematic consequences, including in relation to other aspects of EU relations law. In our view, the only constitutionally sound way of removing the supremacy of retained EU law would be through the conversion of individual pieces of retained EU law into new domestic primary legislation, albeit that this would be a challenging and highly time-consuming process.

- There are similarly compelling reasons of legal certainty for domestic courts continuing to follow pre-Brexit retained EU case law. In our view, the current rules strike an appropriate balance between legal certainty and flexibility.

- Retained EU law has no direct impact on devolved competence, apart from the fact that the EU (Withdrawal) Act is a protected/entrenched statute which the devolved legislatures may not modify. Any blanket repeal of the relevant provisions of the EU (Withdrawal) Act would thus have the effect of increasing the scope of devolved competence, and would therefore engage the operation of the Sewel Convention. Because of the overlap between retained EU law and the Ireland/Northern Ireland Protocol, particular care would need to be taken in relation to reform of retained EU law in respect of Northern Ireland.

Introduction

We are academics specialising in public law and human rights at Durham Law School. We have a general interest in the constitutional implications of Brexit, and a particular interest in the continuing role played by EU rules and concepts in the UK's domestic legal systems.

Question 1: In what ways is retained EU law a distinct category of domestic law? To what extent does this affect the clarity and coherence of the statute book?

Sections 2-4 of the EU (Withdrawal) Act 2018 retain several aspects of EU law in the domestic legal order after Brexit. Sections 6-7 of the same Act refer to 'retained EU law' in general terms, thus seemingly attributing to this category a distinct legal status (section 7) with important implications for judicial interpretation (section 6). In practice, however, this is not an accurate reflection of the content and operation of retained EU law. Rather, retained EU law is comprised of three largely separate elements, which have different degrees of incorporation in domestic statute.

First, section 2 of the Withdrawal Act retains EU-derived domestic legislation, which mainly affects domestic legislation that implemented EU directives. This relates to significant pieces of domestic secondary legislation, such as the Working Time Regulations 1998, which implemented the Working Time Directive. Crucially, however, it also affects domestic primary legislation, such as the Equality Act 2010, aspects of which implement EU non-discrimination obligations (see section 203 of the Equality Act). The fact that different EU obligations have been incorporated into domestic law through measures with a different legal status, including through primary legislation, creates significant legal uncertainty for claimants as well as for courts, a) because it renders it difficult to understand which pieces of domestic primary legislation fall within the scope of this provision; and b) because it is unclear whether the status and interpretation of retained EU law applies to domestic statutes with an EU dimension. Coherence would be particularly affected if domestic statutes that implemented or partly implemented EU law were treated differently – and subjected to different rules of precedent – than other statutes.

The other two elements of retained EU law are directly applicable EU legislation (e.g., Regulations, such as the GDPR), retained by section 3 of the Withdrawal Act, and other rights and obligations arising from EU law (e.g., EU Treaty provisions, such as equal pay between men and women under Article 157 TFEU and the general principles of EU law), retained by section 4. Whereas the former rules were immediately transformed into domestic law upon the end of the Implementation Period (e.g., the EU GDPR has now become the UK GDPR), the latter were not and, in certain cases, remain uncodified (e.g., the general principles of EU law, such as human dignity and non-discrimination, are retained in line with this provision, but there is no exhaustive, written list of general principles). This results in further legal uncertainty, as it is difficult to identify the content of the latter category without an expert study of EU constitutional law.

The wholesale transposition of EU regulations into domestic statute is equally problematic. As highlighted in *Lipton v BA City Flyer Ltd* [2021] EWCA Civ 454, in seeking to interpret retained EU law under section 3 of the EU (Withdrawal) Act, domestic courts have to read down words and passages that have no natural application beyond the EU legal instrument that has been *verbatim* carried over into domestic law. Indeed, the direct incorporation of

all EU measures detailed in section 3 of the EU (Withdrawal) Act means that retention has not been considered on a case-by-case basis for each of those measures and thus does not necessarily result in a coherent approach to maintaining EU law in its different fields of application (this approach was only preferred for reasons of expediency).

Retained EU law as detailed in the EU (Withdrawal) Act, therefore, cannot be viewed as a separate category of law altogether, but as at least three separate sub-categories. While all three raise interpretative concerns under section 6 of the Act, each of the categories creates distinct problems that need to be addressed in specific terms, rather than through an overarching reference to retained EU law as a whole. Finally, it is worth noting that retained EU law across these categories maintains its status even if amended, which means that post-Brexit legislation can also (paradoxically) have the status of retained EU law. Eventually, therefore, an additional sub-category of amended retained EU law will arise within each of these categories.

It follows that it would be problematic to treat 'retained EU law' as a distinct and unitary category of domestic law.

Question 2: Is retained EU law a sustainable concept and should it be kept at all?

In light of our answer to Question 1, we do not feel that retained EU law is a sustainable concept. From the perspective of coherence and legal certainty, it would be preferable if the different elements of retained EU law detailed in sections 2-4 of the EU (Withdrawal) Act formed part of domestic law under the same rules as those applicable to ordinary primary and secondary legislation, subject to the proviso that these measures enjoy primacy in respect of law that predates the end of the Implementation Period, as discussed under Question 4.

Question 3: Do the principles and concepts of EU law continue to provide an acceptable and suitable basis for legislation in post-Brexit UK?

We are unable to answer this question in an abstract manner. The suitability of EU legal concepts and principles is a matter of political judgement which can only be assessed in relation to concrete legal issues. We would, however, counsel against a blanket assumption that they are not suitable purely by reason of their origin in EU law. 48 years of EU membership has had a transformative effect on the UK's domestic legal systems, going beyond those areas where EU law applied directly. For example, developments in the law of remedies, allowing coercive remedies to be awarded against the Crown notwithstanding section 21 of the Crown Proceedings Act 1947, initially applicable to the enforcement of EU law only (*R v Secretary of State for Transport ex p. Factortame (No 2)* [1991] 1 AC 603), were later extended to all domestic judicial review cases (*M v Home Office* [1993] UKHL 5; *Davidson v Scottish Ministers* 2006 SC (HL) 41). Similarly, concepts such as 'proportionality', 'subsidiarity', and 'consistent interpretation' now form part of the domestic legal lexicon. Further, other concepts and principles, such as developments in equality law or environmental principles, would in all likelihood have been adopted into domestic law anyway as a consequence of general developments in legal thinking or because they in turn originate in international legal instruments to which the UK was in any case a party. We

note, for example, the independent adoption of EU law concepts and principles into domestic law post-Brexit, such as the principle of mutual recognition via the United Kingdom Internal Market Act 2020, or the adoption of the precautionary principle and the 'polluter pays' principle via the Environment Act 2021.

Question 4: How has the concept of retained EU law worked in practice since it came into effect and what uncertainties or anomalies have arisen, or may yet arise in the future?

The concept of retained EU law has presented significant challenges. The key issues that are likely to arise concern the interpretation of EU rights that do not have a clearly retained status. For example, while the general principles of EU law have been retained, the content of those principles is highly contested even within EU law, such that it will be difficult for domestic courts to decipher when this saving applies. Similarly, the removal from UK law of EU remedies, such as disapplication, through Schedule 1 of the EU (Withdrawal) Act, means that individuals may be subject to exactly the same law, and enjoy in theory exactly the same rights as they did before the end of the Implementation Period, but they will not always be able to enforce these rights. This places individuals who are in a similar position factually in a dissimilar position legally, and disadvantages those whose case arises after the end of the Implementation Period (or, in certain situations, two years thereafter, in line with Schedule 8 of the EU (Withdrawal) Act). This is a significant concern, as the vast majority of domestic disputes engaging EU law arise in the field of private law, such as in cases concerning, *inter alia*, copyrights, employment conditions, and pensions, which are routinely litigated before lower courts and tribunals. Because of the combined effect of Schedule 1 and section 6 of the EU (Withdrawal) Act, these courts and tribunals will not be able to provide a suitable remedy in line with existing practice, and will be forced to allow a greater number of appeals to proceed to higher courts, since only higher courts are able to reinterpret retained case law in the light of the more restricted remedial apparatus now available. This will inevitably increase the cost and length of litigation in cases that would previously have been considered insignificant in terms of precedential value.

Further, the complexity of the rules on departure from and the interpretation of retained EU law is likely to be a significant challenge for domestic judges, who are not always trained in detail in the operation of both EU and domestic constitutional law. The challenge is exacerbated by the wording of the EU (Withdrawal) Act, which makes overly vague references to key concepts, such as that of retained EU law, across different provisions. The Explanatory Notes to the Act provide limited guidance in this respect, as they lack practical and detailed examples. Many of the interpretive gaps will consequently have to be filled through the case law, contributing further to an increase in litigation before higher courts.

Indeed, the Court of Appeal has already grappled both with the distinction between different types of retained EU law (*Lipton v BA City Flyer Ltd* [2021] EWCA Civ 454) and with that between retained EU law and EU law *simpliciter*. In *TuneIn Inc v Warner Music UK Ltd & Anor* [2021] EWCA Civ 441 (§76-77), the Court noted that it was bound to apply CJEU case law for facts that predated the end of the EU implementation period, as this concerned the interpretation of EU law *simpliciter*, rather than the interpretation of retained EU law. Since EU law was still fully operational in the UK at the relevant time, the individuals concerned

could have accrued rights based on that legal framework (and retained EU law had not yet been created).

Other areas where problems are likely to arise concern provisions of the Treaties or the Charter of Fundamental Rights of the EU which have not yet been litigated at the EU level or have not yet been litigated on the basis of the direct effect principle. It is unclear whether and, if so, to what extent, these provisions may still be taken into account as general principles of EU law. Finally, questions of substantive and remedial consistency between retained EU law and EU law *simpliciter* are likely to arise in the future, and it is expected that domestic courts will try to build coherence between the two systems through judicial interpretation, in order to maintain legal certainty.

Question 5(a): In light of the doctrine of parliamentary sovereignty, what was the rationale for retaining the principle of the 'supremacy of EU law'?

The principle of supremacy of EU law has been removed for post-Brexit legislation by section 5(1) of the EU (Withdrawal) Act, which means that retained EU law can be freely amended by domestic legislation (UK or devolved, depending on the subject matter) following the end of the Implementation Period. However, the supremacy principle has been retained in respect of domestic law in force prior to the end of the Implementation Period (section 5(2)).

The rationale for retaining the supremacy principle was to ensure legal certainty, by ensuring that EU-derived norms retained the same place in the legal hierarchy as they had while we remained members of the EU. Thus, for example, in *R (Open Rights Group) v Secretary of State for the Home Department* [2021] EWCA Civ 1573, part of the Data Protection Act 2018 was disapplied because it was found to be incompatible with retained Regulation 2016/679 (the General Data Protection Regulation).

Had the supremacy rule not been retained, this could have led to attempts to reopen settled questions of interpretation, which had been premised upon the primacy principle (see, e.g., *Walker (Appellant) v Innospec Limited and others* [2017] UKSC 47), and could have had the effect of reinstating outdated legislation rendered dormant by the prior operation of the supremacy principle, thus seriously damaging legal certainty and trust in the predictability of the case law. Indeed, this concern underlies the aforementioned ruling in *TuneIn*, where the Court of Appeal recognised the need to ensure that rights acquired under a particular legal framework (of which primacy was a key element) should continue to be determined based on that framework. Retaining primacy for statutes passed before the UK left the EU but discarding it for statutes passed subsequently allowed the Court to make that distinction, thus preventing the possibility of a retrospective regression on acquired rights. A clear statutory instruction on the primacy of retained EU law also avoided the courts having to make what could have been perceived as a 'political' decision, but which was in reality necessary in order to give effect to legal certainty as a key element of the Rule of Law.

Nevertheless, some uncertainty does remain as to the meaning of the 'principle of the supremacy of EU law' itself. One reason is that pre-Brexit domestic case law suggested that

UK courts would not necessarily give full effect to the principle of supremacy as understood by the CJEU (*Thoburn v Sunderland City Council* [2003] QB 151; *R (HS2 Action Alliance) v Secretary of State for Transport* [2014] UKSC 3). It is therefore unclear which version of the supremacy principle has been continued in effect by section 5(2): the domestic or the European. A second reason for uncertainty is that the principle of supremacy as understood by the CJEU may itself evolve. This may be relevant to decisions in the UK courts insofar as they are permitted by section 6(2) of the EU (Withdrawal) Act to take account of post-Brexit decisions of the CJEU. For example, in *Open Rights Group*, the Court of Appeal, for the first time, suspended its order disapplying the Data Protection Act in order to allow the government to take remedial action. It justified this decision on the basis of both pre-and post-Brexit decisions of the CJEU which held that the CJEU itself had the power to suspend a declaration of incompatibility; decisions which could not be transposed into domestic law directly, but which nevertheless pointed to the necessity of a judicial power to delay the implementation of EU law for compelling reasons of legal certainty.

Question 5 (b): What is the most effective way of removing the 'supremacy of EU law' and other incidents of EU law from the statute book?

The supremacy of EU law could be removed simply by repealing section 5(2) of the EU (Withdrawal) Act. This would, however, have a number of potentially undesirable consequences.

In the first place, this would undermine the principle of legal certainty which motivated the retention of the supremacy principle as it would alter the hierarchical position of retained EU law as against other sources of domestic law.

Secondly, whereas the status and hierarchical position of the first category of retained EU law outlined above (EU-derived domestic legislation) could be easily determined (i.e., they would be treated in the same way as any other pieces of primary or secondary legislation), the same is not true for other categories of retained EU law. A decision would have to be taken as to how directly applicable EU legislation and other EU rights and obligations should be treated for domestic purposes: as primary legislation, secondary legislation, or some other *sui generis* classification.

Thirdly, the interaction between retained EU law and other aspects of EU relations law would have to be borne in mind. Certain provisions may simultaneously be classed as retained EU law and given continuing direct effect and supremacy under the Withdrawal Agreement (see EU (Withdrawal) Act, section 7A). This applies for example to provisions on citizens' rights and to those aspects of EU internal market law and related provisions protected under the Protocol on Ireland/Northern Ireland. The removal of the supremacy of retained EU law would not in itself breach the terms of the Withdrawal Agreement because the enhanced status of the relevant provisions is independently guaranteed. However, it would mean that the same legal norms could have a different legal status depending on where an individual seeks to enforce them. For example, the Working Time Regulations would be given primacy over other sources of law in Northern Ireland, but not in the rest of the UK.

Further, the ruling of the NI High Court in *SPUC Pro-Life Ltd (Abortion)* (currently only available in summary) confirms that the Charter of Fundamental Rights of the EU (rather than the general principles of EU law) continues to have relevance in Northern Ireland, even though it no longer has any effect in the rest of the UK, in line with section 5(4) of the EU (Withdrawal) Act. Questions of who is seeking to enforce the right (e.g., whether they hold an Irish passport from Northern Ireland, rather than having a passport from an EU Member State, including the Republic of Ireland) could also be relevant, particularly on issues of family reunification, on which EU citizens have occasionally been afforded more favourable treatment (see, e.g., *De Souza (Good Friday Agreement: nationality)* [2019] UKUT 355 (IAC) – although we note that the Home Office has since revised its position on this issue).

Downgrading the status of retained EU law by removing the supremacy principle could also trigger the 'level playing field' provisions of the Trade and Co-operation Agreement. This requires that for provisions relating to labour and social protection, environment and climate, the level of protection must not be lowered below the level in place at the end of the Implementation Period, if that would adversely impact upon trade or investment between the UK and the EU.

In our view, 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.

Question 6: Should retained EU law be interpreted in the same way as other domestic law? Should the case law of the Court of Justice of the European Union have any relevance in the interpretation of retained EU law?

The interpretive approach adopted in relation to EU law differs from that adopted in relation to domestic legislation. Whereas interpretation of domestic statutes is grounded in the words of the statute understood in their context, taking account of the statutory purpose only so far as necessary to resolve ambiguity, the approach of the CJEU is purposive or teleological – i.e., legislative provisions are interpreted light of the objectives that they are intended to achieve. By virtue of the *Marleasing* principle of consistent interpretation (pursuant to the CJEU ruling in Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentación SA,* EU:C:1990:395), domestic courts are obliged to interpret domestic legislation compatibly with EU law, which may require the adoption of a strained interpretation or the reading in or reading down of certain words.

Section 6(3)(a) of the EU (Withdrawal) Act requires that 'any question as to the validity, meaning or effect of any retained EU law is to be decided … in accordance with any retained case law and any retained general principles of EU law.' This means that the interpretive approach applicable to EU law will continue to apply to retained EU law. Again, the rationale is to ensure legal certainty and predictability of interpretation.

Subject to the ability of the Supreme Court and various Appeal courts to depart from retained EU case law (section 6(4) and European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulation 2020, No. 1525), this means that decisions of the CJEU continue to be binding, if handed down before the end of the Implementation Period. The obligation to comply with CJEU rulings on references from UK courts is wider, though, following the Court of Appeal's judgment in *HMRC v Perfect* [2022] EWCA Civ 330 [16-21]. Whereas section 6(1)(a) of the EU (Withdrawal) Act stipulates that domestic courts are not bound by CJEU rulings after the end of the Implementation Period, the Court interpreted section 7A of the EU (Withdrawal Act), which recognises the courts' duty to give effect to the Withdrawal Agreement, as meaning that responses to preliminary reference requests made by UK courts before or during the Implementation period but decided *after* the end of the Implementation period, must be considered binding on UK courts. This finding ensured compliance with Articles 86-89 of the Withdrawal Agreement, which provided the CJEU with jurisdiction to hear preliminary references from the UK until the end of the Implementation period and obliged the UK to comply with the CJEU's rulings. In other respects, however, post-Brexit CJEU case law is not binding, but can be taken into account where relevant (section 6(1) and (2)).

As far as pre-Brexit case law is concerned, this promotes the value of legal certainty, whilst allowing a limited right of departure, for example, where CJEU rulings are no longer workable in a post-Brexit context (see, for example, the decision in *Open Rights Group* that it no longer made sense for only the CJEU to have the power to suspend the effect of a disapplication of domestic law). Decisions to depart from pre-Brexit case law are to be determined in accordance with the test that the Supreme Court applies to departures from its own previous case law (section 6(5)). This test (which has been in place since 1966, initially in relation to the Judicial Committee of the House of Lords) recognises the value of following precedent in the interests of legal certainty (with particular importance in relation to criminal law and contractual, property and fiscal arrangements), but that it is appropriate to depart from precedent to avoid injustice or restricting the proper development of the law. It should be noted that the ability to depart from previous House of Lords/Supreme Court decisions has only very rarely been used.

The arguments from legal certainty for following post-Brexit CJEU case law are less compelling. Nevertheless, post-Brexit decisions may be a valuable aid to understanding the meaning of retained EU law, and it is likely that they would be referred to anyway by lawyers and judges even if there was no express statutory permission to do so.

In our view, the current rules strike an appropriate balance between legal certainty and flexibility to depart from EU case law where necessary.

Question 7: Should a wider range of courts and tribunals have the ability to depart from retained EU case law and should it be binding at all?

As noted in our response to question 6, currently only specified, higher level appeal courts have the ability to depart from retained EU case law; first instance courts, and tribunals, are not permitted to do so. Arguably it should be open to any court to disregard retained EU case law where it is obviously no longer applicable. However, where a judgment is being

made about the appropriateness of the substance of retained EU case law, in the interests of orderly development of the law it seems sensible to restrict that power to the higher courts, not least to avoid different courts at lower levels making different decisions about whether to follow or depart from previous decisions.

Question 8: To what extent has retained EU law affected devolved competence?

Retained EU law has no direct impact on devolved competence. Section 12 of the EU (Withdrawal) Act empowered UK ministers to make (temporary) regulations specifying that the devolved legislatures or executives could not modify specified categories of retained EU law (so-called 'freezing powers'). However, these powers have never been used, and they lapsed two years after Exit Day (i.e. on 31 January 2022). This means that the devolved legislatures and executives are free to amend or repeal particular provisions retained EU law, so far as they fall within the scope of devolved policy competences (and subject to the other constraints on devolved competence).

The EU (Withdrawal) Act is, though, itself a protected (or entrenched in relation to Northern Ireland) statute which the devolved institutions may not modify. This means that they 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).

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, and it could have done so differently to the provision made by the Withdrawal Act (e.g., by providing continuity of effect for the EU Charter of Fundamental Rights).

This also means that any wholesale abolition of the concept of retained EU law would engage the Legislative Consent (Sewel) Convention as it would affect the scope of devolved competence. The EU (Withdrawal) Act was enacted without the consent of the Scottish Parliament, which was justified by reference to the exceptional circumstances of Brexit. It is hard to see any justification for dispensing with devolved consent in relation to any future change to the status of retained EU law. It is worth noting that the Supreme Court held in the *Continuity Bill Reference* (at paras 33 and 35) that there is no valid constitutional objection in principle to there being different rules on the continuity of EU law in relation to reserved and devolved matters.

Question 9: Are there issues specific to the devolved administrations and legislatures that should be taken into account as part of the Government's reviews into retained EU law?

As noted in our answer to Question 5(a), certain provisions of retained EU law may be separately protected under the Withdrawal Agreement. This applies particularly to the provisions of the Protocol on Ireland/Northern Ireland. For example, Art. 2(1) of the Protocol provides that:

> 'The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled

> Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.'

This guarantee entails two distinct obligations. On the one hand, there is an obligation of dynamic alignment with the provisions of the legislation contained in Annex 1 (currently six equality directives). Northern Ireland must track both legislative and case law developments in relation to these directives, and must ensure that any developments are implemented in a timely fashion. On the other hand, there is a broader non-diminution obligation for equality and human rights issues under Article 2 of the Protocol, even where these are not listed in Annex 1. While the scope of that obligation is more contentious, it is clear that it contains at least an obligation not to reduce the EU level of protection of human rights, as it stood at the end of the Implementation Period. This means that any CJEU case law interpreting legislation in force in the UK at the end of the Implementation Period must be incorporated into Northern Irish law and that claimants in Northern Ireland may still enjoy remedies such as disapplication and state liability in relation to human rights cases, even though these remedies are unavailable elsewhere in the UK. For example, in Case C-247/20, *VI v The Commissioners for Her Majesty's Revenue & Customs,* EU:C:2022:177, the CJEU recently decided that the NHS constituted comprehensive sickness insurance for the purposes of Directive 2004/38 and that the Directive did not permit the introduction of a requirement that EU citizens obtain private health insurance before being able to enjoy benefits such as Child Tax Credit and Child Benefit. This means not only that any detriment already sustained by EU citizens in Northern Ireland must be remedied, but also that the additional insurance requirement must be altogether removed in respect of Northern Ireland, in order to comply with the non-diminution commitment made in the Protocol. Failure to do so would amount to a breach of the Withdrawal Agreement.

Other Annexes to the Protocol list a wide range of other provisions of EU law, relating to Northern Ireland's continuing membership of the EU single market for goods and related matters, and regulation of the Single Electricity Market, which must also continue to apply in Northern Ireland.

Thus, any reform of retained EU law must take care to ensure that these obligations under the Protocol are not compromised.

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