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1. In these brief remarks I wish to respond to the call for evidence: Retained EU Law: What next. Specifically, I want to respond to questions 1, 2 and 5.

Questions 1 and 2: Retained EU law

What is retained EU Law?

2. The call for evidence asks:
    a. 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?
    b. Is retained EU law a sustainable concept and should it be kept at all?

3. There is no doubt that retained EU Law (REUL) is a distinct category of law. In the broad sense it covers retained EU law (preserved and converted), retained case law and retained general principles of EU law (see fig .1)

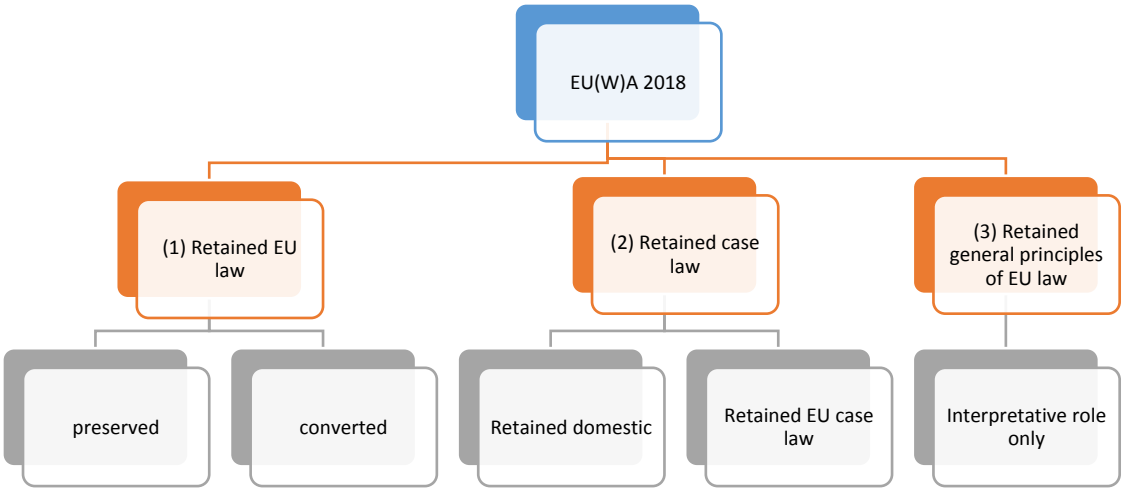

Fig 1: Retained EU law in broad sense: s.6(7)EUWA 2018

4. More specifically, in respect of REUL in the narrow sense it covers preserved and converted EU legislation. The mechanisms for doing this is complex and is summarised in fig 2. In essence, *preserved* EU law (ie law such as Directives which had been implemented into UK law as primary or secondary law when the UK was a Member State continue to have legal

[1] For a full consideration, see Eleanor Duhs, Indira Rao, Retained EU law: a Practical Guide (lw Soceity, 2021); Barnard, Catherine, Retained EU law in the UK Legal Orders: Continuity between the Old and the New (October 1, 2021). Forthcoming in Adam Lazowski, Adam Cygan (eds), Research Handbook on Legal Aspects of Brexit, Edward Elgar 2022., University of Cambridge Faculty of Law Research Paper No. 27/2021, Available at SSRN: https://ssrn.com/abstract=3947215 or http://dx.doi.org/10.2139/ssrn.3947215

effect via s.2). *Converted* EU law concerns (1) directly applicable measures (eg EU Regulations, EU implementing and delegated acts, and Decisions) which needed to be given legal effect in the UK via s.3; (2) directly effective provisions which also needed to be given legal effect in the UK via s.4. [1]

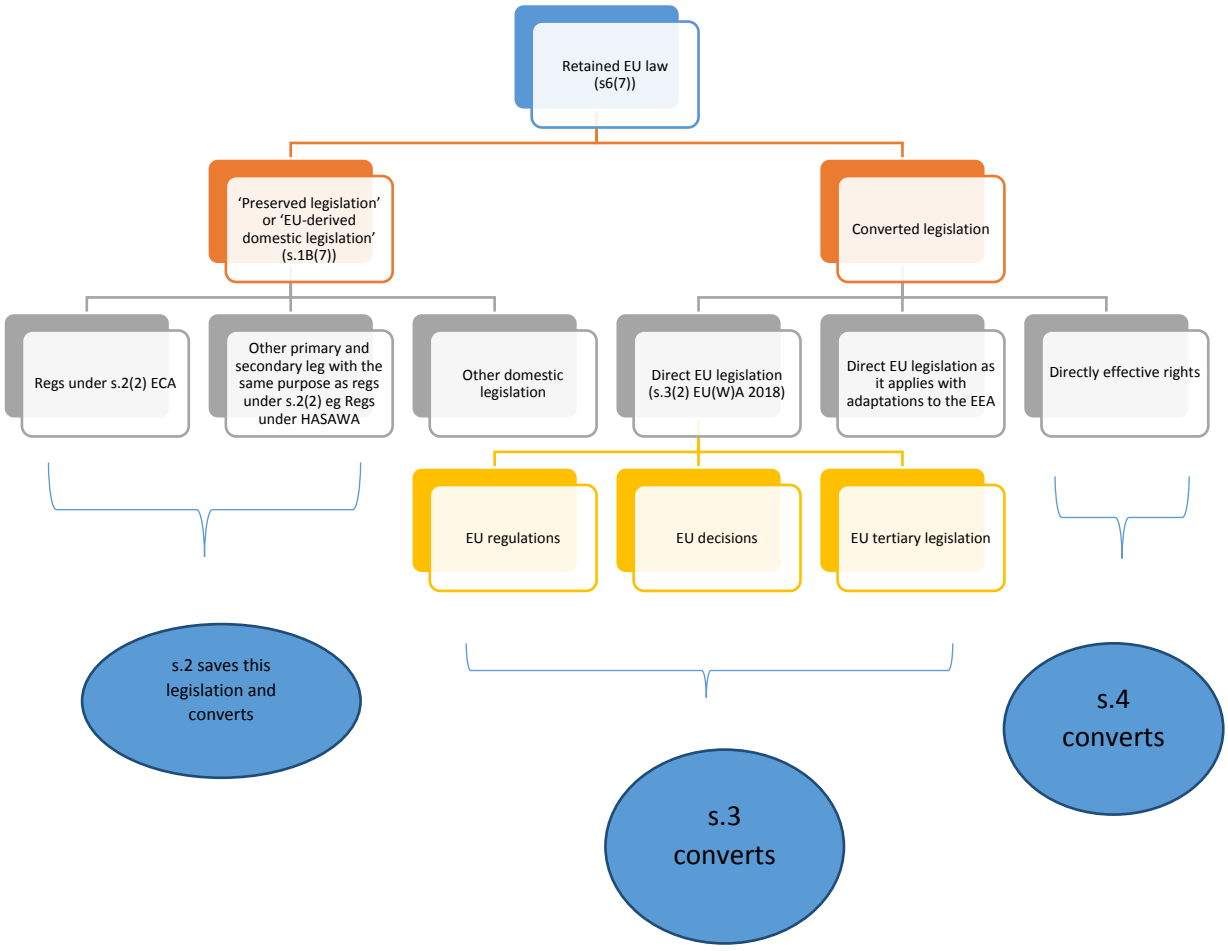

Fig 2 REUL in the narrow sense

The purpose of REUL

5. It was always clear that there would need to be continuity between the old and the new: the old, EU law, and the new, the post Brexit world, but a world where EU law had filled a large space. To have severed all links with the old on exit day would have been a recipe for disaster: legal uncertainty, gaps being filled by rushed legislation, underpinned by a policy which was simply 'not to be the EU' rather than 'what works best for the UK'. So, the sensible decision was taken early on to say that a snapshot would be taken of all EU legislation on the data of exit (11pm, 31 December 2020, known as the Implementation

Period Completion Day (IPCD)) and this would become part of UK law with a new name 'Retained EU law'. This law would have a hybrid status. It would be part of UK law and thus 'onshored', to use the jargon, but it would also still have some of the attributes of EU law (in certain circumstances supremacy and direct effect), thus reflecting the pre IPCD position. But, unlike the position when the UK was still a member state, post IPCD, the UK parliament would be free to remove any effects it did not approve of by passing UK legislation. However, this could be done at a more considered pace, as and when legislative time allowed.

6. These objectives, as set out in paragraph 10 of the Explanatory Notes, are equally valid in 2022 as they were in 2017-18 when the EU (Withdrawal) Bill was going through Parliament where it received very careful consideration at the pre-legislative and legislative stages. Parliament can repeal REUL when there is a considered policy to replace it. The EUWA 2018 gives a democratic stamp to very careful negotiations about how REUL should work post Brexit. There is nothing I have seen to suggest that the current rules are not working. Quite the contrary, they are delivering a 'functioning statute book' which provides legal certainty. Lawyers are able to advise on the basis of existing rules and the courts are working out the implications of REUL in the handful of cases that have come before them.

7. However, I recognise that in its Benefits of Brexit policy document, the government reiterated Lord Frost's ambition to review 'retained EU law to meet the UK's priorities' and to allow 'changes to be made to retained EU law more easily'. Their objection to REUL is that it is 'foreign-derived' and that it was 'often agreed as a result of compromise between the different regulatory approaches from 28 countries, with UK ambitions often levelled down and simplified to reach agreement'. So while the UK will often have had quite an influence on the shape of the legislation, it may not be exactly what a UK government acting alone would have chosen to do. The question then is how to deliver on this aim.

Repealing retained EU law

8. The Benefits of Brexit paper' prioritises the speedy removal of retained EU law. There seem to be two issues of concern to the government.[2]

9. First, it notes, correctly, that 'a large number of EU laws were implemented using the powers in section 2(2)' of the European Communities Act (ECA) 1972. This enabled EU Directives to be implemented by secondary law. So, for example, the Working Time Directive was implemented in the UK via the Working Time Regulations (a Statutory Instrument) adopted under s.2(2) ECA. As secondary law, Regulations like the Working Time Regulations, can be repealed by other UK Regulations; an Act of Parliament is not needed. However, the government may be concerned that every time new regulations are needed to amend or repeal eg the Working Time Regulations, a 'parent' provision in an Act of Parliament is required to provide the power for the government to enact such regulations. So, for example, the government will need to see if the power given to the Secretary of State in s.209 Employment Rights Act 1996 is wide enough to cover amending the Working Time Regulations.

[2] See further C. Barnard, 'Retained EU law and Brexit Opportunities' https://ukandeu.ac.uk/retained-eu-law-and-brexit-opportunities/

10. There are many such powers in existing Acts already on the statute book and it now appears common practice to put a broad clause into new legislation relating to REUL, giving the government power to amend REUL (see eg Schedule 11, paras 21 and 23 of the Building Safety Bill).

11. However, it may be that the government is looking to give itself a broad superpower – a bit like the reverse equivalent of s.2(2) ECA 1972 - so it can remove swathes of REUL secondary law where it has failed to already give itself the necessary power elsewhere or the scope of the existing power is uncertain.

12. Second, the government is concerned that some REUL has the status of primary legislation and does not consider it a good use of 'finite Parliamentary time to require primary legislation to amend all of these rules'.

13. EUWA 2018 makes some EU rules, specifically EU Regulations (labelled 'retained direct principal' regulations), somewhat more difficult to repeal than other EU acts. So, for example, the EU Passenger Rights Regulation which allows passengers to make claims for compensation when their flights are delayed, is a 'retained direct principal Regulation' which requires either (1) an Act of Parliament or, (2) in some carefully defined cases where there is already a suitable Henry VIII power introduced by an earlier UK Act such as EUWA 2018, secondary legislation, to reverse.

14. So the claim that it is not good use of 'finite Parliamentary time to require primary legislation to amend all of these rules' is not entirely correct because in some circumstances Henry VIII powers can be used to amend such legislation. The only parliamentary time engaged would be to approve secondary legislation enacted under a Henry VIII clause.

15. However, the government argues 'A targeted power would provide a mechanism to allow retained EU law to be amended in a more sustainable way'. So presumably the government would like to deploy a reverse equivalent of s.2(2) superpower here too. Perhaps there is also a desire to replace the affirmative resolution procedure for adopting secondary legislation with the negative resolution procedure, such that Parliament has the opportunity to refuse, but need not approve, delegated legislation repealing REUL.

16. Why the concern? The first is process, the second is substance.

17. On *process*, the concern is that secondary legislation gets appallingly little scrutiny by Parliament. The last time the Commons rejected a statutory instrument was in 1979. For all of the talk of taking back control to Parliament, the prevailing approach is, in fact, taking back control to the executive. Although the government says 'We will work with Parliament on how to frame such a power and ensure its use has the appropriate levels of parliamentary scrutiny,' no parliamentary mechanism yet has been developed which ensures adequate, line by line scrutiny of secondary legislation.

18. Nor is it clear which committee(s) in the Commons and Lords have the capacity and expertise to undertake this analysis, bearing in mind that most legislation that will be repealed in this way is sector specific. So the expertise in respect of financial services, one of the areas identified for reform is very different for that in respect of chemicals. While the

constitutional committees will be able to look at the process they may not be able to have a sufficient command of the substance.

19. On *substance*, it is clear that the government plans to repeal a significant volume of REUL. But this will inevitably bring it into conflict with Scotland which wants to continue to map not just existing but also future EU law in key areas, and Northern Ireland which is obliged to comply with existing and future EU law in the areas covered by the Northern Ireland Protocol.

20. The government believes its common framework programme, the UK's version of harmonisation, can paper over the cracks: 'The Government is committed to the proper use of Common Frameworks and will not seek to make changes to retained EU law within Common Frameworks' without following the ministerially-agreed processes in each framework. However, progress on these common frameworks is painfully slow. More than twenty have been published in draft but only one has been adopted.

Supremacy of EU law

21. The call for evidence also asks in 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'?

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

Rationale for retaining supremacy

22. At first sight it certainly seemed odd that the principle of supremacy of *EU law* was carried across into the EUWA 2018, given the purpose of Brexit of taking back control to Parliament. However, since EUWA was meant to take a snapshot of all of EU law (except the Charter) on 31 December 2020 that, by definition, included the key principles of supremacy and direct effect.

23. For many – not just in the UK – 'supremacy' is a neuralgic word. However, once stripped of its sovereignty-limiting connotations, it could also be given a more neutral label, namely a rule on conflicts of law (ie which law applies when there is a conflict between two provisions).[3] All legal systems have such a rule – even the UK. In the UK, it is trite law that Acts of Parliament take precedence over conflicting provision in a Statutory Instrument. This is a conflicts rule. The principle of supremacy is also a conflicts rule, a conflicts rule has the democratic imprimatur of an Act of Parliament, namely s.5(2) of the EUWA 2018

Removing supremacy?

24. The government is also looking at how to remove the continued effect of supremacy of EU law over domestic 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.'

[3] Joerges, Christian and Joerges, Christian, Rethinking European Law's Supremacy with Comments by Damian Chalmers, Rainer Nickel, Florian Rodl, Robert Wai (July 2005). EUI Working Paper LAW No. 2005/12, Available at SSRN: https://ssrn.com/abstract=838110 or http://dx.doi.org/10.2139/ssrn.838110

25. The government will consider 'creating a bespoke rule that would address cases where retained EU law came into conflict with domestic law'. It notes that this rule would have 'the benefit of specific authorisation by Parliament'. This is a perplexing statement because the supremacy rule already has specific authorisation by a provision of an Act of Parliament, namely s 5(2) of EUWA 2018. This provides:

> 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]

26. Further, the supremacy of EU law is only temporary. Unlike when the UK was a Member State of the EU, if a UK court now gives precedence to EU law, Parliament is free to legislate to reverse the effect of that decision.

27. There have been no cases to my knowledge where the issue of supremacy has been a determining issue. Further, it is not at all clear that there are many directly effective EU Treaty provisions which have carried over as REUL and then have not been turned off by other UK legislation. It is likely that Article 157 TFEU on equal pay still benefits from the principle of supremacy over, for example, conflicting provisions of the Equality Act 2010 but it is very unclear what conflicting provisions of the Equality Act are still on the UK statute book. Courts are much more willing to use the doctrine of sympathetic construction than supremacy to achieve their objectives.

28. Given the paucity of cases on REUL, let alone on the supremacy principle, this does not seem to have been a problem in practice. So this raises the legal (as opposed to the political) question why remove it at all?

29. I accept that the politics views s.5(2) differently. Lord Frost appeared to want to remove s. 5(2) EUWA altogether: the Brexit Policy paper suggests something rather different: a bespoke rule.

30. The question then is what form that bespoke rule might take. Could there be a carve out for a specific area of law (eg 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.

Conclusions

31. In summary, I would argue that now lawyers, judges and academics have started to understand the legal complexities surrounding EUWA 2018, changes should be made only where there are very good legal and political reasons for doing so.

32. The paucity of cases on REUL suggests that the concept is working well.

33. While the concept of supremacy causes political problems its operation has not so far caused difficulties.