EVIDENCE OF THE UK ENVIRONMENTAL LAW ASSOCIATION TO THE HOUSE OF COMMONS EUROPEAN SCRUTINY COMMITTEE INQUIRY:

RETAINED EU LAW – WHERE NEXT?

Summary

- The characterisation of retained EU law as a distinct form of domestic UK law supports the continuity and coherence of the statute book in light of the distinctive legal heritage of retained EU law and its deep roots in UK legal doctrine.
- This continuity is particularly important in the area of environmental law, much of which is founded in retained EU law across the UK, since environmental issues were heavily legislated by the EU whilst the UK was an EU member state, in light of the cross-border nature of many environmental problems.
- Retained EU law is interpreted in the same way as other domestic law, applying longstanding principles that ensure ongoing legal certainty. This includes referring to principles and decisions of EU law where these inform the genesis and existing interpretation of retained EU law. The relevance of retained EU case law in certain policy areas may diminish as legislation and legal doctrine develop over time post-Brexit.
- The process for reforming any element of retained EU law should involve specific and adequate legislative scrutiny, which takes into account the wider legal and governance picture. This is particularly important in relation to retained EU environmental law to ensure that levels of environmental ambition are not inadvertently undermined in any specific policy area.
- Enhanced legislative scrutiny is particularly required where retained EU law is disproportionately contained in secondary legislation, where extensive legal or policy change is envisaged, and/or where legislative change impacts devolved competences.
- The supremacy of EU law has not been retained. The principle of supremacy now only applies to the interpretation of pre-Brexit rules as set out in the Withdrawal Act.
- Giving a wider range of courts and tribunals powers to amend retained EU law would undermine legal certainty as questions of legal interpretation would become more volatile.
- Any review of retained EU law should take full account of: existing or planned policy review exercises; the boundary between devolved and reserved matters; impacts on devolved nations' legislative competence; and the impact of the United Kingdom Internal Market Act 2020.

1. UKELA (UK Environmental Law Association) comprises over 1,500 academics, barristers, solicitors and consultants, in both the public and private sectors, involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment.

2. UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This consultation response has been prepared by UKELA's Governance and Devolution Group, which aims to inform the debate on the development of post-Brexit environmental law and policy. It does not necessarily, and is not intended to, represent the views and opinions of all UKELA

members but has been drawn together from a range of its members.

3. UKELA is submitting evidence to this inquiry in light of the extensive amount of UK environmental law that is derived from EU law. The stability of UK environmental law depends on a robust and thoughtful approach to retained EU law.

4. This evidence provides an overview of UK environmental law and EU retained law, highlighting key themes in this critical area for the future of UK environmental law, followed by a response to the consultation questions in turn.

Overview: UK environmental law and retained EU law

5. The predominant source of environmental law in the UK is EU law, which has legislated in a wide number of areas such as waste, water and air quality, nature conservation, and the regulation of chemicals. This is due to the fact that in EU law, environmental policy is a shared competence. In light of the cross-border nature of environmental problems and their connection with trade, EU Member States may agree that environmental policymaking and regulation is better carried out at EU level. The result is that there is a large body of EU environmental law, much in the form of EU Directives. Directives are binding as to their overall objectives but may be implemented in different ways at the domestic level: across the UK, this has often been done by passing secondary legislation (regulations). The EU-level environmental law framework includes obligations on standard setting, environmental quality outcomes, monitoring and plan-making, as well as robust enforcement mechanisms.

6. Environmental policy is a devolved matter in the UK. When the UK was an EU Member State, environmental law across the UK remained relatively unified due to the common EU environmental law framework, without the need to draw sharp lines around devolved policy competence for environmental matters domestically. At the same time, as indicated above, UK Government and devolved administrations often relied on secondary legislation to implement EU environmental law. This led to many 'primary' regulatory obligations in key areas of environmental law being contained in secondary legislation, often made in parallel across the devolved jurisdictions (such as those relating to environmental permitting or habitats protection). As noted in UKELA's 2012 report on The State of UK Environmental Legislation,[1] this extensive

[1] UK Environmental Law Association, King's College London, Cardiff University, The state of UK

transposition of EU law via secondary legislation led to complexity and fragmentation in environmental law, without systematic distinction between obligations and powers in 'primary' and 'secondary' legislation. It also meant that legislative scrutiny of major elements of UK environmental law was relatively light touch when they were implemented domestically, raising concerns about the level of scrutiny that would apply if any of this law needed to be amended in the future, which is now a present reality in light of Brexit.

7. This picture is significantly affected by the process of legal separation required by UK withdrawal from the European Union. Whilst retained EU law under the European Union (Withdrawal) Act 2018 ('Withdrawal Act') provides a useful level of continuity, in respecting the body of UK environmental law that has evolved over the last 40 years, UK environmental law is at risk of becoming even more complicated and fragmented post-EU exit. The unprecedented extent of powers for Ministers under the Withdrawal Act to amend retained EU law to 'correct deficiencies', for example to remove reference to EU institutions,[2] was met with considerable concern in line with the long-standing critique of lack of scrutiny of secondary legislation processes.[3] Accordingly, there was a commitment to use this power to make only 'technical' changes and to 'make major policy change or establish new legal frameworks' by means of primary legislation.[4]

8. In addition, post-EU, UK environmental law is repatriated across the constituent parts of the UK, with divergent new environmental provisions and structures being created on top of the existing legislative picture (notably via the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, and Environment Act 2021). This new legislation creates difficult legal issues around the interaction between retained EU environmental law and subsequent 'post-Brexit' domestic environmental legislation in the various jurisdictions of the UK. This legislative picture will require careful unpacking and analysis to ensure that the full body of environmental law across the UK is visible and can be accurately appraised, particularly to ensure that

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environmental law in 2011-2012: Is there a case for legislative reform? (May 2012).
[2] European Union (Withdrawal) Act 2018, s 8.
[3] For example, Select Committee on the Constitution, European Union (Withdrawal) Bill: interim report (Sept 2017) HL Paper 19; R Fox, J Blackwell, B Fowler, Taking back control for Brexit and beyond: delegated legislation, parliamentary scrutiny and the European Union (Withdrawal) Bill (Hansard Society 2017); J Simson Caird and E Patterson, Brexit, delegated power and delegated legislation: a rule of law analysis of parliamentary scrutiny (Bingham Centre for the Rule of Law 2020).
[4] European Union (Withdrawal) Act 2018, Explanatory Memorandum, para 14.

specific elements or processes for upholding standards of environmental protection are not inadvertently removed or overridden through subsequent legislation.

9. In light of this, there are real risks that UK environmental law will be unhelpfully complicated by new processes for amending retained EU law unless they are transparent and involve scrutiny that takes into account the wider legislative and governance picture.[5] In this regard, it should be noted that the Secondary Legislation Scrutiny Committee and Delegated Powers and Regulatory Reform Committee both recommend a 're-set' of the balance of powers between Parliament and Government in light of legislative practice during Brexit and the Covid-19 pandemic.[6] A particular cause for concern for environmental law is the potential for regression of environmental standards contained in retained EU law without adequate parliamentary scrutiny. EU environmental law did not appear overnight, it was the subject of detailed discussions between Members States over many decades. As transposed in the UK, it is an important and coherent layer of our legal and policy framework. If retained EU environmental law is to be fundamentally changed, it should only be done following full and comprehensive domestic scrutiny. 'Full scrutiny' means adequately involved Parliamentary scrutiny, including timely and increased participation of relevant Parliamentary committees, civil society and expert stakeholders.

10. In this regard, it is important to take into account the intricate framework for making and scrutinising changes to retained EU law as set out in the Withdrawal Act (s 7 and Sch 8). This framework confirms that all retained EU law can be amended or repealed by subsequent primary legislation (s 7), and that it can also be amended or repealed by subordinate legislation in the ways prescribed in Schedule 8.[7] Permissible amendment or repeal of retained EU law by subordinate legislation, and relevant procedures for this, depends on what type of EU law was retained (direct

[5] For example, C Reid, 'Mapping post-Brexit environmental law' (2021) 21 ERA Forum 655; E Scotford, 'Legislation and the stress of environmental problems' (2021) 74(1) Current Legal Problems 299; ClientEarth, Environmental law and governance post-Brexit (ClientEarth (report), 11.02.21); R Macrory, 'Environmental law in the United Kingdom post-Brexit' (2019) 19 ERA Forum 643; M Lee, 'Brexit and environmental protection in the United Kingdom: governance, accountability and law making' (2018) 36(3) Journal of Energy and Natural Resources Law 351.

[6] Secondary Legislation Scrutiny Committee, Government by diktat: a call to return power to Parliament (HL Paper 105, November 2021); Delegated Powers and Regulatory Reform Committee, Democracy denied? The urgent need to rebalance power between Parliament and the Executive (HL Paper 106, November 2021).

[7] This framework was required as there were some aspects of retained EU law that were not implemented through domestic legislation at the time of the Withdrawal Act, as they had previously applied directly in UK law through the force of EU law.

principal EU legislation, direct minor EU legislation, other EU law retained under the savings provisions of section 4, or EU-derived domestic legislation introduced under the European Communities Act 1972 (ECA)), and whether the Act empowering the subordinate legislation conferred that power before or after the Withdrawal Act.[8] For direct principal EU legislation, direct minor EU legislation, other EU law retained under the savings provisions of section 4, these kinds of retained EU law were not incorporated into domestic UK law pre-Brexit and so bespoke processes for amending these were necessary to avoid a gap in the development of post-Brexit law.

11. Most of these provisions do not however apply specifically to the large body of environmental law that derives from EU law, which is in the form of secondary legislation at UK or devolved level introduced under section 2(2) of the ECA (mainly in order to implement EU Directives), since this was already domestic law pre-EU exit and can be amended as retained EU-derived domestic law (having been saved by section 2 of the Withdrawal Act). This raises the prospect of important aspects of UK environmental law being amended or repealed by subsequent secondary legislation, particularly under powers conferred by more recent Acts of Parliament (such as the Environment Act 2021), with limited scrutiny. For such modifications, at least explanatory statements in Parliament are required under para 15 of Schedule 8, although these can be avoided (para 15(4)) and they are not as robust as scrutiny statements required under para 14 (for any modifications introduced under subordinate legislation empowered by Acts preceding the Withdrawal Act).

12. Overall, this legislative framework concerning processes for changing retained EU law shows how complex the legislative process for EU exit has (inevitably) been, and how much parliamentary effort and deliberation has already been invested in developing specific processes for the amendment of retained EU law, which both aimed to support legal continuity and certainty (avoiding gaps in UK law) and allowed Parliament to support and scrutinise the process of UK withdrawal from the EU. This framework also highlights that particular attention needs to be paid to laws created by

[8] For powers to make subordinate legislation that existed *prior* to the Withdrawal Act, there are no real limits on their use to introduce secondary legislation to amend or repeal all kinds of retained EU law (para 3(1)), although there are enhanced legislative procedures for modifications to direct principal retained EU law and EU law retained under section 4 (paras 4(1)-4(2)) and enhanced scrutiny processes for amending or revoking subordinate legislation under section 2(2) of the ECA (paras 13-14). For powers to make subordinate legislation that have been conferred *after* the Withdrawal Act, there are some limits to prevent amendment or repeal of retained direct principal EU legislation by this route (para 11(2)(a)), but modification of retained EU law is generally allowed.

subordinate legislation, both in constituting significant aspects of retained EU law and in subsequent laws that might alter this legal foundation. Changes to retained EU law that are made without careful consideration of the wider picture of UK environmental law may lead to even further unhelpful complexity of the legislative picture, with risks to levels of environmental protection. There may be a case for amending some aspects of the processes for modifying retained EU law under the Withdrawal Act, particularly to enhance scrutiny, but any such changes should take the Withdrawal Act's provisions as a starting point and work from there.

13. In appraising the future of retained EU law in the field of environmental law, compliance with international environmental obligations will also need to be kept in mind. Many EU environmental obligations, now persisting as retained EU law, implement multilateral environmental agreements by which the UK is bound, such as the Bern Convention,[9] Ramsar Convention,[10] Aarhus Convention,[11] or Convention on Long-range Transboundary Air Pollution.[12] Compliance with these treaties is an important reason for maintaining retained EU law as a baseline level of environmental protection and for being mindful of the wider legal architectures in which they are embedded (such as the role of the planning system in implementing nature conservation obligations that ensure compliance with international obligations). Furthermore, any amendments to retained EU law will need to ensure compliance with the UK's commitments under the UK-EU Trade and Cooperation Agreement, including to non-regression and the enumerated principles of environmental policy.[13]

14. As an overall point, retained EU environmental law cannot easily be viewed in isolation from environmental law and policy across the UK. As indicated above, retained EU law establishes fundamental obligations across diverse areas of

[9] Convention on the Conservation of European Wildlife and Their Natural Habitats (1979 Bern Convention) (adopted 19 September 1979, in force 1 June 1982) UKTS No. 56 (1982).
[10] Convention on Wetland of International Importance Especially as Waterfowl Habitat (1971 Ramsar Convention) (adopted 2 February 1971, in force 21 December 1975) 996 UNTS 243.
[11] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998 Aarhus Convention) (adopted 25 June 1998, in force 30 October 2001) 2161 UNTS 447.
[12] Convention on Long-range Transboundary Air Pollution (LRTAP) (adopted 13 November 1979, in force 16 March 1983) 1302 UNTS 217.
[13] Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the European Union and the European Atomic Energy Community, of the other part (signed 30 December 2020, in force 1 May 2021) UKTS No. 8 (2021), Part 2, Heading 1, Title XI, Ch 7 Environment and Climate, Art 391 on non-regression, Art 393 on environmental and climate principles.

environmental law, and these obligations have become intertwined with other domestic aspects of environmental law and policy over time (such as the definition of waste, deriving from the Waste Framework Directive).[14] Moreover, as new environmental law and policy is developed going forward, proposed changes build on the foundations of existing environmental law, including retained EU law. This can be seen in England with the current proposals for environmental targets[15] under the Environment Act (these proposed targets have been designed to supplement those already existing under retained EU law) or in the Nature Recovery Green Paper[16], which is contemplating options for reform for England against the backdrop of nature conservation regimes created to date (partly under retained EU law, partly under other domestic legislation). To support the coherence of environmental law, any proposed changes to retained EU law contemplated in these reform exercises must take into account the holistic picture of legislative obligations and governance arrangements in the relevant policy area (including the position across the devolved jurisdictions). Any processes to adjust retained EU law in isolation, without such wider analysis, could destabilise these and other policy review exercises. Taking a holistic view of the legislative and governance picture is particularly important to ensure that the level of environmental ambition is not inadvertently undermined in any specific policy area.

15. The role of retained EU law in maintaining the coherence of environmental law is also important in relation to environment law across the United Kingdom. This is seen in DEFRA's current proposals for UK Common Frameworks in environmental policy areas[17], which indicate that retained EU law is to persist as the foundation for different areas of environmental policy across the UK.

16. Finally, in developing any new policy in relation to retained EU law, so far as applicable for England and reserved matters, government Ministers will need to have 'due regard' to the policy statement on environmental principles (Environment Act 2021, section 18) in line with the obligations under section 19, Environment Act 2021.[18] Once these provisions are in force under the Environment Act, they will place

[14] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJL 312).
[15] Defra, Consultation on environmental targets (March 2022).
[16] Defra, Nature Recovery Green Paper: Protected Sites and Species (March 2022).
[17] Cabinet Office, UK Common Frameworks (March 2022).
[18] Where UK Ministers exercise powers extending to devolved matters in Scotland, it is the principles enshrined in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 that must be considered.

obligations on Ministers to take into account principles of environmental policy, which pursue environmental protection in various ways, in all their policymaking. In light of the significant amount of environmental law contained in retained EU law, this is a material obligation for new policies in relation to retained EU law, particularly in relation to any policy changes that might risk reduction in environmental standards contained in retained EU law.

Consultation questions

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?

17. Retained EU law was introduced as an overarching category of UK domestic law under sections 2-5 the European Union (Withdrawal) Act 2018. Retained EU law contains distinct subcategories: EU-derived domestic legislation; direct EU legislation; rights etc under section 2(1) European Communities Act 1972; retained EU case law; and retained general principles of EU law. For environmental law, as indicated above, we are mainly concerned with EU-derived domestic legislation: i.e. domestic regulations implementing EU law. Notably, some important aspects of the EU environmental acquis were not retained via the retained EU law provisions in the Withdrawal Act, necessitating a special Bill to fill those gaps (as identified by section 16 of the Withdrawal Act), leading to much of Part 1 of the Environment Act 2021, with similar developments in Scotland under Part 2 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 and proposed for Wales (having established for now the Interim Environmental Protection Assessor).

18. In order to ensure its ongoing legal effect, EU-derived domestic legislation was included as a distinct category of retained EU law (Withdrawal Act, s 2), although it was already domestic law. This was required due to the repeal of the empowering statute for this EU-derived domestic legislation (the European Communities Act 1972). Incorporating the significant body of EU environmental law that was applicable in the UK as a distinct category also supports the clarity and coherence of the statute book by distinguishing between retained EU law and other domestic law. This is useful because retained EU law has a distinctive legal heritage, different norms underpinning it (such as EU environmental principles), and a significant body of CJEU case law supporting its interpretation. All of that heritage is part of the evolution of UK environmental law over 40 years, constituting a large part of domestic environmental regulation, on the basis of which legal practitioners and industry alike have developed their skills and businesses.

19. Having said that, as noted above (para 6), there were issues of clarity and consistency in UK environmental legislation before EU exit. Retained EU law does not in itself exacerbate these issues, but processes of repatriating EU law (paras 7-8) and processes for potentially amending retained EU law (paras 9-11), alongside the interaction of retained EU law with new post-EU exit environmental legislation, risk exacerbating issues of poor legislative clarity and coherence.

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

20. It is useful to keep the concept of retained EU law, particularly since the majority of UK environmental law is in this form. To remove this body of law wholesale would not be desirable or feasible, and to divorce this body of legal norms from its roots would generate a significant amount of legal uncertainty, given that the established meaning of those legal norms is inextricably connected to those roots, including their interpretation by the Court of Justice of the European Union. Having said that, it is a category of law that will be developed over time, as UK courts apply and interpret it, including with new domestic interpretations arising from appellate courts as appropriate (Withdrawal Act, section 6(4)). This evolutionary approach to the domestic development of retained EU law is a sustainable process that balances legal certainty and domestication of retained EU law.

21. Keeping retained EU law as a separate category also means that retained EU law can be distinguished from other domestic law when changing the statute book going forward, ensuring that connections between these bodies of domestic law are woven together over time and that this process is subject to adequate democratic scrutiny. As noted above (para 10), amendment of retained EU law has required a bespoke legislative reform mechanism in relation to certain categories of retained EU law (under the Withdrawal Act), since processes for domestic statutory amendment would not otherwise exist without recourse to primary legislation. Beyond these categories where reform process gaps existed, enhanced legislative scrutiny should be applied where retained EU law has been disproportionately contained in secondary legislation, as is the case in much of environmental law across the UK. This is because, although these laws are in the form of regulations, they are often setting frameworks of a sort normally considered appropriate for primary legislation and are the product not of standard processes for making regulations, but of extended legislative processes involving EU and domestic procedures. Accordingly, their adjustment should be subject to more than just the usual streamlined procedure for delegated legislation to support coherence and sustainability of UK law, and of environmental law across the UK specifically. This is particularly since UK

Government has made notable commitments to maintaining and improving environmental law and extensive policy change is now being contemplated across each of the four countries at varying paces. As noted above (para 11), enhanced levels of scrutiny in the Withdrawal Act arguably do not go far enough in this regard.

22. Further, any suggestion of replacing the unifying architecture of EU-derived environmental law in this devolved policy area is problematic. This kind of change risks undermining the proposed role of UK-wide Common Frameworks in coordinating aligned interests and divergence, which will be particularly important in the area of environmental law. As noted above (para 15), these provisional Common Frameworks are starting from the position that retained EU environmental law will provide a common baseline for environmental law and policy across the UK.

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

23. There is no requirement in the Withdrawal Act for principles and concepts of EU law to underpin any post-Brexit UK legislation. By contrast, in relation to retained EU law, which was developed on the basis of principles and concepts of EU law, this body of law has been deeply woven into UK domestic law for 40 years. Retained EU law is part of UK law and not easily disentangled from it. In relation to environmental law, for example, retained EU law governs most areas of environmental permitting, environmental impact assessment, regulation of waste and waste shipments, regulation of protected habitats and species, and establishes key legal frameworks for air and water quality. For reasons of legal continuity and certainty, it is therefore appropriate that retained EU law is understood in light of retained general principles of EU law and retained EU case law.

24. In short, legal certainty is a critical issue that cannot be overlooked in reviewing the nature and development of retained EU law. This does not mean laws and legal principles cannot be changed going forward, rather it is to say that existing laws and legal principles, understood in their full legal context, provide the basis for a functioning legal system. The key question is how legislative and policy change is conducted going forward. To embark on such change on the basis of a markedly different set of principles and concepts risks producing uncomfortable and unworkable misalignments. Where change is incremental and piecemeal, it should proceed on the basis of existing underlying concepts and approaches.

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?

25. Drafting practices and repeated waves of reform have led to enormous challenges in locating and understanding retained EU law and its interaction with domestic law.[19] As an example, take identifying post-Brexit English air quality standards, as outlined by Professor Scotford:[20]

> In English law, post-EU exit, to know what air quality standards are, one must look first to the Air Quality Standards Regulations 2010,[21] which implemented EU law standards, but as these are amended by The Air Quality (Amendment of Domestic Regulations) (EU Exit) Regulations 2019.[22] One must also look at similar but not equivalent air quality standards and objectives in the national *Air Quality Strategy*, introduced under the Environment Act 1995. Then it is necessary to look at the UK/English Environment [Act 2021], which contains further provisions for setting air quality standards on a different model of standard setting (long term, capable of being achieved, subject to being lowered), under which at least two new air quality standards must be introduced, again in secondary legislation.[23] If the legal obligations relating to any of these standards are required to be interpreted in court, they will be subject to different schemes of legal interpretation, thanks to the provisions of the European Union (Withdrawal) Act 2018 on the interpretation of retained EU law[24]... And this is only to discern English standards; a different set of air quality standards may emerge in the legislation of the UK's devolved administrations, assuming they retain environmental policymaking discretion in this respect. This legislative picture – of knowing what is a basic UK environmental standard and understanding related legal obligations – is overwhelming for a legal practitioner or academic... Knowing what our environmental law is became much harder after Brexit, and this kind of legislative picture is alarming for legal clarity, for transparency, and for the rule of law.

26. This example shows there is a major challenge to address the coherence, transparency and accessibility of the UK statute book. It also shows that legal obfuscation is arising due to the interrelationship between retained EU law and other domestic environmental law, which has not been drafted with this legislative interaction in mind. This difficulty is being exacerbated as new environmental legislation is being developed across the UK, overlaying retained EU law with

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[19] For a summary, see A Sinclair and J Tomlinson, Plus ça change? Brexit and the flaws of the delegated legislation system (Public Law Project 2020).
[20] Eloise Scotford, 'Legislation and the Stress of Environmental Problems' (2021) 74(1) *Current Legal Problems* 299, 325.
[21] SI 2010/1001.
[22] SI 2019/74.
[23] Environment Act 2021, ss 1-8.
[24] European Union (Withdrawal) Act 2018, s 6.

another layer of legal change. One possible solution would be to consolidate relevant laws that address a specific, common issue. This should be done in transparent and issue-specific way, with adequate democratic scrutiny. This is particularly to ensure that levels of environmental protection are not compromised through apparently technical or general processes of 'cleaning up' the statute book.

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?

27. The Withdrawal Act has been an effective way of removing the supremacy of EU law from the statute book by repealing the 1972 Act which gave effect to EU law in the UK (section 1). Further, the principle of supremacy of EU law no longer applies to any enactment passed after exit day (section 5(1)). Supremacy of EU law has not been retained as a general legal principle.

28. The principle of supremacy of EU law only applies, under the Withdrawal Act, to pre-Brexit enactments and rules, thereby preserving the established position and legal certainty. To remove it would upset that position and may have unintended consequences. To the extent that the question is referring to the primacy of retained EU case law in interpreting retained EU law, or the need actively to amend retained EU law over time, both these features are important aspects of legal certainty and legal continuity in domestic UK law post-Brexit.

29. In light of our changing legal and constitutional history, there needs to be clear hierarchy of laws to apply. Since existing domestic law over the past decades has been structured on the basis of the primacy of EU decisions and measures, that cannot suddenly be overturned without creating uncertainty, inconsistency and unforeseen difficulties. Parliaments across the UK have the power to adjust anything that requires it, without throwing the whole body of law into disarray.

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?

30. As things stand, retained EU law will be interpreted in the same way as other domestic law. Domestic judges will use the same principles of legal interpretation and precedent, and use common law modes of legal reasoning. These principles include looking to any domestic statute and previous case law for guidance on legal interpretation, including the Withdrawal Act and relevant EU case law. Subsequent case law across the UK, amendments to the Withdrawal Act and relevant post-Brexit

legislation will also continue to inform the interpretation of retained EU law.[25] As law and policy develop post-Brexit, the relevance of retained EU case law in certain policy areas may diminish.

31. As noted above (para 18), the case law of the Court of Justice of the European Union (CJEU) is an integral part of retained EU law. Retained EU law does not exist as 'bare' legislation devoid of legal meaning. It was integrated into UK domestic law pre-Brexit, as interpreted by the CJEU, and thus CJEU case law continues to have significant legal meaning in relation to the operation of retained EU law, maintaining legal continuity and certainly in relation to this extensive corpus of EU-derived domestic UK law.

32. For example, this issue was explored by the Court of Appeal in *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441 at paras 73 *et seq*, where avoiding legal uncertainty is identified as a key argument for continuing to follow the case law from the European Court.

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?

33. Retained EU case law is important for the reasons set out in the previous answer, and providing clarity about its legal influence, in relation to the body of law that existed and applied prior to EU exit, is important for legal certainty. However, there is currently a lack of clarity about the legal influence of retained EU case law in light of the powers that exist under section 5A of the Withdrawal Act (introduced by section 26, European Union (Withdrawal Agreement) Act 2020).

34. Professor Reid, in a blogpost as section 26 was being considered in the Withdrawal Agreement Bill 2019-20, explained the point and risks about legal certainty as follows:[26]

> The existing 2018 Act does provide for the possibility of departures from the CJEU's judgments, but only when a case reaches the Supreme Court (or High Court of Justiciary) and it is satisfied that the same high hurdle for overturning its own previous decisions has been crossed. Thus, although there is the possibility of changes where required, the law is stable and

[25] See, for example, EU (Withdrawal Agreement) Act 2020, s 26; The EU-UK Withdrawal Agreement 2020; Competition (Amendment etc (EU Exit) Regulations 2019; European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020. For general commentary, see J Williams, 'Retained EU law: a guide for the perplexed' (EU Relations Law (blog), 28.12.20); for retained EU case law on environment, see N Westaway, 'Retained EU law: habitats and species – calm before the storm?' (FTB Chambers (blog), 27.07.21) and R Honey, 'Environmental law and retained EU law' (FTB Chambers (blog), 12.07.21).

[26] Colin Reid, 'The Withdrawal Agreement Bill: New legal uncertainty?' (Brexit & Environment blog, 6 January 2020).

predictable. If the new [section 26] power is used to grant broad powers to revisit and decide afresh issues currently settled in the EU case law, then the position becomes much more volatile, with scope for arguments at potentially all levels of court reopening all sorts of questions that are currently settled by decisions from the CJEU in Luxembourg.

Why does this matter?

The significance of this is two-fold. Firstly, any legal uncertainty can be unsettling and is likely to increase the number and complexity of disputes that end up in the courts – good news for barristers but less good for others, whether business operators, investors or environmental defenders. More importantly, though, the potential for overturning the case law of the CJEU risks dismantling key strands of environmental law as it is applied today.

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

35. The repatriation of powers and responsibility from the EU to the UK and devolved nations has been a critical issue. Although an improvement on the initial proposals, the eventual position in section 12 of the Withdrawal Act still enables UK Ministers to remove from the competence of the devolved administrations matters that fall within areas of devolved responsibilities. Moreover, much subsequent legislation has included other measures that in a piecemeal way confer powers within devolved areas on UK Ministers (for example, Agriculture Act 2020, s 43; Trade Act 2021; Environment Act 2021 on waste and producer responsibility, air quality, water quality and governance and (disputed) forest risk commodities) or have potential to undermine the effectiveness of devolved powers (United Kingdom Internal Market Act 2020). The Scottish Parliament, Senedd and NI Assembly have no direct way of scrutinising subordinate legislation within their competence that is made by UK Ministers.

36. To the extent that there is a desire to avoid a disruption to commerce arising from the fragmentation of regulation within devolved competence, where divergence was previously constrained by the need to comply with EU law, the initial approach seemed to be to favour UK Common Frameworks. These involve all the administrations agreeing on policy and implementation as far as necessary, followed by legislation being introduced at the appropriate level(s) as required. As of March 2022, 26 provisional Common Frameworks (13 of which relating to Defra policy areas) have been proposed or agreed,[27] but the radically different approach embedded in the United Kingdom Internal Market Act 2020 allows laws in any part of

[27] Cabinet Office, UK Common Frameworks (Mar 2022).

the UK to be essentially overridden by prioritising market access for goods and services lawfully available in other parts.[28]

37. A further general observation is that, when the UK was an EU Member State, the wide powers under the European Communities Act 1972 enabled UK Ministers to make legislation that cut across the devolved/reserved divide and there was often no need for a precise delineation of which matters were reserved and which within devolved competence. This is now a legally significant issue, but often a difficult one as measures may straddle the boundary and identifying their true nature (as a matter of competence) is not straightforward.

38. For environmental matters, removing EU-level legislative and institutional frameworks meant that a 'governance gap' in areas such as environmental targets, principles, cooperation and enforcement arose.[29] Intergovernmental cooperation in environment as a devolved area needed to be reassessed because retained EU law does not establish new intergovernmental frameworks, but rather maintains devolved competences for the environment, carrying over the obligations from EU law. If the UK Government reviews and alters retained EU law in relation to England and reserved matters, the consequences for other parts of the UK must be fully considered (for example, tighter/looser waste disposal rules could lead to "waste tourism" between different parts of the UK). There is a need for collaboration and coordination to ensure that any changes are effective and efficient.

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?

39. The considerations in the previous answer mean that any review of retained EU law needs to take full account of the boundary between devolved and reserved matters (which of course is different in each of the devolution settlements and has become much more complex in light of the post-Brexit legislation), of the impact on the devolved nations in terms of legislative competence, and of the practical impact (in England and elsewhere) of the Internal Market Act which has the potential to allow regulatory controls in any one part of the UK to be largely by-passed. Such careful consideration is called for by the principles set out in the Review of Intergovernmental Relations that reported in January 2022,[30] but is not always

[28] K Armstrong, 'The governance of economic unionism after the United Kingdom Internal Market Act' (2021) Modern Law Review; E Lydgate and C Anthony, 'Brexit, food law and the UK's search for a post-EU identity' (2022) Modern Law Review (in press).
[29] C Anthony, 'Mind the gap: the fragmentation of UK environmental governance post-Brexit' (UK in a Changing Europe (blog), 28.05.21).

apparent (for example, in current disputes over legislative consent for the Professional Qualifications Bill).

[30] Cabinet Office, Review of intergovernmental relations (Jan 2022).