Written Evidence submitted by Dr Emily Hancox, University of Bristol

Submission

1. This submission focuses on questions 1, 4, and 5 of the call for evidence. I am an academic based at the University of Bristol. My research is on EU constitutional law, with a focus on the interaction between the sources of EU law and the legal reasoning of the Court of Justice of the EU (CJEU). I am also interested in the role of UK courts in interpreting retained EU law.

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?

2. The idea of saving or retaining EU law was a unilateral measure taken by the UK to combat the grave threat Brexit posed to legal certainty.

3. Leaving the EU risked 'large holes on the statute book' for two reasons.[1] First, much of the EU law applicable in the UK had been incorporated by reference via section 2 of the European Communities Act 1972. Second, considerable subordinate legislation adopted to give effect to the UK's EU law obligations, and especially to transpose directives, had been adopted on the basis of section 2(2) of the European Communities Act 1972. Once the UK left the EU and repealed the European Communities Act, subordinate legislation based on section 2(2) of the European Communities Act 1972, as well as all EU law incorporated by reference, would cease to have effect.

4. An additional threat to legal certainty concerned the meaning of domestic law giving effect to EU law as well EU provisions applicable in the UK. The CJEU interprets certain concepts as having a specific EU meaning; for example, the definition of who is a 'worker' for the purposes of free movement law does not depend on national definitions.[2] In addition, so far as possible, UK courts must interpret domestic law compatibly with EU law (obligation of consistent interpretation). For instance, in *British Gas v Lock* the Court of Appeal read words into Regulation 16(3) of the Working Time Regulations 1998 on the calculation of holiday pay—referring to a 'week's pay'—to include results-based commission.[3] The CJEU's interpretative methodology also relies upon contextual and purposive criteria far more than UK courts do when interpreting domestic (and non-implementing) provisions.

5. Retained EU law is a coherent category linked by the need to prevent gaps in the statute book from arising and to ensure legal certainty and continuity after Brexit. Given the variety of ways in which EU law took effect domestically, retained EU law is a necessarily broad category. Retained EU law covers various types of EU and domestic

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[1] Government White Paper, 'Legislating for the United Kingdom's withdrawal from the European Union' (Cm 9674, 2018) para 3.1.
[2] Case 75/63 *Unger* EU:C:1964:19, [1964] ECR 177, 184-85.
[3] *British Gas Trading Ltd v Lock* [2016] EWCA Civ 983, [2017] ICR 530.

law as applied in the UK at the end of the implementation period. According to the EU Withdrawal Act (EUWA) 2018, retained EU Law encompasses:

- Acts of Parliament and subordinate legislation that gave effect to, or related to, the UK's EU law obligations;
- EU legislative acts—mostly regulations and decisions, but also some unimplemented directives—as well as non-legislative acts.
- Other directly effective provisions of Union law such as rights found in the EU Treaties.

6. Where a measure falls within the category of retained EU law, this generates several specific legal consequences. Distinct interpretative principles apply to the whole category of retained EU law, which again relates to the need to ensure continuity of meaning and legal certainty. The meaning, validity and effect of any retained EU law is determined with reference to the 'retained case law', 'retained EU case law', 'retained general principles of EU law' and with regard to the limits of EU competences.[4] A general power of amendment to remedy failures and other deficiencies found in all retained EU law.[5] There are also rules on the position of retained EU law in the hierarchy of norms and its interaction with other categories of domestic law.[6]

7. The coherence of the statute book is impacted, but not extensively, by the addition of a new and cross-cutting legal category. Retained EU law is classified using different criteria than existing categories of domestic law. Primary and subordinate domestic legislation (and EU legislative and non-legislative acts) are classified on the basis of the procedure for adoption: put simply, a Parliamentary process for primary legislation, and an executive process for subordinate legislation. The inclusion of primary and secondary domestic legislation, alongside EU primary law and legislative and non-legislative acts, within the category of retained EU law may mean that some measures may have a dual categorisation depending upon the context. Lawyers will be well-used to determining whether a provision gives effect to EU law.

8. Without legislative intervention, Retained EU law will continue to persist as a category of domestic law. It should be borne in mind, however, that retained EU law is not a fixed or 'frozen' category. Retained EU law is often described as a 'snapshot' taken on 31 December 2020, but this description is somewhat misleading. What falls within the category of retained EU law will change. This possibility is explicitly noted in the EUWA 2018, which defines retained EU law 'as that body of law [as it] is added to or otherwise modified by or under this Act or by other domestic law from time to time'.[7] The category of retained EU law will be altered and diminished as retained EU law is revoked or

[4] EUWA 2018, s 6(3).
[5] EUWA 2018, s 8.
[6] See the provisions on supremacy (EUWA 2018, ss 5(2), (7)) and on the possibility of amendment (EUWA 2018, s 7).
[7] EUWA 2018, s 6(7).

amended. Acts of Parliament adopted from 1 January 2021 onwards can expressly or impliedly repeal retained EU law since the principle of supremacy does not apply in relation to new measures.[8] There is also a power to amend retained EU law in section 8 of the EUWA 2018 and similar powers may be found in other Acts of Parliament.[9]

9. The possibility of explicitly revoking retained EU law is unlikely to create any difficulties. Increased delegated lawmaking powers may, however, add to the complexity of the statute book. It is important to acknowledge the large volume of statutory instruments amending retained EU law that have already been adopted. Any retained EU law must be read subject to these amendments.

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?

EU law or retained EU law

10. One issue upon which case law has diverged concerns whether a case is properly dealt with as one of retained EU law or EU law. The divergence is clear from the cases of *Lipton*[10] and *TuneIn.*[11] In *Lipton* the facts occurred before the end of the implementation period, but the Court of Appeal decided the case as one of retained EU law.[12] In *TuneIn,* the copyright breach was ongoing for several years—from while the UK was an EU Member State and beyond the end of the implementation period—but the judgment proceeded on the basis that departure from CJEU case law was only possible from 1 January 2021.[13]

11. The approach in *Lipton* is arguably incompatible with section 16 of the Interpretation Act 1978 by virtue of which rights accrued under a statute persist unless the repealing Act evidences a contrary intention. More recent case law, including from the UK Supreme Court, suggests that cases in which the facts arose prior to the end of the implementation period should be treated as involving EU law as it applied at the time.[14] One point to note is that as preliminary references to the CJEU are no longer possible, it may be difficult for domestic courts to decide as the CJEU.[15]

Definition and content of retained EU law

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[8] E.g. Fisheries Act 2020, sch 11. Section 5(1) of the EUWA 2018 clarifies that '[t]he principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after [IP completion day'.
[9] E.g. Trade Act 2021, s 2
[10] *Lipton v BA City Flyer Limited* [2021] EWCA Civ 454, [2021] 1 WLR 2545.
[11] *TuneIn v Warner* [2021] EWCA Civ 441, [2021] WLR(D) 183.
[12] Green L.J. held at the outset that in 2021 'a new set of legal arrangements are in place' and so the Court 'must apply the new approach': *Lipton,* [53].
[13] *TuneIn,* [76].
[14] *Gibfibre Ltd v Gibraltar Regulatory Authority* [2021] UKPC 31, [10], [68]-[69]; *Fratila v Secretary of State for Work and Pensions* [2021] UKSC 53, [1].
[15] See points 13-14 below.

12. Several terms in the EUWA 2018 are vague and require definition. This may lead to difficulties in the future.

    a. The approach of the EUWA 2018 is not to save EU directives, but to save the domestic implementing measures. Section 4 of the EUWA 2018 does include a savings provision for directives, but only those 'of a kind recognised by the' CJEU or a UK court before the end of the implementation period. It is unclear whether this refers to all provisions of directives that meet the criteria for direct effect—e.g. provisions that are 'unconditional and sufficiently precise'[16]—or only those provisions already explicitly recognized as meeting the criteria.

    b. Section 1B(7)(c) and (d) of the EUWA 2018 define 'EU-derived domestic legislation' as incorporating any domestic law 'relating to' domestic implementing measures, EU law or the EU or EEA. It is unclear what this means. 'Related' domestic law could be important where an EU directive has been incorrectly implemented or not implemented at all in the UK. According to the CJEU, the obligation of consistent interpretation 'requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive'.[17] Domestic law may be understood as 'relating to' EU law where it could operate for this purpose.

    c. The EU Charter is not part of retained EU law. Instead, the EUWA saves the general principles of Union law which, prior to the entry into force of the Charter, were the main source of EU fundamental rights protection. What may cause difficulties is that according to section 5(5) of the EUWA 2018 'references to the Charter in any case law are … to be read as if they were references to any corresponding retained fundamental rights or principles'. However, schedule 1, paragraph 2 of the EUWA 2018 only saves those general principles 'recognised as a general principle of EU law' by the CJEU prior to the end of the implementation period. This may create difficulties where there is case law on a Charter right that the CJEU has not recognised explicitly as a general principle.[18]

Interpretation of retained EU law

13. Where there is no specific authority from the CJEU or domestic courts on the issue arising, the EUWA 2018 has been interpreted as requiring domestic courts to try to decide as the CJEU would have done. In *Lipton,* since there was no CJEU authority on the issue of staff illness, Coulson LJ followed the CJEU's stated interpretative methodology: 'the meaning and scope of terms ... must be determined by considering their usual meaning in

[16] Case 8/81 *Becker* EU:C:1982:7, para 25.
[17] C-397/01 *Pfeiffer* EU:C:2004:584, para 115.
[18] For instance, the CJEU has not used the phrase 'general principle' in relation to the prohibition on discrimination on grounds of race and ethnic origin , sexual orientation, and disability. E.g. Case C-83/14 *CHEZ* EU:C:2015:480, para 58; Case C-354/13 *FOA* EU:C:2014:2463, para 32. See further, E Hancox, "The Relationship Between the Charter and General Principles: Looking Back and Looking Forward" (2020) 22 *Cambridge Yearbook of European Legal Studies* 233.

everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part'.[19]

14. Trying to decide as the CJEU may not always be easy, especially as UK courts can no longer make preliminary references, due to the specificities of the CJEU's reasoning style.

    a. The CJEU does not always follow its stated approach—looking to wording, context, purpose—consistently.[20]

    b. The CJEU also has recourse to 'meta-teleological' criteria[21]—i.e. looking to the overarching aims and goals of the EU—which UK courts may consider inappropriate post-Brexit. Requirements to disapply national procedural rules or allow for the possibility of damages so as to secure the effectiveness of (retained) EU rights may offer an illustration.[22]

    c. EU law is multi-lingual. Each of 'the different language versions [of EU provisions] are all equally authentic' and 'interpretation … involves a comparison of the different language versions.'[23] In the recent post-Brexit case of *Greenaway v Parrish,* Spencer J described the 'nightmare' of multi-lingual interpretation and granted permission for the parties to consult experts on the meaning of 'stolen' in different language versions of Directive 2009/103 to aid the interpretation of section 151(4) of the Road Traffic Act 1988.[24]

Amended retained EU law

15. Sections 5(3) and 6(6) of the EUWA 2018 note that, even after amendment, a provision of retained EU law may still be granted supremacy and benefit from interpretation in light of retained case law and general principles so long as this 'is consistent with the intention of the modifications.' Identifying the point at which a provision of retained EU law should no longer benefit from supremacy and interpretation of CJEU case law may prove difficult.

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'? 5(b): What is the

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[19] Case C-549/07 *Wallentin-Hermann v Alitalia* EU:C:2008:771, para. 17. See *Lipton,* [13]-[50].
[20] Contrast CJEU case law relating to the Citizenship Directive (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77). The CJEU takes a far more literal approach in Case C-333/13 *Dano* EU:C:2014:2358 when compared with Case C-378/12 *Onuekwere* EU:C:2014:13.
[21] E.g. Case 26/62 *Van Gend en Loos* EU:C:1963:1.
[22] E.g. Case C-213/89 *Factortame* EU:C:1990:257; Case C-453/99 *Courage and Crehan* EU:C:2001:465;
[23] Case 283/81 *CILFIT* EU:C:1982:335, paras 18-19.
[24] *Greenaway v Parrish* [2021] EWHC 1506 (QB), [44]. See further E Hancox, 'Interpreting the Post-Brexit Legal Framework: *TuneIn v Warner* [2021] EWCA Civ 441; *Lipton v BA Cityflyer* [2021] EWCA Civ 454' (2021) 80(3) *Cambridge Law Journal* 428.

most effective way of removing the 'supremacy of EU law' and other incidents of EU law from the statute book?

The principle of supremacy prior to Brexit

16. The principle of the supremacy, or primacy,[25] is a constitutional principle of EU law. The CJEU summarized the legal consequences of supremacy in *Popławski II.*[26] According to the CJEU, 'the primacy principle requires, inter alia, national courts to interpret, to the greatest extent possible, their national law in conformity with EU law'.[27] The CJEU added that:

> It is also in the light of the primacy principle that, where it is unable to interpret national law in compliance with the requirements of EU law, the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently.[28]

The possibility of disapplying incompatible national legislation only arises where the provision of EU law is directly effective.[29]

17. A similar approach towards ensuring the compatibility of domestic law with EU law has been adopted by courts in the UK. In *Fleming,*[30] Lord Hope stated that:

> Disapplication is called for only if there is an inconsistency between national law and EU law. In an attempt to avoid an inconsistency the national court will, if at all possible, interpret the national legislation so as to make it conform to the superior order of EU law.

The judicial approach to inconsistences between domestic and EU law did not, however, adopt the CJEU's rationale. The supremacy principle never explained the effects of EU law in the UK. The majority of the Supreme Court in *Miller* held that 'EU law enjoys its automatic and overriding effect only by virtue of the 1972 [European Communities] Act'.[31]

18. The phrasing of section 5(2) of the EUWA 2018, especially the reference to as it 'continues to apply', perhaps does not reflect the status of supremacy in domestic law before Brexit.

The principle of supremacy post-Brexit

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[25] The CJEU does not use the term 'supremacy'.
[26] Case C-573/17 *Popławski II* EU:C:2019:53
[27] *Popławski II,* para 57.
[28] *Popławski II,* para 58.
[29] *Popławski II,* paras 60-62.
[30] *Fleming v Revenue and Customs Commissioners* [2008] UKHL 2, [2008] 1 WLR 195, [25] per Lord Hope.
[31] *Miller* [2017] UKSC 5, [61].

19. The principle of supremacy in the EUWA 2018 does not impact on Parliamentary sovereignty. Parliament remains free to adopt legislation repealing expressly or implied any provision of retained EU law.[32]

20. Retaining the order of national law and EU law prior to the end of the implementation period is necessary to ensure legal certainty and continuity. Any inconsistencies between national law and EU law that lead to the interpretation or disapplication of the national measure will not be reversed, even if the national law was adopted *after* the EU provision (so long as it was passed before 31 December 2020). These effects will also continue should any new inconsistencies arise that were not identified before the end of the implementation period.

Removing the principle of supremacy

21. Removing the principle of supremacy could damage legal certainty. There is a danger of strategic litigation arguing that certain provisions of domestic law should be reinterpreted.

22. If the supremacy principle were to be removed, it would be necessary to clarify the following points.

    a. The date of adoption of retained EU law for the purposes of interpretation and implied repeal is not clear. For instance, retained EU law based on section 4 of the EUWA 2018 may include provisions that were first in the Treaty of Rome (1957) and still found in the Treaty of Lisbon (2009). A decision would need to be made over which date is the relevant date of adoption. Any provision would also need to consider the claim that retained EU law saved by sections 3 and 4 of the EUWA 2018 has been 'converted' or 'transferred' to a UK version by the EUWA 2018. This would make those provisions different from their EU counterparts. It could thus be claimed that the date the EUWA 2018 entered into force is the relevant date potentially rendering the removal of the supremacy principle futile.

    b. The principle of consistent interpretation stems from both the supremacy of EU law and the duty of sincere cooperation found in Article 4(3) TEU.[33] In *Allied Wallet,* the Court treated the principle of consistent interpretation as one of the 'principles' laid down by CJEU case law rather than as a manifestation of the supremacy principle. In removing the principle of supremacy, it would need to be clarified whether the intention was also to remove the obligation of consistent interpretation.

23. It is also important to note that there already potentially ways in which the principle of supremacy, as saved by section 5(2) of the EUWA, might be qualified.

    a. Section 5(3) of the EUWA 2018 allows for changes to the principle of supremacy where retained EU law has been amended. UK courts may consider that it is no longer 'consistent with the intention of the modification' a modified provision of retained

[32] See points 8-9 above.

[33] Case C-106/89 *Marleasing* EU:C:1990:395, para 8.

EU law to be granted supremacy.[34]

b. UK courts may be able to exercise the power to depart from CJEU case law found in the EUWA 2018 and secondary legislation to limit the implications of the principle of supremacy in appropriate cases.[35] Such a possibility was suggested by Warby LJ in *Open Rights Group*.[36]

[34] See point 15 above.

[35] EUWA 2018, ss 6(4)-(5); EU Withdrawal Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, reg 3(b).

[36] *Open Rights Group* [2021] EWCA Civ 1573, [28].