Written evidence submitted by the UK Trade Policy Observatory

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The European Union (Withdrawal) Act 2018 at once made provision for removing the ongoing effect of EU law in the UK and for retaining or incorporating EU law onto the UK statute book. This method of incorporating EU law into UK law aimed to avoid gaps in the UK statute book as the UK left the EU and maintain legal certainty. This submission draws on our in-depth examination of how retained EU law has been implemented in the context of food law and associated impacts on intra-UK and international trade. For more detail, please see the blog post and open-access academic article.

In summary, we recommend:

- Publication of and extended consultation on the UK Government's substantive review of retained EU law.
- Due account being taken of the differing legislative frameworks and policy significance of retained EU law.
- Provision of sufficient information and opportunity for engagement by the public, Parliament and the devolved legislatures for any proposed new legislative frameworks and substantive policy change.
- Reform of secondary legislation processes to allow for improved scrutiny.

Consultation questions

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?**

The UK, as an EU Member State, often incorporated EU law onto the domestic statute book by locating major policy areas in secondary legislation in each of the four countries of the UK. This creates a challenge for reviewing the status of retained EU law because many significant legislative and policy frameworks are variously located in primary or secondary legislation, and now in secondary legislation retaining EU law, across the UK. In addition, post-Brexit legislative developments have significantly changed some legislative and policy frameworks. This historical development has impacted the clarity and coherence of the statute book.

Retained EU law can nevertheless be understood as a distinct category, with sub-categories, of UK law introduced by the European Union (Withdrawal) Act 2018. This supports the clarity and coherence of the statute book by introducing a distinction between retained EU law and

domestic law. This is useful because EU law and UK law are distinct legal systems, and both operate a differing hierarchy of norms.

The Withdrawal Act 2018 delegated powers to UK ministers to amend retained EU law to ensure its 'operability' in the UK, for example by removing or replacing reference to EU institutions. The UK Government committed to using these powers solely to make 'technical' changes, and that 'major policy change or new legal frameworks' would be established by means of primary legislation.[1] This delegation of power has been the subject of much parliamentary debate, and critical commentary, highlighting the lack of scrutiny of and accountability for changes to important policy areas and drawing on long-standing concerns about the lack of democratic process in the making of secondary legislation.[2] These so-called 'technical' amendments inevitably make changes to legislative frameworks by changing the location and scope of powers for Ministers and the functions of public bodies.

Retaining and amending EU law via secondary legislation has added significant complexity to UK law and policymaking. EU Exit statutory instruments cross-reference EU law but do not reproduce it in full. Legislation pertaining to domestic bodies is often not cross-referenced and new functions are not set out. EU Exit statutory instruments often contain amendments to multiple EU norms and themselves subject to further revision in amending statutory instruments. Because EU law is not readily equivalent to UK law, significant policy and legislative frameworks that would have conventionally been found in primary legislation are now found in a complex set of secondary legislation. This complexity is challenging to interpret and seriously impacts public engagement and scrutiny.

In recent proposals addressing the future of retained EU law[3], the UK Government prioritises speedy review of areas of economic importance but does not acknowledge that the extent of ministerial discretion is a crucial issue for democratic oversight of changes to retained EU law. This issue is important for domestic law making and also has implications for democratic oversight over regulatory reforms taken pursuant to trade negotiations.

For example, post-Brexit, concerns have been raised that the UK may seek to deregulate its food standards. This could facilitate the negotiation of free trade agreements with countries who oppose some EU food standards (now retained EU law), which have banned or complicated their exports. These include the notorious ‘chlorinated chicken’, but also permitted pesticide residue levels, use of hormonal growth promotants for beef and ractopamine treatment for pork.

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[1] European Union (Withdrawal) Act 2018, Explanatory Memorandum, paras 13 and 14.

[2] 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); P Craig, 'Constitutional principle, the rule of law and political reality: the European Union (Withdrawal) Act 2018' (2019) 82(2) Modern Law Review 319; 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); Hansard Society, Delegated legislation: the problems with the process (Nov 2021).

[3] Cabinet Office, The Benefits of Brexit (Jan 2022).

While the UK has not changed its substantive standards in these areas, the Trade Act 2021 affirms that Ministers, including devolved authorities, can make any 'provisions deemed appropriate' to implement a free trade agreement. In practice, this means that food standards in these key areas can be changed without requiring the passage of primary legislation. Importantly, under treaty ratification processes set out in the Constitutional Reform and Governance Act 2010 and the Trade Act, if these food standards were set out in primary legislation, changing them would also require primary legislation. Thus retained EU law, when taken in combination with the Trade Act, lessens democratic oversight over trade negotiations, and suggests the need to introduce more primary legislation for important areas of UK domestic law and policy post-EU exit.

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

It is useful to keep the category of retained EU law while the UK and devolved nations are in the process of policy development. This maintains legal certainty and should allow for due process in changing major policy and legislative frameworks. Reviewing retained EU law is welcome, due to the complexity of the statute book, but should be subject to democratic process. Where policy areas are devolved, and a UK-wide approach is favourable, new intergovernmental cooperation mechanisms are needed. These are also currently in development with UK-wide Common Frameworks provisionally agreed.[4]

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

The Withdrawal Act provides rules for the incorporation and interpretation of retained EU law, including how EU legal principles and concepts are retained and their status going forward. Further legislation, including the UK-EU Withdrawal Agreement and the UK-EU Trade and Cooperation Agreement, also provide rules on the interaction of EU and UK law going forward. Where certain EU principles and concepts are retained, they provide a suitable basis for the current legal system and as such ensure legal certainty. This is because EU law has formed a part of our legal system for decades and EU legal principles and concepts support the interpretation of retained EU law. Broadly, however, EU retained principles and concepts do not apply to post-Brexit enactments, and as law and policy develop across the UK, EU legal principles and concepts may become less relevant.

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?**

Retained EU law was largely incorporated by means of secondary legislation. Drafting practices have meant there is now significant complexity in locating and understanding retained EU law and its interaction with domestic law.[5] This position exacerbates the complex integration of EU norms into domestic law when the UK was an EU Member State. This is

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

[5] 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).

problematic in terms of the transparency and accessibility of the UK statute book. Addressing this complexity should recognise the significance of legislative and policy frameworks contained in retained EU law and ensure there is sufficient opportunity for engagement by the public, Parliament and the devolved legislatures for any proposed new legislative frameworks and substantive policy change.

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?**

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?**

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?**

The 2018 Act retains EU law, including certain legal principles of EU law and EU case law, up to the 31 December 2020. Subsequent amendments to the 2018 Act have made this picture more complex.[6] The 2018 Act does not prohibit the UK from enacting new laws nor does it prohibit UK courts from departing from retained EU law. Supremacy of EU law is therefore at most partially maintained and does not restrict policymaking and law making going forward. For the courts, EU legal principles and EU case law support the interpretation of retained EU law. The courts should take retained EU law, and its accompanying legal principles, as well as legal developments post-Brexit into account as appropriate. Allowing a wider range of courts special powers to depart from retained EU law could give rise to increased legal uncertainty.

8. **To what extent has retained EU law affected devolved competence?**

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?**

Leaving the EU meant that powers and responsibility at EU-level were repatriated to the UK and devolved nations. Far from being of a 'technical' nature, this involved a fundamental restructuring of constitutional, legislative and institutional frameworks. In the selected areas of food law we have examined[7], post-Brexit devolved competences have largely been formally maintained in retained EU law, however each area of retained EU law and associated new legislative frameworks and intergovernmental cooperation should be assessed in terms of its impact on devolved competences. Changes to devolved competence must be addressed with due process.

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[6] For example, European Union (Withdrawal Agreement) Act 2020, s26; European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020.

[7] E Lydgate and C Anthony, 'Finding the benefits of Brexit: food law and the UK's emerging regulatory identity' (UK Trade Policy Observatory, 10.03.22).

In respect of trade, legislative cooperation and the basis for trade between devolved nations has transformed profoundly. EU single market rules largely eliminate the need for regulatory compliance or certification procedures beyond what is required domestically. Much of this has been achieved through harmonisation of product standards which have now been devolved in retained EU law. To take the example of pesticides, under EU arrangements, Member States hold an agreed list of approved active substances for pesticides and harmonise permitted maximum residue levels. The UK has now devolved these functions. This leads to the potential for trade barriers: if Scotland's maximum residue levels differ from England's, a border must be erected to ensure that products comply with Scotland's requirements.

The Internal Market Act 2020 reintroduced frictionless trade by replacing harmonisation with mutual recognition of different standards. In other words, Scotland now must disapply its maximum residue level requirements to products coming from England (a separate set of arrangements apply in Northern Ireland). While the EU system does include mutual recognition, it plays a much smaller role; in the UK it now acts as the primary legislative underpinning of the UK Internal Market. A harmonisation element is also being pursued through a number of Common Frameworks, but they are currently provisional and, in many cases, defined as 'non-legislative'. In sum, retained EU law has led to profound changes in devolved nations' cooperation on legislation and trade.