Constitution, Europe, External Affairs and Culture Committee

18th Meeting, 2022 (Session 6), Thursday 30th June 2022

Retained EU law roundtable

This paper provides background information as well as material on the four themes being discussed at today's roundtable on retained EU law. Overall, the purpose of the roundtable is to examine the future of retained EU law and what this could mean for law-making in Scotland.

The Committee's adviser, Professor Lock, has observed that *"Retained EU law will play an important role in Scots law in the future. It is to be expected that over time it will be replaced by purely domestic enactments, so that there will be less of it, but this process will likely take decades."*

UK Government reviews of Retained EU law

Last year the UK Government announced two reviews of retained EU law – one on substance and one on status. There has been little detail to date on these reviews. The UK Government's briefing notes for the Queen's Speech detail that *"The Government's review of retained EU law has, to date, identified over 1,400 pieces of EU-derived law that have been transferred into UK law."*

A so-called "Brexit Freedoms Bill" was announced in February 2022 and was included in the Queen's Speech but has not yet been introduced in the UK Parliament. The Bill is expected to be introduced in the UK Parliament before the summer recess. The briefing notes for the Queen's Speech state that the Bill's purpose is to *"Fulfil the manifesto commitment to end the supremacy of European law and seize the benefits of Brexit by ensuring regulation fits the needs of the UK, which in turn will enable economic growth"*, and that the main provisions of the Bill will be:

> ● "Creating new powers to strengthen the ability to amend, repeal or replace the large amounts of retained EU law by reducing the need to always use primary legislation to do so.
> ● Removing the supremacy of retained EU law as it still applies in the UK.
> ● Clarifying the status of retained EU law in UK domestic law to reflect the fact that much of it became law without going through full democratic scrutiny in the UK Parliament."

On 22 June 2022 the UK Government published a dashboard of REUL which is the conclusion of its review into the substance of REUL 'to determine which

departments, policy areas and sectors of the economy contain the most REUL[1]'. The dashboard notes that "*is not intended to provide a comprehensive account of REUL that sits with the competence of the devolved administrations, but may contain individual pieces of REUL which do sit in devolved areas.*"

During questions on the statement in connection with the UK Government's dashboard, the Minister for Brexit Opportunities and Government Efficiency was asked whether the UK Government *"will seek a legislative consent motion [on the 'Brexit Freedoms Bill'] from Pàrlamaid na h-Alba, and from other devolved legislatures, and if so, whether they intend to respect the decisions of those Parliaments"*. Responding, the Minister stated *"obviously where there are devolved consequences from laws coming back from the European Union, the power to amend will be with the devolved authorities... We will indeed ask for legislative consent motions"*[2]. It is likely that any LCM on a 'Brexit Freedoms Bill' would be considered by the Committee.

The Cabinet Secretary for the Constitution, External Affairs and Culture made a statement to the Scottish Parliament on the afternoon of 22 June 2022. The Cabinet Secretary stated that the UK Government had not shared information of the "potentially imminent" 'Brexit Freedoms Bill' with the Scottish Government. The Cabinet Secretary did note how the Scottish Government anticipates broad changes to retained EU law may affect Scotland - for example in relation to common frameworks and the Scottish Government's policy commitment to align with EU law where appropriate.

What is retained EU law?

In essence, "retained EU law" is copy of the EU law that used to apply when the UK was a member of the EU, which was pasted into the domestic UK statute book. EU law ceased to apply in the UK at the end of the implementation period, at 11pm on 31 December 2020. This point in time is known as Implementation Period Completion Day, or "IP Completion Day". Retained EU law has been described as a "snapshot" of the EU law and rights that applied in the UK immediately before IP Completion Day. These laws and rights were brought into domestic law as a new body of law called "Retained EU law". The whole of EU law was not included in the snapshot, there were some exceptions which were not copied across. Retained EU law is an umbrella term comprising three different sub-categories:

1. Domestic law which implemented or related to EU obligations. This is called **"EU-derived domestic legislation"**. This was saved by section 2 of the European Union Withdrawal Act 2018 (EUWA). The most important instance of EU-derived domestic legislation are implemented EU Directives. Examples include the Working Time Regulations 1998 (a UK SI) which implemented the EU Working Time Directive in England, Scotland and Wales and the Air Quality Standards (Scotland) Regulations 2010 (a SSI) which implemented the EU Air Quality Directive in Scotland.

[1] UK Government - Retained EU Law Dashboard | Tableau Public
[2] Hansard, Volume 716, column 872

2. EU legislation which was directly applicable in the UK, most importantly EU Regulations, which used to apply in the UK in and of themselves. This is now called **"direct EU legislation"**. It was converted into domestic law by section 3 of EUWA. Examples are the EU's General Data Protection Regulation (known as the UK GDPR in retained EU law) or Regulation 261/2004 (the Flight Compensation Regulation).

3. Other rights, powers, obligations, remedies etc. in EU law that had direct effect in the UK. These are known as **"saved EU rights"** – a catch-all category for EU rights and obligations which are not captured in "direct EU legislation". These were saved by section 4 of EUWA. Examples include directly effective rights contained in EU treaties such as the right to equal pay (TFEU article 157) and certain rights under the EU's international treaties.

Any EU law that came into force after 11pm on 31 December 2020 is not retained EU law.

Why was retained EU law created?

While the UK was in the EU, EU law applied in the UK because of the European Communities Act 1972 (ECA). Section 1 of the European Union (Withdrawal) Act 2018 (EUWA) repealed the ECA on IP Completion Day. If the ECA had been repealed without any other provision having been made, then from the moment of repeal:

- EU law would have ceased to apply in the UK, and
- all existing domestic legislation made under the ECA 1972, which implemented EU law, would have ceased to have effect.

This would have meant that there would have been no law in place in the UK in the policy areas that were formerly governed by EU law. This would have resulted in very significant gaps in the statue book across a range of policy areas including food standards, environmental protection, animal welfare, climate change.

Scottish Parliament Legislative Competence

Until IP Completion Day (11pm on 31 December 2020), any legislation passed by the Scottish Parliament had to comply with EU law: it was outwith the Scottish Parliament's legislative competence to legislate incompatibly with EU law. When EU ceased to apply in the UK, this requirement was removed.

At the same time, this was replaced by a restriction on the Scottish Parliament's competence to prevent it from changing the law in any policy area that had been "frozen" by regulations made by the UK Government. This was set out in section 30A of the Scotland Act 1998 (which had been added by section 12 of the EUWA). Section 30A(1) provided that:

"An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown."

However, no "freezing" regulations were ever made, and the power to make them expired on 31January 2022. In March 2022 section 30A of the Scotland Act was repealed. This means that in principle the Scottish Parliament has legislative competence in all areas of retained EU law in devolved areas[3].

Most of the EU (Withdrawal) Act 2018 is a "protected enactment" which the Scottish Parliament cannot modify. The Scottish Parliament cannot therefore make provision for the status or interpretation of retained EU law that is inconsistent with the protected provisions of the EU (Withdrawal) Act 2018[4].

EU law and its principles

In understanding retained EU law it is helpful to have an understanding of EU law. EU law is commonly divided into primary and secondary law.

Primary EU law is the EU Treaties.

Secondary EU law is EU acts adopted on the basis of the Treaties. The different categories of secondary EU law include:

> EU Regulations which are directly applicable in the law of the member states, i.e., each member state does not have to make its own legislation in order to make the Regulation effective in its domestic law.
>
> EU Directives which must be implemented into the domestic law of each member state by way of domestic legislation. In the UK, this either happens by way of primary legislation (e.g., certain provisions of the Equality Act 2010) or by way of secondary legislation based on s. 2 (2) of the European Communities Act 1972, e.g. The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017.

There is also EU "delegated" or "implementing" legislation, known as "tertiary" legislation in the EUWA, often made by the European Commission, which supplement, amend or implement the rules set out in Directives, Regulations and Decisions. An example would be implementing legislation made under an EU Regulation. It is comparable to secondary legislation (statutory instruments) in the UK.

A key principle of EU law is that EU law is supreme, which means that it takes precedence over conflicting domestic law within the EU's member states. Domestic laws in EU member states must therefore be disapplied by domestic courts if found to be inconsistent with EU law.

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[3] For completeness, while no freezing regulations were ever made, some devolved policy areas that were formerly governed by EU law were removed from the Scottish Parliament's legislative competence by other post-exit UK Parliament legislation, for example the UK Internal Market Act 2020.

[4] Scottish Continuity Bill Reference [2018] UKSC 64).

The EUWA ended the supremacy of EU law in the UK after IP Completion Day section 5(1) of EUWA provides that:

"The 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."

For law made before IP Completion Day, section 5(2) of EUWA provides that the **principle of supremacy is preserved**, with pre-exit domestic enactments still being read subject to retained EU law and disapplied to the extent that they are inconsistent. Section 5(2) provides that:

"the principle of the supremacy of EU law continues to apply on or after exit 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" (emphasis added).

The second principle is that EU law can have direct effect if it is formulated in a clear, precise and unconditional manner. This means that it can be relied upon by individuals in national court cases in EU member states. The principle of direct effect continues to be relevant in the UK for determining which rights are retained under section 4 of EUWA. EU law itself ceased to have direct effect in the UK on IP Completion Day.

EUWA (as amended by the EU (Withdrawal Agreement) Act 2020) also gives effect to certain provisions in the Withdrawal Agreement, and gives them direct effect in, and supremacy over, domestic law.

Theme 1: How best to understand retained EU law as a category of domestic law and the significance of the status attached to it.

Retained EU law does not neatly fit the traditional distinction between UK primary and secondary legislation[5]. The status of retained EU law in the legal order of the UK is set out in section 7 of EUWA. The status attached to a piece of retained EU law is significant because it determines how it can be amended.

EU-derived domestic legislation which is an Act of Parliament (e.g., the Equality Act 2010) retains the status of primary legislation. Most EU-derived domestic legislation consists of statutory instruments (including Scottish Statutory Instruments) and thus retains the status of secondary legislation.

Apart from the powers to correct deficiencies, explained later in this paper, no particular additional powers for amending EU-derived domestic legislation, were created at the time of EU withdrawal, so it can only be amended in the usual way, like any other domestic legislation. Typically, therefore, an Act of Parliament which is

[5] primary legislation is an Act of the UK Parliament or of a devolved legislature (e.g., an Act of the Scottish Parliament) (as defined in EUWA (s. 20)). Secondary legislation is legislation made under powers delegated by an Act, so for example UK Statutory Instruments made by UK Ministers and Scottish Statutory Instruments made by Scottish Ministers (also known as "subordinate legislation".

retained EU law can only be amended by the legislature, and this would require a new Bill.

Matters are more complex where **direct EU legislation** is concerned. This is because direct EU legislation was EU law that had been made by the EU institutions which was directly applicable in UK law without the need for domestic legislation. In so far as such direct EU legislation was retained by EUWA, it has a unique status in domestic law as neither primary nor secondary legislation. Rather, it is known as "principal" or "minor" retained EU legislation.

In general, the EU Regulations which were incorporated into domestic law are now retained direct principal EU legislation[6] and all EU legislation below that level, including 'tertiary legislation' (typically EU Commission regulations, i.e., delegated legislation) is now retained direct minor EU legislation.

Again, the status of this retained EU law as either retained direct principal EU legislation or retained direct minor EU legislation determines how changes can be made to it by domestic legislation.

EUWA makes it more difficult to repeal retained direct principal EU legislation than retained direct minor EU legislation.

Retained direct principal EU legislation can be amended as provided for in section 7(2) of EUWA:

> (2) Retained direct principal EU legislation cannot be modified by any primary or subordinate legislation other than—
>
> (a) an Act of Parliament,
>
> (b) any other primary legislation (so far as it has the power to make such a modification), or
>
> (c) any subordinate legislation so far as it is made under a power which permits such a modification by virtue of—
>
> (i) paragraph 3, 5(3)(a) or (4)(a), 8(3), 10(3)(a) or (4)(a), 11(2)(a) or 12(3) of Schedule 8,
>
> (ii) any other provision made by or under this Act,
>
> (iii) any provision made by or under an Act of Parliament passed before, and in the same Session as, this Act, or
>
> (iv) any provision made on or after the passing of this Act by or under primary legislation.

Retained direct minor EU legislation can be amended according to section 7(3) of EUWA in all of the above ways, in addition it can also be amended by secondary legislation more generally.

[6] Retained direct principal EU legislation is considered primary legislation for the purposes of the Human Rights Act 1998.

(3) Retained direct minor EU legislation cannot be modified by any primary or subordinate legislation other than—

(a) an Act of Parliament,

(b) any other primary legislation (so far as it has the power to make such a modification), or

(c) any subordinate legislation so far as it is made under a power which permits such a modification by virtue of—

(i) paragraph 3, 5(2) or (4)(a), 8(3), 10(2) or (4)(a) or 12(3) of Schedule 8,

(ii) any other provision made by or under this Act,

(iii) any provision made by or under an Act of Parliament passed before, and in the same Session as, this Act, or

(iv) any provision made on or after the passing of this Act by or under primary legislation.

N.B. Emphasis added above to highlight difference between how retained direct principal and minor legislation can be amended.

Another important aspect of retained EU law is **retained EU case law**. While the UK was a member of the EU, interpretation and application of EU law relied on both the judgments of the Court of Justice of the European Union (CJEU) and of domestic courts (i.e., courts in the UK). Domestic courts were bound to follow the CJEU which determined points of EU law. Domestic courts then applied that law to the specific facts of the case before them. To what extent and how domestic courts should take account of the view of the CJEU on the same point of law post-EU exit is set out in EUWA and generally depends on whether the CJEU judgment was made before or after IP Completion Day (31 December 2020).

EU case law (both from domestic courts and EU courts) that existed immediately before IP Completion Day continues to be binding in relation to interpreting and applying unmodified retained EU law so far as it is relevant to it.

Decisions of the CJEU made after IP Completion Day are not binding on domestic courts, but domestic courts may have regard to it so far as it is relevant to the case before them.

Certain courts are able to depart from retained EU case law. For example, the UK Supreme Court is not bound by any retained EU case law and the High Court of Justiciary in Scotland is not bound in certain circumstances. The same is true for the Inner House of the Court of Session, and the Court of Appeal for England and Wales and the Court of Appeal for Northern Ireland. They may therefore depart from retained EU case law, but 'must apply the same test as [they] would apply in deciding whether to depart from [their] own case law'[7].

How domestic courts will approach retained EU law post EU exit remains in large part to be seen. One of the first cases to consider the issue was the Court of Appeal (England and Wales) in Lipton v BA Flyer (about air passengers' rights to

[7] European Union (Withdrawal) Act 2018, section 6

compensation for delayed flights), heard in March 2021. The Court of Appeal (Lord Justice Green) noted that it *"…cannot therefore assume* that *the old ways of looking at EU derived law still hold good. We must apply the new approach. There is much that is familiar but there are also significant differences."* On the whole the Court of Appeal held that the power to depart from retained EU case law should 'be exercised with great caution' (Chelluri v Air India, per Lord Justice Coulson).

The UK Government's 'Benefits of Brexit' paper [January 2020] highlighted that the UK Government was considering the continued effect of supremacy of EU law over domestic law made before 31 December 2020:

"Second, we are looking at how to remove the continued effect of supremacy of EU law over domestic law which was made before the end of the transition period. Such a change will allow Parliament to more clearly define the relationship between retained EU law and UK 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. This will provide an opportunity to consider creating a bespoke rule that would address cases where retained EU law came into conflict with domestic law, that had the benefit of specific authorisation by Parliament."

Theme 2: What mechanisms exist for changing retained EU law in devolved areas, how these may change in the future, and the interaction of retained EU law and the mechanisms for changing it with other constitutional arrangements such as common frameworks.

As explained above, the mechanism for changing retained EU law depends on its status.

EU-derived domestic legislation which takes the form of primary legislation retains the status of primary legislation. Most EU-derived domestic legislation, however, consists of statutory instruments and retains the status of secondary legislation. Retained EU law that was not originally domestic legislation, i.e., which was originally made by the EU institutions rather than UK institutions, is now broadly split into retained EU Regulations, which are retained direct "principal" EU law, and legislation below that level, which is retained direct "minor" EU law. Whether it can be amended by new secondary legislation, as opposed to requiring new primary legislation, will depend on its status (again as set out above), and also on whether a delegated power exists which is capable of being used for that purpose.

One very wide power to amend retained EU law by secondary legislation was conferred in EUWA: the "deficiency-correcting" power. This power could be used by both the UK and Scottish Ministers in devolved areas to make regulations that fixed the huge number of "deficiencies", or failures of retained EU law to operate effectively, when it was copied over onto the domestic statute book. This power was used to make the hundreds of "EU Exit" SIs and SSIs which the Scottish Parliament

considered either under its normal SSI scrutiny process or by way of its consideration of "SI notifications". This power expires two years after IP Completion Day, and therefore cannot be used after the end of this year (31 December 2022).

Primary legislation has already been passed at the Scottish Parliament which gives Scottish Ministers powers to amend retained EU law by secondary legislation in specific policy areas. The Agriculture (Retained EU Law and Data) (Scotland) Act 2020, for example, gives Scottish Ministers powers to make regulations which amend or replace parts of the EU Common Agricultural Policy which forms part of retained EU law. These powers expire in May 2026.

UK Parliament primary legislation has also amended and conferred powers to amend retained EU law by secondary legislation. For example, the Professional Qualifications Act 2022 itself revoked the European Union (Recognition of Professional Qualifications) Regulations 2015 which implemented the EU scheme for recognising professional qualifications. The 2015 Regulations became retained EU law on IP Completion Day. The Act also provides powers to enable the appropriate national authority to revoke retained EU law that relates to the recognition of overseas qualifications or overseas experience.

The UK Government has indicated that it intends to introduce a '**Brexit Freedoms Bill**' which will:

- create new powers to amend, repeal or replace retained EU law and reduce the need to always use primary legislation to do so;
- remove the supremacy of retained EU law as it still applies in the UK; and
- clarify the status of retained EU law in domestic law.

This would suggest that the Bill will provide extensive powers to Ministers to change and replace laws which fall into the category of retained EU law by secondary legislation rather than under the conditions set out in EUWA.

In its 'Benefits of Brexit' paper [January 2022] the UK Government argued that the efficient use of parliamentary time required a change to the mechanism for amending retained EU law, stating that:

"Many of these retained laws, including those containing technical detail, are afforded the status of primary legislation for the purposes of amendment. As Parliament has so many substantial policy questions to consider, the Government considers it not a good use of finite Parliamentary time to require primary legislation to amend all of these rules. A targeted power would provide a mechanism to allow retained EU law to be amended in a more sustainable way to deliver the UK's regulatory, economic and environmental priorities."

Although the 'Brexit Freedoms Bill' has not yet been introduced, as noted above legislation has been introduced at the Scottish and UK Parliaments which is already changing the mechanisms for amending retained EU law.

Another example is the Animal Welfare (Kept Animals) Bill before the UK Parliament at present, which provides that existing powers to make regulations can amend or

revoke any retained EU law (clause 42). Powers are provided to UK, Welsh and Scottish Ministers "to amend or revoke retained direct EU legislation and any enactments made under section 2(2) of the European Communities Act 1972 in regulations made under those provisions in the 2006 Act."[8]

The power for Scottish Ministers is limited to the purpose of section 26 of the Animal Health and Welfare (Scotland) Act 2006 (i.e., for the purposes of/in connection with securing the welfare of animals). This is not a general power to amend retained EU law but rather provides that the existing powers to make subordinate legislation can be used to revoke any retained direct EU legislation (therefore retained direct principal EU legislation as well as retained direct minor EU legislation). It does, therefore, change the default position set out in EUWA.

It is unknown how the 'Brexit Freedoms Bill' will deal with devolution and whether it will leave the devolved administrations with the same powers of amendment that they currently have.

Common frameworks cover policy areas of retained EU law. They were initially intended to enable the UK Government and the devolved administrations to agree common approaches to areas of retained EU law that were within devolved competence.[9] In its Benefits of Brexit paper [January 2022] the UK Government stated that:

"Common Frameworks ensure a common approach is taken where powers and law have returned from the EU which intersect with policy areas that fall within devolved competence. Some reviews and proposals will fall within the policy areas and retained EU law covered by these frameworks. We have not highlighted each instance where this is the case, but we will continue to work jointly with the Scottish Government, the Welsh Government and the Northern Ireland Executive through the Common Frameworks programme in the development of policy proposals where appropriate. 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."

As stated earlier in this paper, section 30A of the Scotland Act was repealed in March 2022. This means that in principle the Scottish Parliament has legislative competence in all areas of retained EU law in devolved areas.

The Scottish Government's 'keeping pace commitment' relates to keeping pace with 'new' EU law (i.e. law that took effect since IP completion day). Retained EU law consists of the legislation that was on the statute book immediately before IP completion day. If the Scottish Government wanted to keep pace with EU law it could amend any devolved legislation, including retained EU law, in order to do so.[10]

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[8] Explanatory Notes (para 150), Animal Welfare (Kept Animals) Bill
[9] As set out in the principles for Common Frameworks agreed at the Joint Ministerial Committee in 2017, JMC (EU Negotiations) Communique 16 October 2017
[10] see s. 1(6) of the Continuity Act which gives the SG a "Henry VIII" power for keeping pace. (A "Henry VIII" power is a power which enables a government, by secondary legislation, to amend or repeal provisions of primary legislation (an Act)).

The UK Internal Market Act 2020 (UKIMA) sits across all UK legislation, whether retained EU law or not, and whether made at the UK Parliament, the Scottish Parliament, the Welsh Senedd or the Northern Ireland Assembly. As such, any changes to retained EU law which do not comply with the market access principles of UKIMA will be disapplied in the same way as if the changes were to any other type of legislation.

The EU-UK Trade and Cooperation Agreement (TCA) includes level playing field obligations (i.e. non-regression from levels of protection) in some devolved areas such as the environment as well as in reserved areas like employment.[11] These obligations do not, however, mean that retained EU law cannot be changed. Rather, they mean that the overall balance of legal protection provided in an area (for example, the environment) should not be weaker than the overall level of protection afforded before the UK left the EU. The "level playing field" obligations are not therefore about preventing the amendment/repeal of individual pieces of retained EU law but rather about maintaining the level of protection they afforded collectively.

If retained EU law in an area subject to "level playing field" obligations was changed to the point that the EU felt the overall protection was weaker, the EU could raise a dispute with the Panel of Experts for Non-Regression Areas (and vice versa). Temporary remedies are also available which would ultimately allow a party to suspend its own obligations under certain clauses – these are, for example, available if a party ignores a report of the TCA's Panel of Experts for Non-Regression Areas. It is also worth noting that significant decrease or increase in overall standards, if it has a material impact on trade or investment between the parties, could entitle the other party to take "rebalancing" measures.[12] This applies in the fields of labour and social law, environmental and climate protection and subsidy control.

Section 29 of the European Union (Future Relationship) Act 2020 provides that any pre-existing domestic law[13] is to be read as being compatible with the TCA. New domestic law is not affected. In the view of the Committee's adviser this raises the following questions:

- To what extent would a so-called 'Brexit Freedoms Bill' change this: if all retained EU law were put on a new statutory footing, section 29 would no longer apply to it.

- Further: what legislative technique would be used to place retained EU law on a new footing? If there is a catch-all clause in a 'Brexit Freedoms Bill' that says all retained EU law is now called by another name, but has the same content as on the day this Bill became an Act, then legal certainty would suffer because the reader would have to:
    - identify what was retained EU law originally;
    - identify any modifications by SI or statute;
    - identify any modifications prompted by section 29 EUFRA;

[11] Title XI of the TCA: "Level playing field for open and fair competition and sustainable development"
[12] TCA article 411
[13] in relation to the terms of the Withdrawal Agreement as originally agreed, this means from 1 January 2021

- identify any modifications made after the 'Brexit Freedoms Bill' entered into force.

Theme 3: The impact on devolved policy areas of changing the current status of retained EU law and making it easier to amend.

As set out earlier in this paper, whether an area of law is retained EU law does not have an impact on whether it is within devolved competence to change it, given that no "freezing regulations" were ever made and section 30A of the Scotland Act 1998 has now been repealed.

In written evidence to the House of Commons European Scrutiny Committee inquiry on retained EU law, Professor Aileen McHarg and Associate Professor Eleni Frantziou stated that:

"Retained EU law has no direct impact on devolved competence, apart from the fact that the EU (Withdrawal) Act is a protected/entrenched statute which the devolved legislatures may not modify. Any blanket repeal of the relevant provisions of the EU (Withdrawal) Act would thus have the effect of increasing the scope of devolved competence, and would therefore engage the operation of the Sewel Convention."

In the event that the status of retained EU law is changed and/or it is made easier to amend, there may, in practice, be other factors which would influence whether the Scottish Government introduced legislation to amend retained EU law, including:

- what has been agreed in common frameworks;
- the market access principles (mutual recognition and non-discrimination) in the UK Internal Market Act 2020;
- the intergovernmental agreement on seeking exclusions to the market access principles in UKIMA where divergence is agreed in a framework;
- the EU-UK Trade and Cooperation Agreement, which may influence decisions made in devolved policy areas (fisheries, for example) because this agreement, and future decisions made under it, are legally binding;
- the Scottish Government's stated policy ambition of keeping pace with EU law (facilitated by the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021) which may affect the legislative and policy choices which the Scottish Government chooses to present to the Parliament.

As the Committee is aware, these interconnections all raise issues around transparency and accountability.

Theme 4: Whether, from a devolved perspective, there are specific issues which could arise from changing the status of and basis for amending retained EU law which should be taken into account in the future.

The precise ramifications of removing the supremacy of retained EU law vis-à-vis domestic legislation enacted before 31 December 2020 would presumably remove the unique status of retained EU law and it would be treated like any domestic law. This would have ramifications that would need to be explored further. The rationale behind the supremacy of retained EU law was for Brexit to cause as little disturbance to domestic law hierarchies as possible. Because EU law had taken effect in an idiosyncratic fashion – e.g. important EU directives only had effect as statutory instruments; EU regulations and the EU treaties were directly applicable – it did not neatly 'slot into' the ordinary hierarchy of norms in the UK. Hence a mere removal of the supremacy clause in s. 5(3) EUWA might cause problems where e.g. there is a conflict between e.g. direct retained EU legislation and the common law or a pre-EU exit statute or statutory instrument.

In its report on the UK internal market [February 2022] the Committee identified a *"tension in the balance of relations between the Executive and the Legislature"*, noting that:

"there is a risk that the emphasis on managing regulatory divergence at an inter-governmental level may lead to less transparency and Ministerial accountability and tension in the balance of relations between the Executive and the Legislature."

Any significant increase in the number and nature of executive powers for Scottish Ministers and in particular for UK Ministers in devolved areas as a result in a change to the way in which retained EU law can be amended may therefore be an area of concern to the Committee.

If UK Government Ministers were to have additional powers to amend retained EU law in devolved areas the result could be more secondary legislation within the Scottish Parliament's competence made in the UK Parliament. This would mean that the Scottish Parliament could not scrutinise and approve or reject the legislation in the usual way even where the consent of Scottish Ministers was sought. The Scottish Parliament would be reliant on the protocol between the Scottish Government and Scottish Parliament to give the Parliament a say in relation to proposals for such UK SIs, but it would be effective only where the proposed SI requires the consent of Scottish Ministers

In written evidence to the House of Commons European Scrutiny Committee inquiry on retained EU law, the Public Law Project noted in relation to the subordinate legislation process at the UK Parliament that:

"instruments made under any new power may be dealing with important and highly complex matters of policy and former EU competence. The delegated legislation system is ill-suited to managing this."

This section has focused on the impact of changes in Scotland. Given the interaction between retained EU law and the Protocol on Ireland/Northern Ireland reform of retained EU law in respect of Northern Ireland would need to be considered carefully. In this regard we note that the newly introduced Northern Ireland Protocol Bill contains power enabling any regulations made under that Bill to make provision corresponding to sections 3 to 6 of, and schedule 1, to EUWA, being the provisions of EUWA which copied over EU law into domestic law on IP completion day. This could have a significant effect on retained EU law as it relates to the NI Protocol.

Sarah McKay (senior researcher, SPICe) and Professor Tobias Lock (Committee adviser)
22 June 2022