

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Constitutional Law and Human Rights sub-committee welcomes the opportunity to consider and respond to the European Scrutiny inquiry into the future of retained EU Law. The sub-committee has the following comments to put forward for consideration.

General Comments

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?

[legislation.gov.uk](https://www.legislation.gov.uk) explains that “EU legislation which applied directly or indirectly to the UK before 11.00 p.m. on 31 December 2020 has been retained in UK law as a form of domestic legislation known as ‘retained EU legislation’” <https://www.legislation.gov.uk/eu-legislation-and-uk-law> .

Retained EU law is a unique concept in domestic law created by the European Union Withdrawal Act 2018 (EUWA) sections 2–4. Section 6 of the EUWA defines retained EU law:

“Retained EU law” means anything which on or after IP completion day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time).

There are three categories of retained EU law:

- i. EU derived domestic legislation, e.g., regulations and statutory instruments which implemented EU law when the UK was a member of the EU preserved in UK law by section 2 EUWA,
- ii. Direct EU legislation which was directly applicable in the UK incorporated into UK law by section 2 EUWA; and
- iii. Other EU rights and obligations under section 4 EUWA.

In addition, there are the categories of retained EU case law (comprising retained EU case law and retained domestic case law) and retained general principles under section 6 EUWA.

The issue of clarity is a key one. [legislation.gov.uk](https://www.legislation.gov.uk) maintains a searchable database of “All Legislation originating from the EU”. This body of law comprises the legislation required to be

published under schedule 5 EUWA. It contains 124854 Regulations, 30737 Decisions, 4168 Directives originating from the EU and 5 EU treaties. But as the website explains whilst it is the most comprehensive and official UK reference point for EU law as it stood at 11pm on 31 December 2020 (IP completion day) there are exemptions provided for under Schedule 6 EUWA and in schedule 5 EUWA Ministers have the power to create an exception from the duty to publish.

[legislation.gov.uk https://www.legislation.gov.uk/primary+secondary?title=Eu%20exit](https://www.legislation.gov.uk/primary+secondary?title=Eu%20exit) states that there are 906 UK Statutory Instruments, 90 Scottish Statutory Instruments, 86 Welsh Statutory Instruments and 32 Northern Ireland Statutory Rules categorised as “EU exit” regulations currently in force.

Pinsent Masons’ blog on the topic of EU exit regulations states, “For the most part, these were technical, to ensure that the retained EU law would be clear and operable when applied purely in a UK domestic context. However, there were also substantive changes, and some pieces of EU legislation were revoked entirely: [Retained EU law in the UK after Brexit \(pinsentmasons.com\)](https://www.pinsentmasons.com).”

There are therefore issues about clarity and accessibility of Retained EU law. The significant number of statutory instruments which amended Retained EU law and changes to those instruments create a complex body of law which is difficult to determine and apply. We agree with the Bar Council of England and Wales that a consolidation of Retained EU law would be useful to those to whom such laws apply and those who advise them.

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

In the foreword to *Legislating for the United Kingdom’s withdrawal from the European Union* (CM 9446, 2017) the Prime Minister, Teresa May MP, stated “Our decision to convert the ‘acquis – ‘the body of European legislation – into UK law at the moment we repeal the European Communities Act is an essential part of this plan.

This approach will provide maximum certainty as we leave the EU. The same rules and laws will apply on the day after exit as on the day before. It will then be for democratically elected representatives in the UK to decide on any changes to that law, after full scrutiny and proper debate”.

If we accept the premise that retaining EU law in UK law provided “the maximum certainty” as the UK left the EU, then subject to any particular amendments which are necessary to keep the body of law up to date and functioning there is no reason why retained EU law cannot be considered a sustainable concept. On the other hand, it would be equally possible following a thorough review and relevant amendments that the incorporation into domestic law in the four UK jurisdictions could be completed.

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

The principles and concepts of EU law have been incorporated into the law applying in each UK jurisdiction. If some of these areas of law diverge from EU law principles and concepts, they will create legal uncertainty for those citizens and businesses affected by such laws. Because of the wide range of such EU derived laws the continuing applicability of the principles and concepts of EU law as the basis for legislation in post-Brexit UK will depend on the area of law concerned.

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?

There has not been a significant amount of litigation involving retained EU law.

The approach of the Court of Appeal to departing from retained CJEU case law in *TunelIn Inc. v Warner Music Ltd* [2021] EWCA Civ 441 is clear. Lord Justice Arnold stated: "74. Furthermore, 24 of the 25 judgments and orders of the CJEU listed in paragraph 67 above constitute "retained EU case law" (section 6(7) of the 2018 Act), meaning that they continue to form part of domestic law post-Brexit and continue to bind lower courts: section 6(3) of the 2018 Act. The Court of Appeal and the Supreme Court have power to depart from such judgments and orders, but only on the same basis that the Supreme Court has power to depart from one of its own precedents or of one of the House of Lords in accordance with the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234: section 6(5A) of the 2018 Act and the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525).

75. In the domestic context both the House of Lords and the Supreme Court have consistently stated that this is a power to be exercised with great caution. As Lord Bingham of Cornhill said in *Horton v Sadler* [2006] UKHL 27, [2007] 1 AC 307 at [29] in a passage cited as continuing to be applicable by Lord Wilson in *Peninsula Securities Ltd v Dunnes Stores Ltd (Bangor) Ltd* [2020] UKSC 36, [2020] 3 WLR 521 at [49] (two decisions in which the power was exercised):

"Over the past 40 years the House has exercised its power to depart from its own precedent rarely and sparingly. It has never been thought enough to justify doing so that a later generation of Law Lords would have resolved an issue or formulated a principle differently from their predecessors".

The case of *Chelluri v Air India Ltd* [2021] EWCA Civ 1953 concerned whether the Court of Appeal should depart from the CJEU decision in *Wegener v Royal Air Maroc* [2018] EUECJ C-537/17 (31 May 2018) which interpreted Regulation EC/261/2004 concerning air-passenger compensation.

The decision highlighted the following principles

- a. The UK Supreme Court's power to depart from its own precedent and from Retained EU case law must "be exercised with great caution". That the CJEU decision in *Wegener* had been repeatedly followed was cause for further caution in interfering with it;
- b. The interpretation of the Regulation argued for "could not be said to be fanciful" absent the CJEU case law, but the consequences of overturning that case law could be far-reaching;
- c. To introduce such a change in the law without express consideration of the point by the legislature was "both unnecessary and undesirable". See further: Retained EU case law, Early Indicators from the court of Appeal <https://www.simmons-simmons.com/en/publications/cky1ggoz51gnj0b24kltlsxrve/retained-eu-case-law-early-indicators-from-the-court-of-appeal>.

In *Lipton & anr v BA City Flyer Ltd* [2021] EWCA Civ 454, 30 March 2021, the Court of Appeal has provided further guidance on how to apply retained EU law. In this case, Mr Lipton, claimed compensation for a cancelled flight from Milan to London under Regulation EC/261/2004. The

airline claimed that no compensation was due as the 'extraordinary circumstances' exception applied due to the captain's illness. The airline lost and was ordered to pay compensation.

As explained in A lesson on English Law post-Brexit from the Court of Appeal <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/a-lesson-on-english-law-post-brexit-from-the-court-of-appeal> Lord Justice Green explained how the Court should approach retained EU law and how the law can be changed by section 29 of the EU (Future Relationship) Act 2020 (EUFRA). Lord Justice Green's principles are:

1. Consider whether the 'old' EU law is retained EU law. This requires looking at the European Union (Withdrawal) Act 2018 to see if the 'old' EU law (e.g., EU Regulations, CJEU case law, general principles of EU law) has been retained. In this case Regulation (EC) 261/04 was retained, as at 11pm GMT on 31 December 2020, as direct EU legislation under s3.
2. Consider whether the retained EU law has been amended or revoked. In this case, the regulation took effect as amended in the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019.
3. Apply a purposive construction. This requires taking into account recitals and other principles referred to in the retained regulation and recitals.
4. To the extent necessary, use provisions of international law which are incorporated by reference in the regulation as an aid to interpretation.
5. Apply CJEU case law pre-1 January 2021 to determine the meaning and effect.
6. Apply general EU law principles, as recognised in pre-1 January 2021 CJEU case law and as derived from the Charter of Fundamental Rights and the TFEU, as an aid to interpretation.
7. The Court of Appeal (and Supreme Court) may depart from retained CJEU case law or any retained general principles "if it considers it right to do so".
8. The TCA and EUFRA may be relevant to the effect of existing English law if the subject matter of the English law overlaps with the subject matter of the TCA and/or EUFRA, and insofar as domestic law does not already cover the subject matter of the TCA.
9. If the law does not already reflect the substance of the TCA, then the English domestic law "takes effect in the terms of the TCA".

We agree with the Bar Council of England and Wales that the courts have applied the general principles of interpretation of EU law to REUL. We note the case of *re Allied Wallet* [2022] EWHC 402 (Ch), where the court accepted that the EU principle of conforming interpretation (Case C-106/89 *Marleasing* [1990] ECR I-4135) continued to apply to regulations made under section 2(2) of the European Communities Act 1972 and operating as REUL, so that those regulations had to be interpreted so as to be consistent with the directive that they sought to implement.

This analysis would be persuasive but not binding if considered in a Scottish court.

As the Faculty of Advocates point out in their response to the Inquiry, Scottish courts have addressed questions of interpretation of retained EU law in, for example, *Trees for Life v NatureScot* [2021] CSOH 108. They have not encountered uncertainty or anomaly in doing so.

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?

Section 5(2) of the EUWA, the principle of the supremacy of EU law continues to apply "so far as relevant to the interpretation, disapplication or quashing of any enactment... passed or made before exit day".

The reason for retaining the supremacy of EU law is certainty and clarity in the law. Adherence to the principle will help people and businesses will have taken decisions, based on the law as it was in the UK at that time. We agree with the Bar Council that “removing the principle would be to give priority to any subsequent domestic legislation that was inconsistent with the EU legislation that became RUEL”.

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?

See our response to question 4 above.

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?

We do not agree that the power to depart from retained EU case law should be extended to other courts and tribunals beyond the UK Supreme Court and High Court of Justiciary. We reaffirm the point of view we expressed during the passage of the European Union (Withdrawal Agreement) Act 2020 that a wider range of courts or tribunals being able to depart from precedent may see a proliferation of decisions around the status of retained EU case law (and, potentially an increase in upward appeals where a higher court could reaffirm the original interpretation and reasoning of CJEU case law).

We also reaffirm our view that such a provision could result in divergence of approach within and between the jurisdictions of the UK on matters of law where a common approach is essential, both for legal certainty and the proper operation of that law. We also confirm our view that a decision on the interpretation of retained EU law should be taken at the highest level, as originally envisaged by the EUWA.

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

The Scotland act 1998 section 29 provided that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the competence of the Scottish Parliament. When such an Act was passed any provision which was incompatible with EU law was outside competence and therefore “not law”. The original version of the EUWA contained provisions in clause 11 dealing with retained EU law. These provisions were controversial and resulted in amendments to the bill during its passage which resulted in section 12 of the EUWA.

Until the European Union (Withdrawal) Act 2018 (Repeal of EU Restrictions in Devolution Legislation, etc.) Regulations 2022 <https://www.legislation.gov.uk/ukSI/2022/357/regulation/6/made> which repealed most of section 12 of the EUWA, the Government had a statutory requirement under Schedule 3, Part 2 to the European Union (Withdrawal) Act 2018 to report to the UK Parliament every three months in connection with retained EU law restrictions.

The Government now only has to report on the progress made on the development of UK Common Frameworks. The fourteenth *European Union Withdrawal and Common Frameworks* report covers the period from 26 September to 25 December 2021 <https://www.gov.uk/government/publications/the-european-union-withdrawal-act-and-common-frameworks-26-september-to-25-december-2021/the-european-union-withdrawal-act-and-common-frameworks-26-september-to-25-december-2021> . The report details that the Government did not make use of powers under section 12 of the EUWA to limit devolved competence in any policy areas.

Notwithstanding the repeal of most of Section 12 it is worthwhile setting out how it did affect devolved competence by removing the restriction on the legislative competence of the Scottish Parliament (and the other devolved legislatures) not to legislate in a manner incompatible with EU law.

The EUWA provided that the power to make law where EU and devolved law intersected passed by default to the devolved institutions on IP completion day, 31 December 2020. Analogous provisions applying to the other devolved legislatures were contained in section 12. Similar provisions affecting executive competence were to be found in Schedule 3 EUWA. Section 12 inserted a new Section 30A *Legislative competence: restriction relating to retained EU law* into the Scotland Act which provided:

(1) 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.

(2) But subsection (1) does not apply to any modification so far as it would, immediately before exit day, have been within the legislative competence of the Parliament.

These provisions created a legislative framework which ensured that, subject to regulations under subsection (1) being in force the Scottish Parliament could modify retained EU law. Section 12 further provided that a Minister of the Crown was obliged not lay a draft statutory instrument containing regulations under section 12 for approval before both Houses of Parliament unless the Scottish Parliament had made a consent decision in relation to the laying of the draft, or the 40-day period has ended without the Parliament having granted consent. The Minister of the Crown who was proposing to lay the draft was obliged to provide a copy of the draft to the Scottish Ministers and inform the Presiding Officer that a copy had been so provided.

Schedule 7 EUWA (duty to make explanatory statement about regulations under this section including a duty to explain any decision to lay a draft without the consent of the Parliament) applied to the Minister of the Crown.

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?

It is important in any review for the UK Government to bear in mind the legislative and executive competencies of the devolved legislatures and administrations. In respect of retained EU law these will relate to a variety of policy areas which may differ between the respective devolved arrangements. In relation to Scotland those policy areas will cover Agriculture and rural affairs, fisheries, forestry and the protection of the environment. Many areas are subject to Common Frameworks such as a. agricultural support, b. animal health and welfare, c. plant varieties and seeds, d. fertilisers, e. plant health, f. organics, g. chemicals and pesticides, h. food compositional standards and labelling, i. air quality, j. ozone depleting substances and fluorinated greenhouse gases, k. integrated pollution prevention and control best available techniques and l. fisheries management and support. It is important that the principles relating to Common Frameworks are followed by all parties to ensure that the functioning of the UK internal market is enabled, while acknowledging policy divergence, compliance with international obligations is ensured and the UK can negotiate, enter into and implement new trade agreements and international treaties.

