



## BRIEFING PAPER

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# The status of "retained EU law"

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## Summary

### Repeal of the European Communities Act

The *European Union (Withdrawal) Act 2018 (EUWA)* repeals the *European Communities Act 1972 (ECA)* effective on “exit day” (originally 29 March 2019, now 31 October 2019).<sup>1</sup> In so doing, it removes the domestic constitutional basis for EU law having effect in the United Kingdom. The basis in international law for EU law having effect on the UK will simultaneously have been extinguished by the operation of Article 50 of the *Treaty on European Union*.

### Retention of some EU law

However, this does not mean that EU law is of no consequence to the UK after that point. The *EUWA* also provides for the retention of most of that law, as it stands on exit day, by “converting” or “transposing” it into a freestanding body of domestic law. The intention of this is to provide legal certainty in the period immediately following EU exit, by (in effect) adopting a rulebook and set of institutional arrangements that is initially as close as possible to that which currently exists.

#### How is EU law retained?

This new body of law is called “retained EU law” and will replicate several different sources of EU law as domestic equivalents. It retains this law under three distinct provisions:

- **Section 2** preserves **EU-derived domestic legislation**. This (typically) concerns the regulations made (usually but not always under s2(2) *ECA*) or any primary legislation passed in order to implement one or more EU directives (though sometimes other sources of EU law).
- **Section 3** preserves **direct EU legislation**. This is defined as all EU regulations, decisions or tertiary legislation and certain parts of the EEA agreement.
- **Section 4** preserves any directly effective residual **rights, powers, liabilities, obligations, restrictions, remedies and procedures** in EU law, subject to several specified exceptions.

#### What EU law is retained?

In practice, this means (broadly) that the UK is retaining:

- EU regulations, decisions and tertiary legislation and elements of the EEA agreement (as they existed on exit day);
- domestic legislation passed to implement EU directives (and other EU law);
- most general principles of EU law (as they existed on exit day);
- most rights and obligations that currently exist in domestic law because of s. 2(1) of the *ECA* (as they existed on exit day); and

The *EUWA* also provides for the retention of most of EU law, as it stands on exit day, by “converting” or “transposing” it into a freestanding body of domestic law.

The intention of this is to provide legal certainty in the period immediately following EU exit, by (in effect) adopting a rulebook and set of institutional arrangements that is initially as close as possible to that which currently exists.

<sup>1</sup> In the event of a Withdrawal Agreement being agreed to by the House of Commons, the *EU (Withdrawal Agreement) Bill* may postpone this effect until the end of the transition period. See Section 9 on Transition below.

## 4 The status of "retained EU law"

- relevant case law of the *CJEU* issued before exit day (though the UK Supreme Court and High Court of Justiciary need no longer follow it).

But the UK is specifically not retaining:

- the *Charter of Fundamental Rights of the European Union*;
- the legislative instruments known as EU directives themselves (as opposed to the legislation implementing them or rights and obligations under them, which will be retained);
- the principle of supremacy of EU law (for prospective legislation); and
- the *Francovich* principle of state liability (in relation to post exit facts).

### Status of retained EU law

*EUWA* also provides a scheme that determines the constitutional status of these elements of EU law. Whereas previously the principle of supremacy of EU law would have given **all** EU law priority over **any** domestic law or legislation, this is not the status afforded to retained EU law.

EU law retained under section 2 of *EUWA* already has a domestic status, as it is either secondary legislation (mainly but not exclusively made under s. 2(2) *ECA*) or in some cases Acts of Parliament.

EU law retained under sections 3 and 4 of *EUWA*, however, is neither primary nor secondary legislation. It is instead a unique, new category of domestic law with new bespoke rules determining how it may be modified. The *EUWA* sets out these rules in section 7 and Schedule 8.

### Retained direct EU legislation

The status of retained EU law not falling into existing domestic categories is defined by section 7 *EUWA*. It subdivides retained direct EU legislation into two categories:

- retained direct "principal" EU legislation; and
- retained direct "minor" EU legislation.

These two categories do not directly correspond to "primary" and "secondary" legislation, which are the normal distinctions drawn in domestic law. Instead, the *EUWA* sets out the rules that govern how those two categories of law can be modified or repealed and by what type of conventional domestic legal instrument.

Although the principle of supremacy applies to interpretation of retained direct EU legislation in relation to domestic legislation passed **before** exit day, the real challenge concerns interpretation of legislation passed **after** exit day, which may modify or repeal it (whether expressly or impliedly). The key difference between "minor" and "principal" retained direct EU legislation is that, whereas the former can be modified routinely by secondary legislation, the latter must be modified by primary legislation unless and to the extent that the provisions under which secondary legislation is made provides otherwise.

Whereas previously the principle of supremacy of EU law would have given **all** EU law priority over **any** domestic law or legislation, this is not the status afforded to retained EU law.

The Act also treats retained direct “principal” EU legislation as though it were “primary” legislation for the purposes of the *Human Rights Act 1998*. This immunises it against being declared invalid for incompatibility with the European Convention on Human Rights.

## What this briefing paper does not cover

### **Statutory instruments already making changes to retained EU law**

The *European Union (Withdrawal) Act 2018* includes several time limited delegated powers specifically concerned with making changes to retained EU law in anticipation of exit day. More than 550 statutory instruments have been laid in connection with EU withdrawal (mostly under section 8 of *EUWA*, the so-called “correcting power”).

These statutory instruments deal with a broad range of issues and hundreds of instruments of retained EU law. Some make relatively minor drafting changes, such as clarifying the meaning of references to “Member States”. However, these instruments are also responsible for more significant changes, such as the transfer of functions previously exercised by EU institutions to domestic bodies, or even the repeal or revocation of certain parts of retained EU law before it ever comes into force.

### **Primary legislation directly connected to Brexit**

The Government has also sought to pass several Brexit-related Acts of Parliament. Those already on the statute book include:

- *The Taxation (Cross-border) Trade Act 2018*
- *The Nuclear Safeguards Act 2018*
- *The Sanctions and Anti-money Laundering Act 2018*
- *The Haulage Permits and Trailer Registration Act 2018*
- *Healthcare (European Economic Area and Switzerland Arrangements) Act 2019*

There are also several Bills which have yet to complete their passage through Parliament:

- *The Trade Bill*
- *The Agriculture Bill*
- *The Fisheries Bill*
- *The Immigration and Social Security Co-ordination (EU Withdrawal) Bill*
- *The Financial Service (Implementation of Legislation) Bill*

All of these statutes either modify retained EU law, confer delegated powers to do so, or do both. These allow for explicit policy divergence in these areas, which are currently impacted to a significant degree by EU competencies and EU legislation.



# 1. Current status of EU law

## Summary

The UK is a dualist state, which means that international treaties do not automatically become part of domestic law. They are therefore enforceable by national courts only to the extent that implementing legislation permits or requires it. The principle of Parliamentary sovereignty also implies that the legislature can revoke that implementation at a future date, although there are domestic constitutional presumptions against the implied repeal of 'constitutional statutes' (such as the *Human Rights Act 1998*, the devolution Acts, and the *European Communities Act 1972*).

This constitutional approach exists at a tension with EU law generally, which adopts a principle of supremacy of EU law. Both dualism and Parliamentary sovereignty sit uncomfortably with that principle. Both domestic principles leave open the possibility that the Court of Justice of the European Union and national courts could disagree as to what EU law and national law (respectively) demands.

The UK implements the EU Treaties through the *European Communities Act 1972*. It gives effect to all of the rights, powers, liabilities, obligations and restrictions that are imposed by EU law at any given point in time. National courts recognise the principle of supremacy of EU law insofar as it has been adopted by the 1972 Act. The case of *Factortame (No. 2)* confirms the principle that subsequent domestic legislation is presumed not to have intended to repeal or modify the *European Communities Act* and must instead be read "subject to" it and the EU law it recognises.

There have been further developments since the 1990s in relation to the relationship between Community/EU law and the UK constitution. These have served to affirm the position that Parliament can repeal or modify the legislation that gives effect to EU law. Senior UK judges have also argued (in a recent Supreme Court case) that the *ECA* cannot be presumed (at least automatically) to have intended to modify or restrict prior fundamental principles of the UK constitution.

## 1.1 Implementation of EU treaties in the UK

Having ratified the Lisbon Treaty in 2009, the UK is obliged, under international law, to give effect to the system and body of law known as "EU law".<sup>2</sup> As a dualist state, the UK needs domestic legislation to implement the EU Treaties. In the absence of that legislation, domestic courts are neither permitted nor required (as a matter of domestic constitutional law) to give effect to the rights and obligations under those Treaties. As Lord Denning MR said in relation to the Treaty of Rome in *McWhirter v Attorney General* in 1972 (emphasis added):

Even though the Treaty of Rome has been signed, it has no effect, so far as these courts are concerned, until it is made an Act of Parliament. **Once it is implemented by an Act of Parliament, these courts must go by the Act of Parliament. Until that day comes, we take no notice of it.**<sup>3</sup>

The *European Communities Act 1972* is the legislative instrument by which the UK gives effect to EU law. Its most important provisions are contained in section 2. It includes an ambulatory provision, which incorporates wholesale the Treaties (insofar as they apply to the UK) and gives them domestic legal effect:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by

<sup>2</sup> Article 4(3) TEU also commits Member States to "sincere cooperation" with the EU.

<sup>3</sup> *McWhirter v Attorney General*, [1972] C.M.L.R. 882, para 886

or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly...<sup>4</sup>

The Act also provides a broad power for Ministers (including devolved Ministers) to pass secondary legislation to give effect to EU law:

... Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision—

(a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

(b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;

and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the EU and to any such obligation or rights as aforesaid...<sup>5</sup>

The combined effect of these provisions is that EU law, including the principles of EU law, have effect in domestic law, and national courts both can and must enforce EU law and interpret domestic legislation in light of it.

## 1.2 Supremacy of EU law generally

One of the underlying principles of EU law is the principle of supremacy (or primacy). This principle requires that national law must be consistent with EU law and, to the extent that it is not, EU law must prevail over national law. This principle was first set-out in the 1964 European Court of Justice (ECJ) judgment of *Costa v ENEL*. In that case, the Italian authorities sought to argue that an Italian court was forbidden from referring a question of compatibility of Italian law with Community law to the European Court of Justice. They argued that:

a national court which is obliged to apply a national law cannot avail itself of art 177 [now TFEU, art 267].

The ECJ rejected this argument, saying that (emphasis added):

The integration into the laws of each member state of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, **make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity.** Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one state to another in

### Section 2(1) European Communities Act 1972

“All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly.”

<sup>4</sup> s. 2(1) ECA

<sup>5</sup> s. 2(2) ECA

deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty.<sup>6</sup>

And, crucially:

**The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights.<sup>7</sup>**

In subsequent case law, the ECJ affirmed that this principle applied to **all** national law, including constitutional law. In *Internationale Handelsgesellschaft*, the ECJ rejected the argument that, if an export licence scheme in Community law was incompatible with principles of German constitutional law, the latter should prevail (emphasis added):

Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, **the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.**<sup>8</sup>

**Case 6/64 Costa v ENEL [1963] ECR 1**

"The executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty."

## 1.3 Current relationship between EU law and the UK constitution

### Parliamentary sovereignty

Bradley, Ewing and Knight define Parliament's legislative supremacy as:

a legal rule which governs the relationship between the courts and the legislature, namely that the courts are under a duty to apply the legislation made by Parliament and may not hold an Act of Parliament to be invalid or unconstitutional.<sup>9</sup>

One of the common arguments for leaving the European Union has concerned the acceptability or otherwise of a body of supranational law taking precedence over domestic legislation. As the Government itself put it in a White Paper in February 2017 (emphasis added):

The sovereignty of Parliament is a fundamental principle of the UK constitution. **Whilst Parliament has remained sovereign throughout our membership of the EU, it has not always felt like that.** The extent of EU activity relevant to the UK can be demonstrated by the fact that 1,056 EU-related documents were deposited for parliamentary scrutiny in 2016. These include proposals for EU Directives, Regulations, Decisions and Recommendations, as well as Commission delegated acts, and other documents such as Commission Communications, Reports

**The United Kingdom's exit from and new partnership with the European Union, Cm 9417, February 2017**

"Whilst Parliament has remained sovereign throughout our membership of the EU, it has not always felt like that."

<sup>6</sup> Case 6/64 *Costa v ENEL* [1963] ECR 1

<sup>7</sup> Ibid.

<sup>8</sup> Case 11/70 *Internationale Handelsgesellschaft v Einfuhrund Vorratsstelle für Getreide*

<sup>9</sup> Bradley, Ewing and Knight, *Constitutional and Administrative Law*, 17<sup>th</sup> edition, 2018, p54



and Opinions submitted to the Council, Court of Auditors Reports and more.<sup>10</sup>

There are three components of Parliamentary sovereignty which have a direct bearing on the UK's ability to give effect to EU law and specifically the principle of supremacy of EU law, namely that:

- Parliament can make or unmake any law;<sup>11</sup>
- Parliament cannot bind its successors;<sup>12</sup>
- if two inconsistent Acts are passed at different times, the most recent must be enforced by the courts to the extent that they are inconsistent<sup>13</sup>.

The first of these aspects is substantively at tension with the principle of supremacy of EU law. Some laws could, by their content or the nature of what they sought to achieve, directly contradict provisions of the EU Treaties themselves, let alone any EU legislation subsequently made under those treaties.

The second and third aspects are arguably more procedurally at tension with EU legislative supremacy. Even if a UK statute purported to give effect to EU law (and even to track changes in it) it would not prevent Parliament subsequently passing contrary legislation. Domestic courts (deriving their authority from the domestic constitutional order) would give effect to EU law only to the extent that a valid Act of Parliament allows and requires them to do so. Future Acts of Parliament could therefore be taken, whether expressly or impliedly, to have disapplied (whether in whole or in part) any statute purporting to implement EU law in domestic law.

These tensions explain why Lord Reed (in his dissent in *ex parte Miller*) recently went so far as to describe the supremacy of EU law as being a doctrine that is:

incompatible with the dualist approach of the UK constitution, and ultimately with the fundamental principle of Parliamentary sovereignty.<sup>14</sup>

## European Communities Act 1972

The UK's approach to overcome the tension between the EU supremacy principle and domestic constitutional arrangements (both in relation to dualism and Parliamentary sovereignty) was to pass the *European Communities Act 1972*.

The Treaties of what is now the European Union are implemented into domestic law by section 2(1) ECA. It provides that:

**Lord Reed in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 183**

"[The doctrine of the supremacy of EU law] is incompatible with the dualist approach of the UK constitution, and ultimately with the fundamental principle of Parliamentary sovereignty."

<sup>10</sup> [The United Kingdom's exit from and new partnership with the European Union](#), Cm 9417, February 2017, para 2.1

<sup>11</sup> A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th edition, 1996, p. 38

<sup>12</sup> *Ibid.* p. 21

<sup>13</sup> *Dean of Ely v Bliss* (1842) 49 E.R. 700, p. 704; *Thoburn v Sunderland Council* [2002] EWHC 195 (Admin)

<sup>14</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 183

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly...

This is an ambulatory provision because of the words "from time to time created or arising by or under the Treaties". This means that the UK has not simply adopted EU law as it was when any given Treaty came into force, but has instead given domestic effect on an ongoing basis to EU law as and when it changes. Such changes include the subsequent passing of new EU legislation and any new judgments from the Court of Justice of the European Union (that interpret and apply EU law).

An ambulatory provision removes the problem of "keeping pace" with implementing EU law. However, it does not address, in and of itself, the problems presented by domestic constitutional law in relation to Parliamentary sovereignty. Although the adoption of EU law in this provision (by implication) includes giving effect to the supremacy of EU law where it intersects with national law, there is nothing, constitutionally, to prevent subsequent Acts of Parliament from qualifying or reversing that method of implementation.<sup>15</sup>

This is where section 2(4) *ECA* is particularly important. It effectively creates a rule of statutory interpretation in order to reconcile any conflict between EU law and subsequently enacted national law. It provides that:

any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section.

This means that subsequent Acts of Parliament will be read in such a way so as not to limit or frustrate any "rights, powers, liabilities, obligations and restrictions" that would otherwise be given effect to by section 2(1) *ECA*. Among those obligations is that of the UK courts to acknowledge and give effect to the principle of supremacy of EU law.

### Factortame and disapplication of incompatible domestic law

The validity of this domestic approach was affirmed in the case of *ex parte Factortame (No. 2)* in 1990.<sup>16</sup> Lord Bridge stipulated that the restrictions imposed by the *ECA* on subsequent primary legislation were an exercise, rather than an abrogation, of Parliamentary sovereignty:

Some public comments on the decision of the European Court of Justice, affirming the jurisdiction of the courts of member states to override national legislation if necessary to enable interim relief

#### Section 2(4) European Communities Act 1972

... any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to [sections 2(1-3) of this Act]...

<sup>15</sup> See *Macarthy's Ltd v. Smith* [1979] ICR 785, Lord Denning at 789 "If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it, or intentionally of acting inconsistently with it, and says so in express terms, then I should have thought that it would be the duty of our courts to follow the statute of our Parliament"

<sup>16</sup> *R (Factortame (No. 2)) v Secretary of State for Transport* [1991] 1 AC 603

to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception...

...there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.<sup>17</sup>

He drew particular attention to the fact that the requirements of EEC membership (in relation to the supremacy of EU law) were well established before the UK joined the organisation:

If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the E.E.C. Treaty (Cmnd. 5179- II) it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary.<sup>18</sup>

Moreover, he insisted the 1972 Act stipulated a clear intention on the part of Parliament to interpret and apply post accession domestic legislation compatibly with and subject to EU law. Domestic courts would therefore not assume that subsequent primary legislation was intended to be incompatible with EU law and/or to repeal the *ECA* to the extent that they may have been incompatible:

Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments.<sup>19</sup>

## Constitutional statutes and implied repeal

The *Factortame* judgment can be understood (if read narrowly) as interpreting section 2(4) *ECA* as creating a presumption (though not a prohibition) against the implied repeal of section 2(1) of the same Act. This presumptively prevents, by extension, the implied repeal of domestic recognition of rights and obligations arising from the EU Treaties.

What it does not prevent, however, is the possibility that Parliament could, using express words, modify or repeal section 2(1) or any other part of the *European Communities Act* in a subsequent Act of Parliament. The “recognition” of EU law supremacy is not, as a matter of domestic law, irrevocable. Neither has it been taken, nor can it be taken, to be legally “permanent”. This was made clear by Laws LJ in

### ***R (Factortame (No. 2)) v Secretary of State for Transport* [1991] 1 AC 603**

“There is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy...”

Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.”

<sup>17</sup> [1991] 1 AC 603, 658-659

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

## 12 The status of "retained EU law"

*Thoburn v Sunderland City Council*, better known as the "Metric Martyrs" case:

Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the ECA. It cannot stipulate as to the manner and form of any subsequent legislation. It cannot stipulate against implied repeal any more than it can stipulate against express repeal. Thus there is nothing in the ECA which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it.<sup>20</sup>

However, Laws LJ argued that, even if the ECA itself could not outright prohibit its own repeal (whether impliedly or expressly), the common law of the UK could develop rules of statutory construction that would prevent that statute's **implied** repeal. In making this argument, he made a distinction between "ordinary" and "constitutional" statutes:

a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.<sup>21</sup>

Laws LJ was unambiguously of the view that the ECA was such a statute. This had direct implications for whether future Acts of Parliament could impliedly modify or repeal it. The fundamental difference, he argued, was that:

Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's actual – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes.<sup>22</sup>

The implication of this judgment is that the ECA – including the provisions that require subsequent domestic legislation to be given effect to "subject to" rights and obligations arising from EU law – cannot be repealed otherwise than in the most explicit of terms in an Act of Parliament.

### European Union Act 2011

Section 18 of the *European Union Act 2011* provides that:

Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is

**Laws LJ in  
*Thoburn v  
Sunderland City  
Council* [2002]  
EWHC 195  
(Admin) para 59**

"For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's actual – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes."

<sup>20</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) para 59

<sup>21</sup> *Ibid.* para 62

<sup>22</sup> *Ibid.* para 63

required to be recognised and available in law by virtue of any other Act.

This is a declaratory provision.<sup>23</sup> The (then) Government's intention was to affirm what was said in *Thorburn*: that an Act of Parliament using express words can repeal the *European Communities Act*. If a statute did so and to the extent that it did so, domestic courts would be obliged neither to enforce EU law nor to give it primacy over other sources of UK law.

## EU law and Parliamentary procedure

The UK Supreme Court has resisted the suggestion that EU law automatically has the effect of disapplying the UK's constitutional rules and norms to the extent that the two are inconsistent. It maintains instead that, under the principles of dualism, national courts must address the effect of EU law through the prism of the *European Communities Act* and its relationship with other constitutional statutes and legal norms.

In late 2013 the UK Supreme Court (UKSC) was asked to consider whether EU law can place constraints on the legislative process adopted by Parliament.<sup>24</sup> The case concerned a proposed "hybrid Bill" to authorise work on a new high-speed rail project from London to the West Midlands. The HS2 Action Alliance and others sought to argue that the 2011 *Environmental Impact Assessment Directive*<sup>25</sup> required certain forms of public consultation to be included as part of that legislative process.

One of the appellants' arguments was that a national court was expected to apply the doctrine of supremacy of EU law and therefore to impose the requirements of the Directive onto the legislative process. Though finding that the legislative process was not, in any case, incompatible with the Directive, Lord Reed's lead judgment rejected this argument:

Contrary to the submission made on behalf of the appellants, [the question of whether the *ECA* has qualified certain UK constitutional principles] cannot be resolved simply by applying the doctrine developed by the Court of Justice of the supremacy of EU law, since the application of that doctrine in our law itself depends upon the 1972 Act. If there is a conflict between a constitutional principle, such as that embodied in article 9 of the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom.<sup>26</sup>

Moreover, Lord Reed distinguished the relationship between EU law and Parliament's legislative process from the relationship between EU law and national legislation generally (as had been set out in *Factortame*):

Nor can the issue be resolved, as was also suggested, by following the decision in *R v Secretary of State for Transport, Ex p*

### Section 18 European Union Act 2011

Directly applicable or directly effective EU law ... falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.

### Lord Reed in *R (HS2 Alliance and others) v Secretary of State for Transport* [2014] UKSC 3, para 79

"If there is a conflict between a constitutional principle, such as that embodied in article 9 of the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom."

<sup>23</sup> [Explanatory Notes](#) paras 118-124

<sup>24</sup> [R \(HS2 Alliance and others\) v Secretary of State for Transport](#) [2014] UKSC 3

<sup>25</sup> 2011/92/EU

<sup>26</sup> [R \(HS2 Alliance and others\) v Secretary of State for Transport](#) [2014] UKSC 3, para 79



## 14 The status of "retained EU law"

Factortame Ltd (No 2) [1991] 1 AC 603, since that case was not concerned with the compatibility with EU law of the process by which legislation is enacted in Parliament. In the event, for reasons which I shall explain, it is possible to determine the appeal without requiring to address these matters.<sup>27</sup>

Lords Mance and Neuberger's concurring judgment put it even more explicitly that the *European Communities Act* could not be taken conclusively (by the mere fact of its existence) to imply the repeal of antecedent constitutional statutes found to be inconsistent with EU law (emphasis added):

The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law. **It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.**<sup>28</sup>

For a more detailed discussion on the constitutional implications of the HS2 case, see the [comment piece from Mark Elliott](#), Professor of Public Law at the University of Cambridge available on the UK Constitutional Law Association blog.<sup>29</sup>

**Lords Mance and Neuberger in R (HS2 Alliance and others) v Secretary of State for Transport [2014] UKSC 3, para 207**

"there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation."

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid. para 207

<sup>29</sup> M. Elliott [Reflections on the HS2 case: a hierarchy of domestic constitutional norms and the qualified primacy of EU law](#), U.K. Const. L. Blog, 23 January 2014

## 2. Effect of repealing the *European Communities Act 1972*

### Summary

The *European Union (Withdrawal) Act 2018* repeals the *European Communities Act 1972* effective “on exit day”. Exit day was originally defined in the Act as 29 March 2019. This date has since been changed (twice) by regulations to reflect the fact of extensions to the Article 50 process. **Exit day is currently defined as 31 October 2019.**

In the absence of other provisions in the *EUWA*, this repeal would disapply EU law (as a matter of UK constitutional law). It would prevent national courts from relying on EU law, except to the extent that other primary legislation still implements it. The repeal of the *ECA* would also (automatically) revoke any subordinate legislation made under that Act, which is typically (though not exclusively) designed to give effect to EU directives.

The *EUWA* avoids some of the effects this outcome. It does this by including saving provisions which “retain” certain types of EU law as domestic law. This gives an ongoing domestic legal status to those sources of law, notwithstanding the fact that (a) the Treaties will no longer apply to the UK and (b) even if they did, primary legislation would not implement those Treaties.

The main objective of retaining EU law is to ensure that the UK statute book operates as closely as possible immediately following exit day as it did before then. Although domestic law cannot replicate identically the effect of EU law when the UK is no longer a Member State, this legislative scheme seeks to minimise those initial differences and, in doing so, to provide legal certainty.

### 2.1 Repealing the 1972 Act

Section 1 of the *European Union (Withdrawal) Act 2018* states the following:

The European Communities Act 1972 is repealed on exit day.

This explicitly removes the basis on which (almost all) EU law has effect in UK domestic law. If the *EUWA* contained only this provision, it would have the effect not only of disapplying EU law from the UK as a whole, but would also remove the legal basis for any secondary legislation made under the *ECA* (including section 2(2)). Domestic courts would no longer have the legal authority or obligation to recognise or give effect to EU law (including EU-derived domestic *secondary* legislation made under the *ECA*) on or after exit day.

This would drastically change the legal and constitutional landscape of the United Kingdom. The House of Commons Library paper on the *European Union (Withdrawal) Bill* estimated that this would involve the disapplication of over 12,000 EU regulations alone.<sup>30</sup>

In the absence of something to replace these legal instruments, the UK’s statute book would be compliant or compatible with EU law only to the extent that other primary legislation (or secondary legislation made otherwise than under the *ECA*) happened to give effect to it.

<sup>30</sup> Commons Library Briefing Paper, [European Union \(Withdrawal\) Bill](#), 17/8079, 1 September 2017, p. 9

## 2.2 Retaining law arising from the 1972 Act

Crucially, however, the *EUWA* does include provisions that seek to "retain" significant elements of EU law by "converting" or "transposing" it into domestic law with limited (initial) modification. This effectively allows the UK to "shadow" a great deal of the effects of EU law as it existed at the point the UK left the EU. It is this body of law that is discussed in Sections 3-6 of this paper.

## 2.3 When is exit day?

The Act as passed defined "exit day" as 29 March 2019.<sup>31</sup> However, the Act also allows exit day to be modified by regulations:

to ensure that the day and time specified in the definition are the day and time that the Treaties are to cease to apply to the United Kingdom.<sup>32</sup>

This provision allows the point at which domestic law ceases to recognise EU law to be updated in the event that either:

- the final Withdrawal Agreement; or
- an agreement between the UK and EU27 to extend the Article 50 negotiation period

provides for the UK's Treaty obligations to be extinguished at a later or earlier date.

In the event, the definition of "exit day" was modified on two separate occasions by regulations. Firstly, it was redefined as 12 April (after the first decision of the European Council to extend Article 50 was agreed to by the UK Government).<sup>33</sup> Secondly, the date was further redefined to 31 October 2019, after the second extension decision had been adopted.<sup>34</sup>

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<sup>31</sup> s. 20(1) *EUWA*

<sup>32</sup> s. 20(4) *EUWA*

<sup>33</sup> [European Council Decision taken in agreement with the United Kingdom, extending the period under Article 50\(3\)TEU](#), EUCO XT 20006/19 BXT 26, 22 March 2019

<sup>34</sup> [European Council Decision taken in agreement with the United Kingdom, extending the period under Article 50\(3\)TEU](#), EUCO XT 20013/19 BXT 38, 11 April 2019

## 3. What is retained EU law?

### Summary

'Retained EU law' is a new body of UK domestic law. It contains all the EU law (and UK domestic law that implements it) which the UK Government wishes to keep as a starting point once the UK has left the EU. It subdivides into three categories: EU-derived domestic legislation; direct EU legislation; and preserved rights and obligations that currently have effect because of the *European Communities Act*. The *European Union (Withdrawal) Act* preserves or transposes these three categories in or into domestic law. It also provides the UK Government with certain powers to modify that law to ensure that it operates coherently and effectively on exit day.

Although preserving these general categories, the *European Union (Withdrawal) Act* explicitly excludes certain parts of EU law from incorporation. The most notable of these include the *Charter on Fundamental Rights*, the principle of supremacy of EU law (for post-exit enactments), and the discontinuation of the *Francovich* principle of state liability.

Retained EU law also does not include the legislative instruments known as EU "directives" since they are not directly applicable to UK law. However, it does include domestic legislation implementing directives and any directly effective rights enjoyed under EU law before exit day with regard to them.

The key issue going forward will be less what EU law is retained, but how it can subsequently be modified. The fundamental difference between **EU law** and **retained EU law** is that the latter will, in its entirety, be modifiable or revocable by Parliament. In many cases, the UK Government (and in other cases, devolved authorities) will also be able to change **retained EU law** through secondary legislation.

### 3.1 Definition

"Retained EU law" is a residual body of law. Its purpose is to preserve, so far as is possible, the domestic effect of EU law as it stands on exit day: when the UK formally leaves the EU.

Retained EU law is defined as anything that is retained by virtue of subsections 2, 3 or 4 of the *EUWA*.<sup>35</sup>

EU law is "retained" if it falls within three categories stipulated by the *European Union (Withdrawal) Act*. Those categories are:

- EU-derived domestic legislation (section 2);<sup>36</sup>
- direct EU-legislation (section 3);<sup>37</sup> and
- other rights and obligations (etc.) arising from section 2(1) of the *ECA* (section 4).<sup>38</sup>

### 3.2 Exceptions

The *EUWA* notably and specifically excludes from retained EU law:

- the principle of supremacy of EU law (in relation to future enactments or rule of law);<sup>39</sup>
- the *Charter on Fundamental Rights* (except insofar as rights are replicated in instruments of retained EU law anyway);<sup>40</sup> and

<sup>35</sup> s. 6(7) *EUWA*

<sup>36</sup> s. 2 *EUWA*

<sup>37</sup> s. 3 *EUWA*

<sup>38</sup> s. 4 *EUWA*

<sup>39</sup> s. 5(1) *EUWA*

<sup>40</sup> s. 5(4) *EUWA*

- the “*Francovich*” state liability principle of EU law (for acts or omissions arising after exit day or not litigated within 2 years of it).<sup>41</sup>

### 3.3 Omissions

The *EUWA* does not retain from EU law the category of EU legislation called “directives”. Directives set common objectives for Member States but leave discretion as to the manner of implementation on a national level, unlike regulations which apply and are directly effective across all Member States. This means they are not “directly applicable”. Through a combination of sections 2 and 4 *EUWA*, domestic legislation that implements directives (i.e. EU-derived domestic legislation) has been preserved, as have:

any rights and obligations [arising from an EU directive] of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before exit day.<sup>42</sup>

Some of those rights and/or obligations may have been conferred by EU directives, and will be preserved under the *EUWA*.

### 3.4 How retained EU law might change

The *European Union (Withdrawal) Act* only preserves the legal effect of EU law on exit day only as a starting point, however. Whether and how this body of law will change in the future is at least as important as what the substance of it is at the point the UK formally leaves the European Union.

Except for domestic implementing legislation (which will now become “EU-derived domestic legislation”) no part of what will become “retained EU law” will have been susceptible to domestic modification while the UK is a Member State of the EU. For Parliament to so modify, or for Governments to be able to so modify, would have been against the principle of EU law supremacy that underpins the Treaties.

As retained EU law is a domestically transposed “equivalent”, rather than EU law itself, however, Parliament will assume the ultimate constitutional control over its content and its status in relation to domestic law more generally. Unless and to the extent that subsequent primary legislation provides otherwise, this law will be able to be modified (or even repealed) by future Acts of Parliament from exit day onwards.<sup>43</sup>

In some circumstances, retained EU law will also be modifiable (or indeed susceptible to repeal) by secondary legislation. This secondary legislation will be made under, but need not be limited to being made under, the *EUWA* and other specific Brexit-related legislation (e.g. the *Trade Bill*).

Retained EU law being a domestically transposed “equivalent”, rather than EU law itself means that Parliament will assume the ultimate constitutional control over its content and its status in relation to domestic law more generally.

<sup>41</sup> Schedule 1 para 4 and Schedule 8 para 39(7) *EUWA*

<sup>42</sup> s. 4(2)(b) *EUWA*

<sup>43</sup> e.g. the provisions of an *EU (Withdrawal Agreement) Bill* would be expected to suspend at least some of the effects of repealing the *ECA* until at least the end of the anticipated transition period (31 December 2020). See also Section 9 on Transition, below.



## 4. EU-derived domestic legislation (section 2 *EUWA*)

### Summary

EU-derived domestic legislation is law enacted by the UK Parliament or Government to give effect to or to support the implementation of EU law in the UK. Most, but not all, EU-derived domestic legislation implements EU directives, but it can also provide for the effective implementation of rights arising directly under the Treaties or regulations. But for the retention of EU-derived domestic legislation, statutory instruments made under the *ECA* would be revoked on exit day, because the *EUWA* will repeal the parent Act.

Most EU-derived domestic legislation takes the form of statutory instruments made under section 2(2) of the *European Communities Act*. However, the definition also covers delegated legislation made under other enactments, and some Acts of Parliament that implement or give effect to EU law. Although the saving of EU-derived domestic legislation will include instruments that **implement** EU directives, the directives themselves will not themselves form part of retained EU law (since they were never directly applicable to Member States).

EU-derived domestic legislation will retain the status it had in UK law before exit day: it is either primary or secondary legislation already. However, the *EUWA* makes certain arrangements regarding the modification, repeal or revocation of this class of legislation. This is intended to allow for additional scrutiny where the Government proposes to change these laws otherwise than by primary legislation.

### 4.1 What is it?

EU-derived domestic legislation is defined by section 2(2) of the *EUWA*.

It includes any legislation so far as:

- (a) made under section 2(2) of, or paragraph 1A of Schedule 2 to, the *European Communities Act 1972*,
- (b) passed or made, or operating, for a purpose mentioned in section 2(2)(a) or (b) of that Act,
- (c) relating to anything—
  - (i) which falls within paragraph (a) or (b), or
  - (ii) to which section 3(1) or 4(1) applies, or
- (d) relating otherwise to the EU or the EEA, but does not include any enactment contained in the *European Communities Act 1972*.

In practice this mostly, but not exclusively, means legislation made under section 2(2) *ECA*.<sup>44</sup> In several cases, primary legislation, or delegated legislation made under other primary legislation, will be categorised as EU-derived domestic legislation under section 2(2)(b) because its purpose was (among other things) to implement EU rights and/or obligations.<sup>45</sup>

The definition also includes domestic legislation which otherwise “relates to” two other types of retained EU law:

- direct retained EU legislation (dealt with by section 3 of the *EUWA*); and
- residual rights and obligations arising as a consequence of section 2(1) of the *ECA* (as defined by section 4 of the *EUWA*).

<sup>44</sup> s. 2(2)(a) *EUWA*

<sup>45</sup> s. 2(2)(b) *EUWA*

Most of this EU-derived domestic legislation will be concerned with the implementation of EU directives. Directives are the mechanism by which the EU sets common objectives or standards, but allows Member States a degree of discretion as to how to meet those objectives or standards in their jurisdiction(s).

Although directly applicable EU law (e.g. Treaty provisions, regulations and decisions) do not (as such) require domestic provision to be enforced by UK courts, the UK will also have passed legislation which relates to them, or which otherwise supports the force and effect of rights and obligations arising from them.<sup>46</sup>

Some EU law obligations will have been given effect to by other Acts of Parliament, rather than by way of secondary legislation. In these cases, the repeal of the *ECA* would not, in and of itself, prevent those Acts from continuing to have force and effect.

## 4.2 Examples of what it will include

By way of example, EU-derived domestic legislation will include, among other instruments:

- Acts of Parliament like the *Equality Act 2010* or *Data Protection Act 2018*;
- delegated legislation made by UK ministers under s. 2(2) of the *European Communities Act* like the *Public Contract Regulations 2015* or *Working Time Regulations 1998*;
- delegated legislation made under Acts that implement EU law, including regulations made by UK ministers under the *Value Added Tax Act 1994* or *Competition Act 1998*;
- both primary and secondary legislation made by devolved institutions, including the *Procurement Reform (Scotland) Act 2014* or the *Public Contracts (Scotland) Regulations 2012*.

## 4.3 How can EU-derived domestic legislation be changed?

### Existing rules of statutory interpretation

EU-derived domestic legislation is, definitionally, either primary or secondary legislation. The *EUWA* provides that EU-derived domestic legislation will retain the domestic status it currently has after exit day.<sup>47</sup>

The ordinary domestic rules of statutory interpretation therefore apply to EU-derived domestic legislation. Primary EU-derived domestic legislation would only be amendable by further primary legislation or by a Henry VIII power (such as those contained in the *EUW Act* or the *Trade Bill*). Secondary legislation that is EU-derived domestic legislation would be amendable by either primary or secondary legislation.

Most (though not all) EU-derived domestic legislation will be concerned with the implementation of EU directives.

Some EU law obligations will have been given effect to by other Acts of Parliament.

### Section 7(1) European Union (Withdrawal) Act 2018

Anything which was, immediately before exit day, primary legislation of a particular kind, subordinate legislation of a particular kind or another enactment of a particular kind, and continues to be domestic law on and after exit day by virtue of section 2, continues to be domestic law as an enactment of the same kind.

<sup>46</sup> For more on this, see the Commons Library Briefing Paper [Legislating for Brexit: directly applicable EU law](#), 17/7863, 12 January 2017, p. 9

<sup>47</sup> s. 7(1) *EUWA*

## Practical differences

The key difference post exit is that EU-derived domestic legislation will no longer have to be read (a) “subject to” or (b) “compatibly with” EU law should Parliament subsequently wish to change its content.

An example of how this might work in practice would be if Parliament wished to modify the retained version of domestic legislation currently implementing an EU directive. Currently a domestic court would “read down” domestic implementing legislation where possible to ensure that it was compatible with EU law (generally) and the directive (specifically). This would happen by a combination of EU law supremacy and the EU law doctrine of statutory interpretation known as “indirect effect”.

### Box 1: Indirect effect

Especially, but not exclusively, with EU directives implementing legislation is necessary to give domestic effect to EU law obligations. In many instances, a bespoke domestic implementing instrument will transpose a given set of EU law obligations into domestic law, providing effective means of enforcement. In other instances, however, a Member State will rely on pre-existing national law for implementation. Moreover, national legislation may be understood (if interpreted in a certain way) to cut across the rights and obligations EU law intends to confer.

To prevent conflicts between EU and national law in these cases, and to re-enforce the supremacy of EU law, the CJEU has developed the principle of “indirect effect”. It requires national legislation to be “read down” or interpreted in a way that is compatible with EU law wherever (and to the extent that) a compatible interpretation is possible. As the ECJ said in *Marleasing*:

in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter.<sup>48</sup>

Domestic authorities would be unable either to modify the directive itself or subsequently and deliberately to frustrate rights established by the directive and given effect to by implementing legislation. To do so would be both a breach of EU law and sections 2(1) and (4) of the *ECA*.

After exit day, however, the Treaties and the obligations under them (including the obligation to implement directives) would no longer apply to the UK. Moreover, directives themselves will not form part of retained EU law.<sup>49</sup> Parliament would therefore be able to modify retained implementing legislation in ways that would have been inconsistent with (the intentions of) the original directive giving rise to it.

## Ministerial powers to modify

There are three scenarios in which Ministers, rather than Parliament, could make significant changes to retained EU-derived domestic legislation.

The first scenario concerns statutory instruments that are EU-derived domestic legislation, but made **otherwise than under s2(2) ECA**. The

<sup>48</sup> Case 106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135

<sup>49</sup> Some of the rights and obligations under it, however, might have been otherwise retained (by s. 4 *EUWA*).

repeal of the *ECA* would not in itself extinguish the powers to make regulations under which they were made. Secondary legislation that is also EU-derived legislation because of sections 2(2)(b-d) *EUWA* (but not necessarily caught by section 2(2)(a) *EUWA*) could therefore be modified by delegated powers in existing statutes.

The second scenario concerns the exercise of delegated powers created just before, or after, exit day. Where (e.g.) the *EUWA* itself, the *Trade Bill*, or any other future Act, confers delegated powers for purposes connected with EU-derived domestic legislation, regulations made under those powers could modify this body of retained legislation. This could cover **any** secondary legislation that has been preserved by section 2(2) generally, including that saved by section 2(2)(a).

The third scenario concerns EU-derived domestic legislation that is primary legislation. Even if legislation (covered by section 2(2)(b-d)) is an Act of Parliament there are circumstances in which Ministers could (by regulations) change it. Any "Henry VIII power" conferred by an Act could (in principle) be used to modify EU-derived domestic primary legislation.

### Special protections for modification and revocation of EU-derived domestic legislation

#### Lords proposals (rejected by the Commons) for additional protection

During the passage of the *EUW Bill*, the Lords raised concerns that there were inadequate protections against the modification, repeal or revocation of retained EU law by secondary legislation. At Lords Report stage, a clause was inserted to make it more difficult to repeal retained EU law in certain subject areas by way of existing secondary legislation. Those areas were:

- employment entitlements, rights and protection;
- equality entitlements, rights and protection;
- health and safety entitlements, rights and protection;
- consumer standards; and
- environmental standards and protection.

The Lords preferred that, were this retained EU law to be modified, repealed or revoked, fresh primary legislation should be needed. If delegated powers conferred by pre-*EUWA* Acts were to make those changes, these proposals would require greater Parliamentary scrutiny: statutory instruments otherwise made under negative procedure would be required to undergo an affirmative procedure.

#### Provisions included in the Act

The Commons rejected those proposals. The Government argued the Act already provided adequate safeguards, although it did introduce additional measures (as a compromise) in the Lords during Ping Pong.

The final *EUWA* includes additional protections against the modification or revocation of instruments that were originally made under section

During the passage of the *EU (Withdrawal) Bill*, the Lords raised concerns that there were inadequate protections against the modification, repeal or revocation of retained EU law by secondary legislation.

2(2) *ECA*. Certain instruments – made under pre-existing delegated powers that could otherwise have been approved by a negative procedure, must instead be made by an affirmative procedure.<sup>50</sup>

Schedule 8 requires certain instruments to be published in draft at least 28 days before being laid before Parliament. In respect of those drafts, the Government must also make a “scrutiny statement”.<sup>51</sup> Before an instrument or draft is laid, the Government must make an “explanatory statement” setting out “good reasons” for modification or revocation.<sup>52</sup>

**Box 2: Affirmative procedure for instruments which amend or revoke subordinate legislation made under section 2(2) of the *ECA* (including subordinate legislation implementing EU directives)**

**Schedule 8 paragraph 13(1) European Union (Withdrawal) Act 2018**

A statutory instrument which –

(a) is to be made on or after exit day by a Minister of the Crown under a power conferred before the beginning of the Session in which this Act is passed,

(b) is not to be made jointly with any person who is not a Minister of the Crown,

(c) amends or revokes any subordinate legislation made under section 2(2) of the European Communities Act 1972, and

(d) would otherwise be subject to a lower procedure before each House of Parliament and no procedure before any other legislature,

may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

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<sup>50</sup> Schedule 8 para 13 *EUWA*

<sup>51</sup> Schedule 8 para 14 *EUWA*

<sup>52</sup> Schedule 8 para 15 *EUWA*



## 5. Direct EU legislation (section 3 *EUWA*)

### Summary

Direct EU legislation includes (mainly) EU regulations, decisions and tertiary legislation, insofar as they have not already been incorporated into domestic legislation or they are specifically excluded from retention by the *European Union (Withdrawal) Act*. It also includes certain aspects of the EEA agreement insofar as it has not already been incorporated into domestic legislation.

Unlike EU-derived domestic legislation, direct EU legislation does not fall neatly into the domestic categorisation of "primary" and "secondary" legislation. Instead, it has a unique status, being the transposed version of law made by the European Union.

Nevertheless, it has been assigned an internal hierarchy, which distinguishes between retained "principal" and retained "minor" direct EU legislation. "Principal" direct EU legislation (generally) covers EU regulations, whereas "minor" direct EU legislation (generally) covers everything else. Pre-*EUWA* subordinate legislation will not as easily be able to modify retained "principal" direct EU legislation as it will the "minor" variant. The "principal" law is also treated like primary legislation for the purposes of the *Human Rights Act*.

### 5.1 What is it?

Direct EU legislation is defined by section 3 of the *European Union (Withdrawal) Act*:

(a) any EU regulation, EU decision or EU tertiary legislation, as it has effect in EU law immediately before exit day and so far as—

- (i) it is not an exempt EU instrument<sup>53</sup>,
- (ii) it is not an EU decision addressed only to a member State other than the United Kingdom, and
- (iii) its effect is not reproduced in [EU-derived domestic legislation],

(b) any Annex to the EEA agreement, as it has effect in EU law immediately before exit day and so far as—

- (i) it refers to, or contains adaptations of, anything falling within paragraph (a), and
- (ii) its effect is not reproduced [EU-derived domestic legislation], or

(c) Protocol 1 to the EEA agreement (which contains horizontal adaptations that apply in relation to EU instruments referred to in the Annexes to that agreement), as it has effect in EU law immediately before exit day.

Retained direct EU legislation includes:

- EU regulations
- EU decisions
- EU tertiary legislation
- aspects of the EEA agreement

### Subdivision of direct EU legislation

Section 7(6) of the *EUWA* then sub-divides retained direct EU legislation into two categories:

- retained direct **principal** EU legislation; and
- retained direct **minor** EU legislation.

<sup>53</sup> Exempt instruments are defined in s. 20(1) and Schedule 6 *EUWA*

The “principal” category is defined so as to include:

- (a) any EU regulation so far as it—
    - (i) forms part of domestic law on and after exit day by virtue of section 3, and
    - (ii) was not EU tertiary legislation immediately before exit day, or
  - (b) any Annex to the EEA agreement so far as it—
    - (i) forms part of domestic law on and after exit day by virtue of section 3, and
    - (ii) refers to, or contains adaptations of, any EU regulation so far as it falls within paragraph (a),
- (as modified by or under this Act or by other domestic law from time to time).

Retained direct **principal** EU legislation includes (mainly) EU regulations that are not also tertiary legislation.

Whereas the “minor” category is all other retained direct EU legislation not covered by the “principal” category. In practice, the distinction means that most (though not all) EU regulations (and elements of the EEA agreement) are retained direct **principal** EU legislation.

Retained direct **minor** EU legislation includes (mainly) EU decisions and tertiary legislation.

## 5.2 Examples of what it will include

Direct EU legislation will include (for instance):

- EU regulations in respect of which no or incomplete EU-derived domestic legislation has been passed, like the recent Regulation 2018/644/EU on cross border parcel delivery services;
- EU decisions directed at the UK or Member States generally, such as Commission Decision 2011/753/EU (establishing the rules and methods for calculating targets for re-use and recycling set out in the Waste Framework Directive); and
- EU tertiary legislation that augments rules set out in regulations, decisions and directives, such as that made under Article 4 of Regulation 1143/2014/EU on the prevention and management of the introduction and spread of invasive alien species (which updates a list of plant species designated as invasive).

## 5.3 How can retained direct EU legislation be changed?

Direct EU legislation is different from EU-derived domestic legislation in one fundamental respect. These instruments were legislated for by the EU rather than by the UK in its capacity as a Member State. This means that they do not currently have a conventional domestic constitutional status. Direct EU legislation is **neither** primary nor secondary legislation.

Direct EU legislation is **neither** primary nor secondary legislation.

Instead, EU regulations, decisions and tertiary legislation have domestic effect only by virtue of section 2(1) of the *European Communities Act*. The ambulatory reference to rights and obligations in that provision allows them to be directly effective as a matter of domestic constitutional law.

To the extent that direct EU legislation is retained by the *European Union (Withdrawal) Act*, it adopts a “unique” status in domestic law. It is also neither primary nor secondary legislation. Instead, the *EUWA*

stipulates the conditions in which this body of law can be modified by other domestic legal instruments. These provisions make it more difficult to repeal retained direct **principal** EU legislation than retained direct **minor** EU legislation. However, this distinction is not the same as the domestic distinction between primary and secondary legislation.

Retained direct **principal** EU legislation can only be changed by:

- an Act of Parliament (or other primary legislation);<sup>54</sup>
- pre-existing "Henry VIII" powers;<sup>55</sup>
- powers to make subordinate legislation – conferred by post-*EUWA* enactments – that expressly authorise modification of retained (primary) direct EU legislation;<sup>56</sup> and
- powers to amend retained direct minor EU legislation that would make only supplementary, incidental or consequential changes to retained direct principal EU legislation.<sup>57</sup>

By contrast, retained direct **minor** EU legislation can be modified by all of the above but also by subordinate legislation generally.<sup>58</sup>

## 5.4 Human Rights Act and retained direct EU legislation

The distinction between "principal" and "minor" direct EU legislation is also important for the purposes of the *Human Rights Act* (*HRA*).

That Act itself treats "primary" legislation differently from "subordinate" legislation. Primary legislation cannot be deprived of its force and effect if a court concludes its provisions are incompatible with Convention rights (those enjoyed under the Council of Europe's European Convention on Human Rights). By contrast, subordinate legislation is not law insofar as it is incompatible with Convention rights and can be deprived of legal effect to the extent that it is incompatible.

Under the *EUWA*, retained direct **principal** EU legislation is to be regarded as primary legislation for the purposes of the *HRA*.<sup>59</sup> By contrast, retained direct **minor** EU legislation is only treated as primary legislation to the extent that it amends primary legislation. It is otherwise to be treated as subordinate legislation for the purposes of the *HRA*.

The European Union (Withdrawal) Act makes it more difficult to repeal retained direct **principal** EU legislation than retained direct **minor** EU legislation.

### Section 4(6) Human Rights Act 1998

A... declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision [in primary legislation] in respect of which it is given.

<sup>54</sup> This includes Acts of the devolved legislatures

<sup>55</sup> Schedule 8 para 3(1) *EUWA*. This power cannot be used, however, in such a way as to amend Northern Ireland legislation which is an Order in Council.

<sup>56</sup> Two examples of this can be found in the *Trade Bill* in relation to clauses 1 and 2. [Commons Amendments 34 and 40](#) provided that regulations made under those provisions "may make provision modifying retained direct EU legislation".

<sup>57</sup> Schedule 8 paras 5(3-4) *EUWA*

<sup>58</sup> Schedule 8 para 5(2) *EUWA*

<sup>59</sup> Schedule 8 para 30 *EUWA*

## 5.5 The “appropriate” status of retained direct EU legislation

### Recommendations of the Constitution Committee

The House of Lords Constitution Committee was critical of the fact that the original Bill did not assign a domestic status to this source of retained EU law. It said (emphasis added):

Retained direct EU law will be domestic law. There is no reason why Parliament cannot or should not assign to retained direct EU law a recognisable domestic legal status. The fact that retained EU law began life as something other than domestic law does not prevent Parliament from assigning it a domestic legal status once it becomes domestic law. **Nor does the fact that retained direct EU law originated outside the domestic legal system provide any good reason for neglecting to assign it a domestic legal status once it is recognised as domestic law.**<sup>60</sup>

It argued that all of this law should be designated as primary legislation:

We recommend that the legal status that should be accorded to all retained direct EU law for all purposes is that of domestic primary legislation, as directly effective EU law is closely analogous to domestic primary legislation. This will secure legal continuity and certainty post-exit.<sup>61</sup>

The Lords Constitution Committee acknowledged that the content of retained direct EU legislation would (likely) have been legislated for by a combination of primary and secondary legislation had it been introduced independently of EU membership, but cast doubt on the practicality of dividing provisions after the fact (emphasis added):

while some elements of retained direct EU law will deal with relatively mundane and technical matters—that is matters of the type that one would normally expect to find in secondary legislation—the same is not true of the whole body of retained direct EU law. Indeed, **some parts of that new body of law will concern legal norms and rights that would, had they not originated in EU law, almost certainly have had the status of domestic primary legislation.**<sup>62</sup>

The Committee quoted (approvingly) the analysis of Keir Starmer, Shadow Secretary of State for Exiting the European Union, who gave oral evidence to it in November 2017. He explained that rights in (e.g.) EU regulations were often significant precisely because a Member State could not unilaterally erode them. Although rights were often also articulated in delegated domestic legislation, they were re-enforced by EU rights and obligations that were completely immune from domestic amendment:

Almost of all the workplace rights, from memory, are in delegated legislation. That has not mattered much until now, because they are underpinned by our EU membership. Nobody particularly felt that their workplace rights were vulnerable, because everybody

**Lords  
Constitution  
Committee,  
European Union  
(Withdrawal) Bill,  
HL Paper 69, 29  
January 2018,  
para 44**

“The fact that retained direct EU law originated outside the domestic legal system [does not] provide any good reason for neglecting to assign it a domestic legal status once it is recognised as domestic law.”

**Lords  
Constitution  
Committee,  
European Union  
(Withdrawal) Bill,  
HL Paper 69, 29  
January 2018,  
para 63**

“some parts of that [retained direct EU legislation] will concern legal norms and rights that would, had they not originated in EU law, almost certainly have had the status of domestic primary legislation.”

<sup>60</sup> Lords Constitution Committee, [European Union \(Withdrawal\) Bill](#), HL Paper 69, 29 January 2018, para 44

<sup>61</sup> Ibid. para 52

<sup>62</sup> Ibid. para 63

knew that unless and until either we left the EU or the EU provisions changed, although it was a lesser form of legislation, they were in truth enhanced or ring-fenced. If, through this process, they become ordinary delegated legislation, those rights can be removed by provisions other than primary legislation. The ring-fencing just falls apart with the designation. Tied up with what seems like quite a narrow legalistic point about designation are a whole series of possible constitutional consequences, which are very, very wide-ranging.<sup>63</sup>

## Government response to the Constitution Committee

The Government rejected the core recommendation of the Constitution Committee. On 11 April 2018, in a [letter outlining the Government's response to the Committee's report](#), Lord Callanan said:

We understand the attraction of the Committee's recommendation to accord domestic primary legislation status to all retained direct EU law for all purposes, particularly with regard to how retained direct EU law will be amended in the future. However, as we set out during Committee debates, the Government considers that such an approach would present significant practical and constitutional problems, which could have considerable impacts on our domestic statute book for the foreseeable future.<sup>64</sup>

In the Lords Committee stage, Lord Keen of Elie outlined the Government's main objections to the Committee's approach:

At the end of the day, treating all of that as primary legislation would present... a quite enormous task for Parliament if it is going to legislate to amend any of that retained EU law. How many Acts of Parliament would we have to contemplate putting through this House to wrestle with that demanding position? It really would be formidable. Because this legislation will come on to our domestic statute book in a unique way, it will not already have been scrutinised and approved by this Parliament—so we would be bringing in this enormous body of law and treating it as primary legislation when nobody in this Parliament had actually examined it.

The breadth of this body of law, in the case of EU law being converted, is unique in its nature, which is why the Government have deliberately chosen to tread rather carefully and not simply assign a single status to that retained law in domestic legislation. While assigning a single status for all purposes to all retained EU law may be theoretically possible, it would have the most difficult consequences and might lead ultimately to a situation in which we had to extend the use of Henry VIII powers beyond any reasonable limit normally contemplated in the context of provisions of this kind.<sup>65</sup>

**Lord Keen of Elie,  
Advocate General  
for Scotland, HL  
Deb 5 March 2018  
Vol 789 cc895-896**

"While assigning a single status for all purposes to all retained EU law may be theoretically possible, it would have the most difficult consequences and might lead ultimately to a situation in which we had to extend the use of Henry VIII powers beyond any reasonable limit normally contemplated in the context of provisions of this kind."

The Government did, however, bring forward further amendments to the Bill at Lords Report stage in relation to the status of retained direct EU legislation. These changes were responsible for the distinction created between "principal" and "minor" retained direct EU legislation.

<sup>63</sup> [Oral evidence](#), Lords Constitution Committee, 29 November 2017, Q27

<sup>64</sup> [Government Response to the Lords Constitution Committee Report on the European Union \(Withdrawal\) Bill](#), 11 April 2018, p. 4

<sup>65</sup> [HL Deb 5 March 2018 Vol 789 cc895-896](#)



This distinction is not directly analogous to “primary” and “secondary” legislation but it does establish a an amendability hierarchy for retained direct EU legislation (explained in Sections 5.3 and 5.4). In justifying this approach to the Constitution Committee the Government said:

These amendments do not give EU Regulations greater protection from amendment than Acts of the UK Parliament, which would be constitutionally inappropriate. [They] will however preserve the crucial ability to regularly adjust EU tertiary legislation, where that was an envisaged part of its design (such as adding to lists or modifying technical standards to account for market developments) using existing powers to amend subordinate legislation...

In line with this policy to reflect the hierarchy of retained EU law the Government has also tabled amendments to provide that retained direct minor EU legislation will be treated as subordinate legislation for the purposes of the Human Rights Act and retained direct principal EU Regulations will be treated as primary legislation for the purposes of the Human Rights Act.<sup>66</sup>

## Other responses

Professor Alison Young, Sir David Williams Chair of Public Law at the University of Cambridge, has criticised the scheme in the Act for failing to provide sufficient clarity as to the status of retained direct EU legislation. She was particularly critical of the provision that allows supplementary, incidental or consequential modification of retained direct **primary** EU legislation by powers that can only otherwise modify retained direct **secondary** EU legislation:

It would be easy to argue that any modification of direct principal EU legislation or of directly effective EU law is ‘supplementary, incidental or consequential’ or is needed to ‘confirm or approve transitional, transitory, or saving provisions’. It may, in practice, be just as easy to modify directly effective provisions of EU law and direct principal EU legislation as it is to modify, amend or revoke direct minor EU legislation. Even if this is not the case, it is not difficult to predict that this may give rise to potential litigation to determine the meaning of these terms. This may detract from the certainty these provisions are meant to provide.<sup>67</sup>

She was also concerned that, while the Government’s amendments (made at that time in the Lords) offered some clarity for the interaction between retained EU law and pre-exit domestic legislation, the same could not be said for its interaction with post-exit domestic legislation:

Whilst we may get some clarification as to the status of retained EU law post exit day, these amendments fail to provide a complete account. As such, they may give rise to considerable uncertainty post exit day as the courts have to determine whether the distinctions between directly effective provisions of EU law, direct principal EU legislation and direct minor EU legislation have implications when these provisions conflict with each other, or with other principles of UK delegated or primary legislation post exit day.<sup>68</sup>

### Professor Alison Young, University of Cambridge

“It may, in practice, be just as easy to modify directly effective provisions of EU law and direct principal EU legislation as it is to modify, amend or revoke direct minor EU legislation.”

<sup>66</sup> [Government Response to the Lords Constitution Committee Report on the European Union \(Withdrawal\) Bill](#), 11 April 2018, p. 4

<sup>67</sup> Alison Young, [Status of EU Law Post Brexit: Part Two](#), U.K. Const. L. Blog, 4 May 2017

<sup>68</sup> Ibid.

## 6. Otherwise retained EU law (section 4 *EUWA*)

### 6.1 EU "law" beyond legislative instruments

Not all (EU) law is contained in either EU or domestic legislative instruments. EU law is also contained in:

- the EU Treaties themselves;
- the *Charter of Fundamental Rights of the European Union*; and
- legal principles espoused by and interpretive judgments of the CJEU.

The full extent of, especially, the first and third of these sources of EU law, is difficult to determine and replicate directly in the domestic law of a non-Member State. The Treaties apply to Member States and determine their relationship with the institutions of the European Union, including the CJEU. Although certain rights and obligations could be preserved, institutional arrangements especially, and legal relationships between EU law and domestic law, cannot be replicated directly.

This residual body of EU law is currently given effect by the general provision in section 2(1) *European Communities Act*. It gives effect to:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties...

This provision gives effect to directly effective provisions in the Treaties. The EU law principle of "direct effect" is not constrained to regulations, decisions and tertiary legislation, but can also include certain rights and obligations stipulated in:

- the Treaties and/or the *Charter*;<sup>69</sup> or
- EU directives whose implementation date has passed.<sup>70</sup>

At the moment, therefore, domestic courts will enforce these rights and obligations as a corollary of giving effect to the Treaties, including the principles of interpretation of EU law.

If the *EUWA* sought only to retain the instruments of EU law specified in sections 2 and 3 of the Act, it would mean that many rights and obligations related to those instruments, and the policy areas to which they relate, would not remain fully functional and effective after exit day in the United Kingdom. For this reason, section 4 *EUWA* attempts to preserve residual domestic rights and obligations, to a significant extent, where they are given effect by the *European Communities Act* immediately before exit day.

If the *EUWA* sought only to retain the instruments of EU law specified in sections 2 and 3 of the Act, it would mean that many rights and obligations related to those instruments, and the policy areas to which they relate, would not remain fully functional and effective after exit day in the United Kingdom.

<sup>69</sup> Case 26/62 *Van Gend En Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1

<sup>70</sup> Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337. EU law distinguishes between "vertical" and "horizontal" direct effect for the purposes of directives. Rights under directives are only "vertically" directly effective (i.e. they can only be relied upon against state actors and not in disputes between private parties).

## 6.2 What does section 4 *EUWA* retain?

Section 4(1) of the *European Union (Withdrawal) Act* provides that:

Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day—

(a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and

(b) are enforced, allowed and followed accordingly, continue on and after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).

However, subsection (2) specifically excludes from this retention any such “rights, powers, liabilities, obligations, restrictions, remedies and procedures” insofar as they either:

(a) form part of domestic law by virtue of section 3 [i.e. are part of retained direct EU legislation]

or

(b) arise under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before exit day (whether or not as an essential part of the decision in the case).

The *EUWA*’s Explanatory Notes explain the essence of what is retained:

Directly effective rights are those provisions of EU treaties which are sufficiently clear, precise and unconditional to confer rights directly on individuals which can be relied on in national law without the need for implementing measures. Where directly effective rights are converted under this clause, it is the right which is converted, not the text of the article itself.<sup>71</sup>

### EU Withdrawal Act Explanatory Notes para 92

“Section 4 ensures that any remaining EU rights and obligations which do not fall within sections 2 and 3 continue to be recognised and available in domestic law after exit. This includes, for example, directly effective rights contained within EU treaties.”

## 6.3 Which Treaty provisions does section 4 cover?

The Explanatory Notes to the *EUWA* provide a non-exhaustive list of provisions in the Treaty on the Functioning of the European Union that the Government believes confer directly effective rights falling under section 4 of the Act. This list includes:

- **Article 18** (prohibiting discrimination on grounds of nationality);
- **Article 20** (though not **20(2)(c)**) (citizenship rights);
- **Article 21(1)** (rights of movement and residence deriving from EU citizenship);
- **Articles 28 and 30** (concerning the EU’s customs arrangements);
- **Articles 34-36** (concerning non-tariff barriers);
- **Article 37 (1-2)** (prohibiting discrimination on access to goods);
- **Article 45(1-3)** (free movement of workers);
- **Article 49** (freedom of establishment);

<sup>71</sup> [Explanatory Notes, European Union \(Withdrawal\) Act 2018](#), para 92

- **Article 56-57** (freedom to provide services);
- **Article 63** (free movement of capital);
- **Article 101(1)** and **102** (competition law);
- **Article 106(1-2)** (public undertakings); and
- **Article 107(1)** (state aid).<sup>72</sup>

Many of the rights that are currently directly effective in these Treaty provisions would, under the Government's plans, be repealed by subsequent domestic legislation to the extent that they are inconsistent with post-exit arrangements. For example, the *Trade Bill* and *Taxation (Cross-border Trade) Act* would, by necessary implication, repeal some or all of the directly effective rights that would otherwise be retained by section 4. This would be necessary to give domestic effect to the Government's stated policy preference of leaving the Single Market and Customs Union.

Nevertheless, the default retention of these directly effective rights and obligations (and those in other EU instruments like directives) currently exercised under the *ECA* matters: it ensures that the "starting point" for UK law on exit day is presumptively closer to the current set of arrangements than would be the case if only certain EU instruments were preserved.

## 6.4 Exclusion of certain rights and obligations arising under directives

The qualification (quoted above in Section 6.2) on retention in section 4(1)(b) *EUWA* is significant. EU directives are not retained instruments of EU law, so any retention of rights and obligations in them depends on either or both (a) EU-derived domestic legislation and/or (b) section 4.

The qualification in section 4(1)(b) means that directly effective rights arising under an EU directive can only be retained if the CJEU or a domestic court or tribunal has already recognised rights "of [that] kind".

Whether the CJEU or a domestic court has recognised such a right would have to be assessed on a case-by-case basis. The actual breadth of "rights of a kind" may also be uncertain in specific instances.

Directly effective rights arising under an EU directive can only be retained if the CJEU or a domestic court or tribunal has already recognised rights "of [that] kind".

## 6.5 How can EU law retained by section 4 be changed?

As with retained direct EU legislation, *EUWA* does not assign a domestic legal status of primary or secondary legislation to anything that is retained EU law by virtue of section 4 of the Act. Instead, it outlines a set of rules that govern the type of legal instruments that can modify it. This law is subject to the same domestic rules for modification as retained principal direct EU legislation. Therefore, it can only be modified by:

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<sup>72</sup> Ibid pp. 24-25

- an Act of Parliament (or other primary legislation);
- pre-existing “Henry VIII” powers;
- powers to make subordinate legislation – conferred by post-*EUWA* enactments – that expressly authorise modification of EU law retained by section 4; and
- powers to amend retained direct minor EU legislation that would make only supplementary, incidental or consequential changes to EU law retained by section 4.

## 7. Limits on retention of EU law (section 5 and Schedule 1)

### Summary

In addition to excluding certain EU **legislation** from retained EU law, the *EUWA* excludes or limits the effect of certain other parts of EU law. These restrictions affect its fundamental characteristics and several of its fundamental principles.

- The supremacy of EU law is modified heavily by the *EUWA*: its effect is only partially preserved in relation to pre-exit enactments.
- The *Charter of Fundamental Rights* also does not form part of retained EU law. However, some of the rights set out in the *Charter* may be kept, but only because (and to the extent that) they appear elsewhere in EU law that **is** retained.
- The EU law principle of state liability (which allows private parties to seek damages against the state for loss sustained as a result of a failure to implement EU law) will no longer apply after exit day. This remedy has been expressly excluded from domestic law by Schedule 1 *EUWA*.

### 7.1 Future status of the principle of supremacy of EU law

Leaving the EU on exit day extinguishes the UK's obligations under those Treaties, except where (and to the extent that) a withdrawal agreement otherwise provides. It might be thought that the mere fact of leaving, or at least the repeal of the *ECA*, extinguishes the supremacy of EU law in relation to domestic law in the United Kingdom.

Supremacy is a principle that reconciles differences between two systems of law (EU and domestic). Insofar as EU law is retained by *EUWA*, it does not generate a conflict between two systems of law; any conflict between **retained** EU law and other domestic law is a question of domestic statutory interpretation.

However, the drafting of the *EUWA* suggests that the Government believes section 4 of the Act is taken to have the effect of preserving the supremacy principle in some (possibly modified) form. To the extent section 4 does this, section 5 of the Act expressly limits the applicability of the supremacy principle to the interpretation of and resolution of conflicts between retained EU law and other domestic law.

#### Supremacy prospectively disapplied

Section 5(1) of the *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 exit day.

This provision only disapplies the supremacy principle for developments in domestic law that happen **after exit day**.

#### Supremacy preserved for pre-exit law

Pre-exit domestic enactments, however, must still be read subject to retained EU law and disapplied (as before) to the extent that they are inconsistent. As section 5(2) provides:

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 exit day.

Whether the principle of supremacy is “relevant” in this context will ultimately be a matter for the courts to determine. The Government illustrated how it expects this new approach to work in its Explanatory Notes to the Act:

a retained EU regulation would take precedence over pre-exit domestic legislation that is inconsistent with it. The principle would not, however, be relevant to provisions made by or under this Act or to other legislation which is made in preparation for the UK's exit from the EU.<sup>73</sup>

## Supremacy and subsequent modifications to pre-exit domestic law

Section 5(3) allows the supremacy principle to continue to apply to pre-exit legislation that is **modified after exit day**. It provides that subsection (1):

does not prevent the principle of the supremacy of EU law from applying to a modification made on or after exit day of any enactment or rule of law passed or made before exit day if the application of the principle is consistent with the intention of the modification.

Whether a subsequent modification’s intention is “consistent with the principle” of supremacy will ultimately be a question for domestic courts to determine.

## Lords Constitution Committee reaction

The House of Lords Constitution Committee was critical of the approach taken by the Bill to the supremacy of EU law. Though accepting that it was “sensible” to “giv[e] retained direct EU law priority over pre-exit, but not post-exit, domestic law” it considered the whole approach of the Act to achieving this goal to be conceptually and practically flawed:

It is constitutionally unacceptable for the Bill to be ambiguous as to what retained EU law the “supremacy principle” will apply. It is insufficient for the Solicitor General to suggest that there is a shared assumption as to what the “supremacy principle” means and that it will therefore function in the Bill as the Government wishes it to. If references to the “supremacy principle” were to be preserved in the Bill, then clause 5 should be amended to set out clearly the intended scope of the principle.<sup>74</sup>

It maintained that, whatever the Government’s intentions, the original drafting of the Bill did not make clear how the principle of supremacy was intended to apply to the different types of retained EU law (emphasis added):

The Solicitor General appears to take the view that retained EU law will benefit from the “supremacy principle” (in respect of pre-exit domestic law) only if it corresponds to pre-exit EU law that itself benefitted from the “supremacy principle”. In very broad

### Section 5(2) EU (Withdrawal) Act

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 exit day.

<sup>73</sup> Explanatory Notes, *European Union (Withdrawal) Act 2018*, para 103

<sup>74</sup> Lords Constitution Committee, [European Union \(Withdrawal\) Bill](#), HL Paper 69, 29 January 2018, para 83

terms, this suggests that retained direct EU legislation under clause 3 and directly effective EU law domesticated by clause 4 should benefit from the post-exit "supremacy principle" under clause 5. However, it suggests that EU-derived domestic legislation under clause 2 should not benefit from the post-exit "supremacy principle" because it, unlike the underlying EU law to which it gives effect, did not benefit from that principle pre-exit. We consider this to be a sensible approach, not least because it corresponds to the current position as regards EU law, and thus accords with the Bill's objective of securing legal continuity.

**However, none of this is clear from the face of the Bill. Indeed, the Bill says nothing about the types of retained EU law to which the "supremacy principle" is intended to apply following exit.<sup>75</sup>**

It was also critical of the lack of clarity in the clause as to the future interaction between the common law and the supremacy principle:

If references to the "supremacy principle" were to be preserved in the Bill, then clause 5 would need to be amended to provide courts and others with suitable guidance for the purpose of determining whether a rule of the common law should be taken to have been "made" before or after exit. Providing such guidance is unlikely to be a straightforward matter.<sup>76</sup>

It further criticised the ambiguity of the applicability of the supremacy principle to pre-exit enactments that are modified after exit day:

If the "supremacy principle" were to continue to feature in the Bill, clause 5(3) would need to be amended to clarify the extent to which retained EU law can be modified while retaining the benefit of that principle, and to clarify in what circumstances the modification of pre-exit domestic law would be such as to turn it into post-exit domestic law that is no longer vulnerable to the operation of the "supremacy principle".

These problems, as the Constitution Committee saw it, were connected to wider issues in the Bill about the domestic status assigned to retained EU law. It believed that the Government's objectives would be more effectively satisfied if:

retained direct EU law [were to] be made to prevail over pre-exit domestic law by providing in the Bill that retained direct EU legislation under clause 3 and all law that is converted into domestic law by clause 4 is to be treated as having the status of an Act of the UK Parliament enacted on exit day.<sup>77</sup>

This approach, automatically, would have given precedence to:

- retained direct EU law (i.e. law retained by sections 3 and 4) over pre-exit law; and
- post-exit Acts over retained direct EU law.

This is because of the principle of statutory interpretation that a more recent Act of Parliament takes precedence over an inconsistent antecedent Act. However, the Government declined to adopt this approach (on which see **Section 5.5** above).

<sup>75</sup> Ibid. para 82

<sup>76</sup> Ibid. para 87

<sup>77</sup> Ibid. para 93

## Other reactions

Professor Alison Young argues that it is not clear what is meant by *EUWA*'s partial retention of the principle of supremacy in terms of what the doctrine itself is. Pointing to the *HS2* and *R (Miller)* cases (on which see **Section 1.3** above), she maintained it is unclear whether the doctrine of supremacy that is retained is to be that as interpreted by the CJEU or that as interpreted by the UK's national courts.<sup>78</sup> However, she was also critical of the Lords Constitution Committee's alternative proposal to treat all direct retained EU law as primary legislation:

The difficulty with the solution of the House of Lords Constitution Committee was two-fold. First, did it really resolve the sovereignty conundrum? It only really dealt with the issue of whether EU law should override earlier UK law. It did not deal with issues arising from interpretation and *Marleasing*... Second, it potentially created more problems than it resolved, suddenly adding thousands of measures as primary legislation, and failing to recognise how EU-tertiary legislation derives its validity, in part, from other elements of EU legislation conditioning its operation, which would have implications for the way in which it should be modified, interpreted, or declared unlawful.

## 7.2 Exclusion of the Charter of Fundamental Rights

### Box 3: Library Briefing Paper on the Charter, Francovich Damages and general principles of EU law

The Commons Library published a briefing paper: [EU \(Withdrawal\) Bill: the Charter, general principles of EU law, and 'Francovich' damages](#) in November 2017 (CBP8140). The final Act's provisions in relation to these issues has changed significantly, but it may be useful for readers to refer to that briefing paper for an overview of the issues and challenges presented by the (non)-retention of these areas of EU law.

Section 5(4) *EUWA* explicitly provides that:

The Charter of Fundamental Rights is not part of domestic law on or after exit day.

However, section 5(5) clarifies that this is not intended to deprive retained EU law of any fundamental rights or principles that are recognised independently of the Charter:

Subsection (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).

Not incorporating the Charter into domestic law has two significant implications. Firstly, it means that (unless and to the extent that other parts of retained EU law provide otherwise) the substance of those fundamental rights will no longer have effect and UK courts will not be able to enforce them. There will be circumstances in which the text of a

<sup>78</sup> Alison Young, [Status of EU Law Post Brexit: Part Two](#), U.K. Const. L. Blog, 4 May 2017

Charter right is more detailed or prescriptive than its equivalent in the Treaties or other instruments of EU law, in respect of which the *EUWA* retains rights and obligations.

By way of example, in a recent opinion on an EU-Canada agreement on transferring personal data outside the EU,<sup>79</sup> the Grand Chamber of the Court of Justice said it would refer only to Charter Article 8 (protection of personal data), because that provision lays down the conditions for data processing in a more specific manner than Article 16 TFEU.<sup>80</sup> Substitution of references to the Charter, in the manner envisaged by section 5(5) *EUWA*, may therefore not be a straightforward task for domestic courts.

Secondly, to the extent that Charter rights would be recognised in other parts of retained EU law, the non-incorporation of the Charter will deprive those rights of the elevated legal status they currently enjoy within the body of EU law and in relation to domestic primary legislation. The Charter and its fundamental principles, like the EU Treaties, currently take explicit precedence over EU secondary legislation (directives, regulations, decisions etc.) and national legislation to the extent that there are inconsistencies.

The rights and principles of the Charter will not, post exit, take priority over other instruments of retained EU law, unless and to the extent that those rights and principles can be shown to exist independently of the Charter. Post exit legislation will also be able to modify, remove or replace those rights and principles.

## Reaction of the House of Lords to non-retention of the Charter

The exclusion of the Charter from retained EU law was (unsuccessfully) resisted by the House of Lords during the passage of the *EUW Bill*. The Lords Constitution Committee had questioned the disapplication of the Charter and the Government's rationale for it (emphasis added):

The primary purpose of this Bill is to maintain legal continuity and promote legal certainty by retaining existing EU law as part of our law, while conferring powers on ministers to amend the retained EU law. **If, as the Government suggests, the Charter of Fundamental Rights adds nothing to the content of EU law which is being retained, we do not understand why an exception needs to be made for it. If, however, the Charter does add value, then legal continuity suggests that the Bill should not make substantive changes to the law which applies immediately after exit day.**

The effects of excluding the Charter rights, retaining the "general principles", but excluding rights of action based on them, are unclear. This risks causing legal confusion in a context where clarity is needed. We look forward to the views of the Joint Committee on Human Rights on the implications for rights of

There will be circumstances in which the text of a Charter right is more detailed or prescriptive than its equivalent in the Treaties or other instruments of EU law, in respect of which the *EUWA* retains rights and obligations.

<sup>79</sup> [Opinion 1/15 on the transfer of Passenger Name Record data from the European Union to Canada](#), 26 July 2017 (Grand Chamber).

<sup>80</sup> See Lorna Woods (Professor of Internet Law, University of Essex), '[Transferring personal data outside the EU: Clarification from the ECJ?](#)', EU Law Analysis blog, 4 August 2017.

excluding the Charter of Fundamental Rights in the Bill. We recommend that the Government provides greater clarity on how the Bill deals with the general principles and how they will operate post-Brexit.<sup>81</sup>

The Joint Committee on Human Rights was similarly critical (emphasis added):

the exclusion of the Charter from domestic law and the retention of underlying “fundamental rights and principles” results in an uncertain human rights landscape...

Further, having published the Bill in July, the Government has retrospectively carried out its analysis of the human rights implications nearly five months late having been pressed for clarity by this Committee. **This implies that the Government’s decision to exclude the Charter whilst retaining nearly all other EU law was taken without having done a comprehensive analysis of the implications for the protection of rights.**<sup>82</sup>

However, the Government (with the approval of the Commons) insisted on the retention of the exclusion of the Charter from retained EU law. As Robert Buckland, the then Solicitor General, put it:

We continue to strongly believe that it would not be right to retain rights of action based on incompatibility with the charter or the general principles of EU law after we have left. To keep these in our domestic law... would undermine two crucial principles. [It] is not consistent with the proper restoration of parliamentary sovereignty if legislation, including primary legislation, can continue to be disapplied or quashed by the courts on the basis of elements of the EU legal system intrinsically linked to our membership and obligations....

The charter did not create any more rights. It reaffirmed the rights that were already recognised in EU law—the law being retained in the UK under the Bill. The charter applies to EU institutions and member states only when they are acting within the scope of EU law. It is not—I repeat, not—as broad a body of law as the European convention on human rights and should not be compared to it.<sup>83</sup>

**Joint Committee  
on Human Rights  
on the  
Government’s  
“retrospective”  
human rights  
analysis**

“This implies that the Government’s decision to exclude the Charter whilst retaining nearly all other EU law was taken without having done a comprehensive analysis of the implications for the protection of rights.”

<sup>81</sup> Lords Constitution Committee, [European Union \(Withdrawal\) Bill](#), HL Paper 69, 29 January 2018, paras 119-120

<sup>82</sup> Joint Committee on Human Rights, [Legislative Scrutiny: The EU \(Withdrawal\) Bill: A Right by Right Analysis](#), HL Paper 70/HC 774, 26 January 2018, pp. 4-5

<sup>83</sup> [HC Deb 13 June 2018 Vol 642 cc932-933](#)

#### Box 4: Charter of Fundamental Rights of the European Union

The EU Charter of Fundamental Rights is part of the EU's complex set of human rights obligations. It overlaps with other EU laws and international human rights treaties, and its 54 articles were intended to consolidate existing fundamental rights and principles relating to the EU. But it has also been considered innovative – for instance, disability, age and sexual orientation are specifically prohibited as grounds of discrimination, and it includes some modern rights such as the prohibition against reproductive human cloning.

The Charter now has the same legal force as the EU Treaties. It binds the EU institutions, but also the Member States (including the UK) whenever they implement EU law. It has direct effect in the UK as a result of the ECA and the Treaty on European Union (TEU), so when the UK is 'acting within the scope of EU law' it must act compatibly with the Charter, and UK primary legislation which conflicts with a directly effective right under the Charter must be set aside if it cannot be read compatibly with it.

Although the Charter incorporates or reflects the provisions of the Council of Europe's European Convention on Human Rights (ECHR), it is entirely separate from the ECHR. The Charter contains more rights than the ECHR does, but it applies in fewer circumstances, and it is enforced in a completely different way.

#### Why is the Charter used in the UK courts?

Individuals and businesses can bring cases in UK courts to uphold their rights under the Charter, and have been doing so increasingly, as it has some substantive and procedural advantages over ECHR claims under the Human Rights Act 1998.

For instance, in the *ZZ* case the CJEU held that the Charter right to a fair hearing (Article 47) applied to deportation hearings, unlike the corresponding ECHR right (Article 6).<sup>84</sup>

Although the Charter applies to the UK only when it is acting within the scope of EU law, anyone with 'sufficient interest' can apply for judicial review based on the Charter, whereas claims under the Human Rights Act can only be made when an individual is a 'victim' of a rights violation. Also, stronger remedies are available for incompatibility with the Charter – including disapplying contrary provisions of UK primary legislation.

A recent example is the case of *Benkharbouche and Anor v Embassy of the Republic of Sudan*.<sup>85</sup> The Court of Appeal found that the applicants' right to a fair hearing under general principles of EU law as enshrined in Article 47 of the Charter was breached by the UK's State Immunity Act 1972, which had prevented them from accessing the courts to enforce their employment rights. The Court therefore disapplied the Act, which allowed their claim to proceed.

Currently, UK courts may – and sometimes must – make referrals to the CJEU to interpret the Charter (Article 267 TFEU). The CJEU could also be involved if the Commission took enforcement action against the UK in relation to the Charter.

#### Objections to the Charter

Objections to the Charter have largely been based on concerns that it is overly complex, that it could extend enforceable EU rights and obligations, and/or that the CJEU would take an expansionist approach to interpreting it.<sup>86</sup>

It was in response to such concerns that the UK and Poland succeeded in obtaining a Protocol on the Charter (Protocol 30 to the EU Treaties) which (in part) emphasises that the Charter is not to be interpreted as imposing new obligations on the UK. But Protocol 30 cannot be used to prevent the CJEU from defining the extent of EU rights contained in the Charter;<sup>87</sup> and it does not amount to an opt-out, as has sometimes incorrectly been thought.<sup>88</sup>

<sup>84</sup> Case C-300/11, 4 June 2013 (Grand Chamber)

<sup>85</sup> [2015] EWCA Civ 33

<sup>86</sup> See Joint Committee on Human Rights, [The human rights implications of Brexit](#), 19 December 2016, paras 61-65. For academic analysis of accusations of CJEU 'activism' and 'competence creep' generally, see European University Institute, AEL 2013/9, Academy of European Law Distinguished Lectures of the Academy [To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice](#), Koen Lenaerts and José A. Gutiérrez-Fons.

<sup>87</sup> [R v David Davis MP et al](#) [2015] EWHC 2092 (Admin), para 10.



## 7.3 Exclusion of state liability (“Francovich damages”)

In certain circumstances, EU law allows individuals to seek damages from a Member State for its failure to implement in a timely manner and in full the terms of an EU directive. This was first recognised in the ECJ case of *Francovich*, and the principle of state liability is also known as the right to “Francovich damages”.<sup>89</sup> This principle was developed because the principle of sincere cooperation in the Treaties expects that Member States will implement, domestically, EU law in full.

### Box 5: What is the *Francovich* rule?

The Court of Justice of the EU (CJEU) allows individuals, under certain conditions, the possibility of obtaining compensation for directives whose transposition is poor, delayed or non-existent.

In the *Francovich* case in 1991<sup>90</sup> the CJEU (then the ECJ) held that the Italian Government had breached its EU obligations by not implementing the Insolvency Directive on time and was liable to compensate the workers' loss resulting from the breach. The Court further held that the damages for such breaches should be available before national courts, and that to establish state liability based on the **failure to implement a directive**, claimants had to prove that:

- the law infringed was intended to confer rights on individuals;
- the breach was “sufficiently serious”, i.e. the Member State had manifestly and gravely disregarded the limits of its discretion;
- there was a direct causal link between State's failure to implement the directive and the loss suffered.<sup>91</sup>

The principle of State liability for damage caused to individuals by breaches of EC law was clarified five years later in the judgments in *Brasserie du Pêcheur* and in *Factortame* (1996). The principle was extended to all cases of infringement and all State bodies responsible for the breach.

Once the UK leaves the EU, its Treaty obligations will be extinguished (except and to the extent otherwise agreed). The principle of state liability would therefore become an anachronism to the extent that the UK lacks Treaty obligations to be able to fail to implement. As Lord Keen of Elie put it in May 2018:

After we leave the EU, Francovich damages will no longer be relevant when we cease to be bound to follow obligations that apply to member states. This is for the simple reason that the majority of Francovich cases in the UK have been brought on the grounds of non-implementation or insufficient implementation of a directive. The UK will no longer be under an obligation to implement directives after exit and the directives will not form part of our domestic law as retained EU law, so the ability to claim Francovich damages would not be possible for a post-exit cause of action.<sup>92</sup>

<sup>88</sup> See Angela Patrick, [Mapping the Great Repeal: European Union Law and the Protection of Human Rights](#), October 2016, para 53.

<sup>89</sup> See Commons Library Briefing Paper, [EU \(Withdrawal\) Bill: the Charter, general principles of EU law, and 'Francovich' damages](#), 17/8140, 17 November 2017, Section 3.

<sup>90</sup> Judgment in the Cases C-6/90 and C-9/90 *Francovich and Bonifaci* of 19 November 1991.

<sup>91</sup> *Factortame III*, Joined Cases C-46/93 and C-48/93: *Brasserie du Pêcheur SA v Federal Republic of Germany*; and *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others* 5 March 1996.

<sup>92</sup> [HL Deb 8 May 2018 Vol 791 c140](#)

This is why Schedule 1 paragraph 4 *EUWA* excludes from retained EU law the right to seek damages in a domestic court for a failure on the part of the UK Government to implement an EU directive after exit day:

There is no right in domestic law on or after exit day to damages in accordance with the rule in *Francovich*.

However, Schedule 8 includes an exception to this. Paragraph 39 provides for a two-year transitional opportunity for legacy cases of non-implementation to be litigated in UK courts:

Paragraph 4 of Schedule 1 does not apply in relation to any proceedings begun within the period of two years beginning with exit day so far as the proceedings relate to anything which occurred before exit day.

## 8. Interpretation of retained EU law (section 6)

### Summary

One of the biggest differences between EU law and retained EU law is that the latter will not be interpreted by the Court of Justice of the European Union. UK domestic courts will have to interpret and apply this body of domestic law unassisted and will not be required to follow decisions of the European Court after exit day.

Section 6 of the *EUWA* provides for the rules that govern how UK courts should approach this task, indicating where and when CJEU case law (whether issued before or after exit day) can or should be taken into account.

There are some other limits that are relevant to the role of the courts after exit day contained in Schedule 1 *EUWA*. Restrictions have been placed on the ability of individuals to bring a legal challenge against the validity of a retained EU instrument or law. Parties will also no longer be able to raise an action alleging that the general principles of EU law have been breached. This does not prevent those general principles (as recognised on exit day) from being used to interpret the meaning of provisions in retained EU law, however.

### 8.1 Loss of CJEU jurisdiction

EU law depends on the case law of the Court of Justice of the European Union for its consistent interpretation and application. Article 267 TFEU provides a “preliminary reference” procedure, whereby the CJEU will give a ruling on the interpretation of EU law. It will do so where it is “necessary” to establish a point of EU law to dispose of a case in a national court.

Once the UK leaves the EU, the Treaties will no longer apply to it and this reference procedure will lapse with respect to it. In any case, UK courts will be enforcing **retained** EU law (a purely domestic form of law) and not EU law itself.

### 8.2 Status of CJEU jurisprudence

Interpretation and application of EU law currently relies both on the judgments of the CJEU and domestic courts, with the latter being bound to follow the former. Typically, the CJEU determines points of EU law; then domestic courts are left to apply that law to the specific facts of the case raised before them. Insofar as domestic courts can no longer refer a question of EU law to the CJEU, they will therefore have to decide questions of interpretation and application of retained EU law for themselves. How they should do this, and to what extent they should follow or take into account CJEU jurisprudence on the same point of law, depends (according to the *EUWA*) on whether the CJEU judgment came before or after exit day.

## Pre-exit judgments

Section 6(3) *EUWA* provides that, "so far as unmodified" and "so far as they are relevant" UK courts are expected to determine cases concerning retained EU law "in accordance with" pre-exit case law and any "retained general principles of EU law" as they existed on exit day.<sup>93</sup> Retained general principles of EU law might include, but would not be limited to, principles of legal certainty, legitimate expectation, proportionality, effectiveness and non-retroactivity. These general principles might be considered to be retained either or both by virtue of section 4 of *EUWA* or by reference to "retained EU case law" in section 6(7) of the Act.

Section 6(5) provides that for decisions by the UK's two most senior courts (the UKSC and, for criminal matters in Scotland, the High Court of Justiciary) to depart from CJEU case law they must "apply the same test" as they would have applied had they been deciding whether to depart from their own case law. Where, and to the extent that, those two domestic Supreme Courts (in their respective domains) decide to continue to follow precedents of the CJEU section 6(4) indicates lower courts would be bound to follow suit.

In practice, this means that the UK courts are likely to follow pre-exit CJEU judgments except, and to the extent that, Parliament or the Government modifies retained EU law in certain ways. The Act itself refers to the need for case law to be "consistent with the intention" of modifications to continue to be applicable to the circumstances in respect of which it sets a precedent.<sup>94</sup> The responsibility for assessing the "intention" of those modifications, however, will ultimately be a domestic legal question for the UK Supreme Court (or in limited cases, Scotland's High Court of Justiciary) to discern.

To depart from CJEU case law, the UK Supreme Court must "apply the same test" as it would have applied had it been deciding whether to depart from its own case law.

In practice UK courts are likely to follow pre-exit CJEU judgments except, and to the extent that, Parliament or the Government modifies retained EU law in certain ways.

## Post-exit judgments

Section 6(1) *EUWA* provides that:

A court or tribunal is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and cannot refer any matter to the European Court on or after exit day.

This affirms in domestic law the effect of disapplying the EU Treaties. This does not prevent domestic courts from treating CJEU case law as persuasive authority, as they do in relation to case law from other jurisdictions.<sup>95</sup> However, case law of the CJEU **made on or after exit day**, even if it relates to retained EU law that remains unmodified, is not binding on UK courts.

Section 6(2) expressly permits (but does not require) a domestic court or tribunal to refer to:

<sup>93</sup> s. 6(3) *EUWA*

<sup>94</sup> s. 6(6) *EUWA*

<sup>95</sup> A study of the Supreme Court's case law 2009-2013 found that 31.3% of cases in that period cited foreign jurisprudence (77 out of 246 cases): Hélène Tyrrell, [The Use of Foreign Jurisprudence in Human Rights Cases before the UK Supreme Court](#) (2014) p143.

anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.

In practice, therefore, it may be the case that the UK courts and tribunals continue to follow CJEU jurisprudence as it develops after exit day, to the extent that retained EU law does not consciously diverge from EU law itself. After all, the UK courts already take into account as persuasive authority the jurisprudence of other (especially common law) countries, to the extent that questions of legal principle or substance are sufficiently analogous.

It is impossible to say with any significant level of confidence to what extent post-exit CJEU case law would be followed by UK courts and tribunals. There are too many unknowns (as to the extent to which retained EU law will diverge from EU law in the years following exit) to assess this at the time of writing. It will depend both on whether there is a withdrawal agreement and (if there is one) what future relationship is agreed between the UK and EU to take effect after any transition or implementation period.

In practice, it may be the case that the UK courts and tribunals continue to follow CJEU jurisprudence as it develops after exit day, to the extent that retained EU law does not consciously diverge from EU law itself.

### 8.3 Limits on rights of action after exit day

In addition to excluding a right of action for *Francovich* damages (on which see **Section 7.3** above) Schedule 1 of *EUWA* places other restrictions on parties seeking to rely on retained EU law in post-exit litigation.

#### Challenging validity of retained EU legislation

At the moment, it is possible to challenge (e.g.) an EU regulation in the domestic courts on the grounds that it is “invalid”. This might be (for instance) because its provisions cannot be read compatibly with a provision in the Treaties or a *Charter* right (the Treaties and *Charter* having an elevated status over EU legislation).

Schedule 1 para 1 *EUWA* abolishes any right of action in domestic law, after exit day, that would previously have been available to challenge the validity of EU legislation **unless** either:

- the CJEU had already declared (before exit) that the instrument to be invalid; or
- a UK minister has preserved or replaced a cause of action by way of regulations.<sup>96</sup>

The first of these two scenarios is uncontroversial in one sense. To the extent that the CJEU declared an instrument to be invalid before exit day, that instrument does not form part of retained EU law anyway. More controversially, if the CJEU declares a pre-exit EU regulation to be invalid, but only does so post-exit, UK law will continue to operate **as though** the instrument were valid, giving effect to its retained equivalent on that basis.

<sup>96</sup> Schedule 1 para 1(2) *EUWA*

The second scenario is likely to be the more important, because it will allow, among other things, causes of action to be brought against UK domestic institutions in cases where previously a cause of action might have been brought directly against an EU institution.<sup>97</sup>

In March 2019, the Government made the *Challenges to Validity of EU Instruments (EU Exit) Regulations 2019*. These allow domestic courts to rule after the fact on "validity" of EU instruments. They apply to a handful of cases where proceedings had begun in the domestic courts by exit day, but where the CJEU either:

- had not yet ruled on the point of EU law; or
- had not yet received a reference from a domestic court but would otherwise have done so.

## No right of action on general principles

Schedule 1 also restricts the role of the "general principles" of EU law to the interpretation of, and action taken in domestic law in respect of, retained EU law. Paragraph 2 provides that "general principles" (including but not limited to: proportionality, non-retroactivity, legal certainty, legitimate expectation etc.) only form part of retained EU law to the extent that they were recognised by the CJEU before exit day.

More importantly, however, paragraph 3 of Schedule 1 explicitly excludes a right of action in domestic law "based on the failure to comply with" the general principles of EU law, so far as they are retained. This means that, although general principles can be taken into account when interpreting the meaning of retained EU law, they do not, independently, provide a right of action. As the Government explains in its Explanatory Notes:

Courts cannot disapply domestic laws post-exit on the basis that they are incompatible with the EU general principles. Further, domestic courts will not be able to rule that a particular act was unlawful or quash any action taken on the basis that it was not compatible with the general principles. Courts will, however, be required under section 6 to interpret retained EU law in accordance with the retained general principles.<sup>98</sup>

There are certain arrangements in Schedule 8, however, which allow for a limited exception to this exclusion from challenge. The Explanatory Notes explain that the exception applies to proceedings initiated within three years of exit day where they:

relate to something that occurred before exit day and may be made against either administrative action or domestic legislation other than Acts of Parliament or the common law.<sup>99</sup>

In those circumstances:

Courts, tribunals and other public authorities will be able to disapply legislation or quash conduct in the event of a successful challenge.<sup>100</sup>

Although the general principles of EU law can be taken into account when interpreting the meaning of retained EU law, they do not, independently, provide a right of action.

<sup>97</sup> Schedule 1 para 1(3) *EUWA*

<sup>98</sup> [Explanatory Notes, European Union \(Withdrawal\) Act 2018](#), para 210

<sup>99</sup> [Explanatory Notes, European Union \(Withdrawal\) Act 2018](#), para 211

<sup>100</sup> *Ibid.*



## 9. Transition

### Summary

The UK Government negotiated with the European Union the text of a Withdrawal Agreement in November 2018. This proposed treaty text includes a “transition” or “implementation” period which would come into force immediately after the UK has formally left the EU. This would see EU law continue to apply to the UK – on similar terms as now – until 31 December 2020.

If the Joint Committee (a body to be set-up if the treaty is ratified) were to decide – on a one-off basis – to extend the transition period, it may end instead as late as 31 December 2022.

This transitional arrangement cannot be delivered by the *EUWA* because its provisions would commence the new scheme of retained EU law “on exit day”. In any case, to ratify the Withdrawal Agreement, fresh primary legislation is required.

The Government’s July 2018 white paper [Legislating for the Withdrawal Agreement \(etc.\)](#) says that the *EU (Withdrawal Agreement) Bill* would deliver the transition period. It would do this by amending the *EUWA* to delay the repeal of part of the *European Communities Act* until the expiry of that period. Arrangements would also be made to ensure that developments in EU law during the transition period were reflected in the body of retained EU law.

The *European Union (Withdrawal) Act 2018* operates agnostically as to whether there is a Withdrawal Agreement and agreement on a future relationship between the UK and the EU. It provides legal continuity in the absence of a deal, and the default position is that its major changes would take effect from exit day (currently 31 October 2019).

This has no direct bearing on the “status” of retained EU law, but has potentially significant implications for when (in reality) this new scheme or body of law has effect, and how far retained EU law will (in the future) diverge from EU law itself.

If there is to be a ratified Withdrawal Agreement, it is highly likely that it will be based upon [the negotiated treaty text](#) the most recent version of which was published on 11 March 2019.<sup>101</sup> Part IV of that treaty text includes provisions on a “transition” or “implementation” period.<sup>102</sup>

The effect of this transition period would be that, although the UK would leave the EU on the coming into force of the Withdrawal Agreement, it would continue to abide by EU law (including any changes that may happen during the transition period) in almost all respects until 31 December 2020.

The *EUWA* could not, in and of itself, give effect to such a transition period in domestic law. Its provisions, for instance, are manifestly inconsistent with allowing continued references to the CJEU during that transition period. The *European Union (Withdrawal Agreement) Bill*, therefore, will need to provide, among other things, a legislative mechanism to recreate most of the effects of the *European Communities Act* for that period.

The *European Union (Withdrawal) Act* could not, in and of itself, give effect to a transition period in domestic law.

Its provisions are manifestly inconsistent with allowing continued references to the Court of Justice of the European Union during that transition period.

<sup>101</sup> [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#), 11 March 2019

<sup>102</sup> Articles 126-132

It is possible that, as part of that implementing process, the UK Government may choose to revisit aspects of how it has chosen to transpose EU law through the *EUWA*. The then Secretary of State for Exiting the European Union Dominic Raab indicated on 12 July 2018 that the Government would publish a white paper on the *EU (Withdrawal Agreement) Bill*, addressing some of these issues:

We will shortly publish a White Paper on the withdrawal agreement and implementation Bill setting out how we will give effect to the withdrawal agreement in domestic law and demonstrating to the EU that the UK is a dependable negotiating partner—one that will deliver on its commitments.<sup>103</sup>

Although a White Paper was subsequently published, no Bill has (at the time of writing) been introduced or published in draft.

## 9.1 Preservation of the European Communities Act for transition

The White Paper, [Legislating for the Withdrawal Agreement between the United Kingdom and the European Union](#) was published on 24 July 2018. The Government intended to amend the *Withdrawal Act* to preserve the effect of the *European Communities Act* beyond exit day. This means that, although the UK would have formally left the EU and ceased to be a Member State on exit day, domestic law would continue to function, for many purposes, as though the UK were still a Member State. The Government said:

On exit day ([then] 29 March 2019) the EU (Withdrawal) Act 2018 will repeal the ECA. It will be necessary, however, to ensure that EU law continues to apply in the UK during the implementation period. This will be achieved by way of transitional provision, in which the Bill will amend the EU (Withdrawal) Act 2018 so that the effect of the ECA is saved for the time-limited implementation period. Exit day, as defined in the EU (Withdrawal) Act 2018, [would] remain [as was then] 29 March 2019. This approach will provide legal certainty to businesses and individuals during the implementation period by ensuring that there is continuity in the effect that EU law has in the UK during this time. The Bill will make provision to end this saving of the effect of the ECA on 31 December 2020.<sup>104</sup>

## 9.2 Areas in which ECA will not be preserved for transition

The Government explained that the preservation of the *ECA* would not be on identical terms as it has effect now. Separate arrangements would replace some parts of the *1972 Act*, such as those in relation to financial obligations, which would be governed by the withdrawal agreement rather than by existing EU Treaties:

The Bill will also modify the parts of the *1972 Act* whose effect is saved to reflect the fact that the UK has left the EU, and that the UK's relationship with EU law during this period is determined by

**Legislating for the Withdrawal Agreement between the United Kingdom and the European Union, 24 July 2018, Cm9674 para 60**

"The [Withdrawal Agreement Bill] will amend the EU (Withdrawal) Act 2018 so that the effect of the ECA is saved for the time-limited implementation period. Exit day, as defined in the [Act], will remain 29 March 2019."

<sup>103</sup> [HC Deb 12 July 2018 Vol 644 c1158](#)

<sup>104</sup> [Legislating for the Withdrawal Agreement between the United Kingdom and the European Union](#), Cm9674, 24 July 2018, para 60

the UK's commitments in the Withdrawal Agreement, rather than as a Member State. The Bill will take a selective approach to saving the effect of the ECA; the Government will not, for example, seek to save the effect of section 2(3) of the ECA, which provides the authority for Government to make payments to the EU. All payments to the EU as part of the negotiated financial settlement will instead be conducted under a new financial authority taken in the Bill.<sup>105</sup>

### 9.3 Timing of “domestication” and “correction” of EU law

It also appears as though, if there is a transition period, the Government would “domesticate” EU law at the end of it, rather than on exit day:

EU rules and regulations will continue to apply in the UK during the implementation period. This means that some provisions of the EU (Withdrawal) Act 2018 will not now be needed until the end of the implementation period. The Bill will therefore need to amend the EU (Withdrawal) Act 2018 so that the conversion of EU law into ‘retained EU law’, and the domestication of historic CJEU case law, can take place at the end of the implementation period.<sup>106</sup>

It also intended to alter the sunset clauses in the Bill to reflect domestication happening after transition rather than from exit day:

Whilst the Government would hope to make any corrections before the end of the implementation period, it is possible that some deficiencies will only become apparent after the conversion of EU law has taken place. The Bill will therefore amend the sunset on the correcting power at section 8 of the EU (Withdrawal) Act 2018 so that the power expires on 31 December 2022. This arrangement will preserve Parliament’s intention when it passed the EU (Withdrawal) Act 2018 to give the UK Government and the devolved administrations two years beyond the end of the application of EU rules and regulations in the UK to ensure that the UK has a functioning statute book.<sup>107</sup>

### 9.4 What if there is no deal?

The transition period is an integral part of, and completely depends upon, the existence of a ratified withdrawal agreement. In the event of “no deal” there will be no withdrawal agreement and therefore no agreed transition period.

In such a scenario, it would be expected that the *European Union (Withdrawal) Act* would operate as enacted: i.e. that the “domestication” of EU law would take place on the expiry of Article 50 (currently expected on 31 October 2019).

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<sup>105</sup> Ibid. para 61

<sup>106</sup> Ibid. para 69

<sup>107</sup> Ibid. para 73, see also paras 74-75

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