



Public
Law
Project

Public Law Project written evidence on Retained EU Law for the Scottish Parliament Constitution, Europe, External Affairs and Culture Committee

June 2022

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Introduction and Recommendations

1. The Public Law Project (PLP) was invited to submit written evidence on retained EU law to the Committee in connection with the Committee's roundtable on the 30 June 2022. This submission addresses the first four issues identified for discussion.
2. Information about the PLP is provided at the end of this submission.
3. The PLP's recommendations are:
 - a. **Legal Continuity:** the rules concerning supremacy and interpretation of REUL should be retained. A less contentious name may be 'The Retained EU Law Conflicts Rule'.
 - b. **Area-by-Area Approach to Repeal:** a blanket repeal of REUL would undermine the purpose of the REUL concept and create the problems the concept was designed to avoid. REUL should be repealed as and when the UK and devolved legislatures have a specific policy to enact.
 - c. **Legal Continuity within Devolved Competences:** if the UK Parliament enacts a blanket repeal, the Scottish Parliament may want to consider legislating its own concept of REUL within its competences. This is explained in more detail in our response to the third question.
 - d. **Avoiding Executive Aggrandisement:** UK and Scottish Ministers should refrain from asking the UK and Scottish Parliaments for unduly broad Henry VIII powers. Such powers would enable Ministers to make substantive changes to primary law, and therefore policy, in broad areas of social and economic life.
 - e. **Scrutiny:** broad Henry VIII powers, as described in the first recommendation, will reduce scrutiny of policy. This is undesirable from the perspective of (a) democratic legitimacy of executive action, (b) ensuring policy is properly explained and justified, and (c) producing more effective policy and legislation.
 - f. **Interparliamentary Collaboration:** Where Henry VIII powers are created, there may be scope for committees of the UK and devolved legislatures to work together to scrutinise proposed secondary legislation.
 - g. **Oppose a Blanket Sunset for REUL:** a blanket sunset (or expiry date) for REUL will

create considerable uncertainty for citizens and businesses, as well as place the devolved legislatures in a difficult position.

- h. **Scrutiny of Scottish Ministers Exercising Henry VIII Powers:** Scottish Ministers should refrain from seeking a broad Henry VIII power to change REUL, for the same reasons UK Ministers should refrain from seeking such a power.

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

4. Retained EU law (REUL) is a concept born out of necessity. Vast swathes of social and economic life in the UK were governed by EU law: equality law, labour, food, environment, data protection, consumer protection, VAT, financial regulation, and market regulations, to name a few. Legislating in all policy areas covered by EU law before the UK's withdrawal from the EU was not practically possible. Blanket repeal would have caused chaos since many areas of social and economic life would have reverted to out-of-date regulatory regimes (some pre-dating the UK's accession to the EU) or no regulatory regime at all.
5. The point of REUL was to create the time and space for the UK and devolved legislatures to devise new policy in areas previously covered by EU law in a considered and area-specific manner, whilst avoiding the immense legal uncertainty that would have resulted from a 'cliff-edge' on the Implementation Period completion day (IP Day).
6. The significance of REUL flows from this purpose. If the purpose is to retain EU law for the sake of legal certainty, then it becomes necessary to maintain the application of EU law, including the interpretative approach to be taken. Section 5(1) of the European Union (Withdrawal) Act 2018 (EUWA) removes the principle of supremacy, but this is reinstated by s.5(2) in relation to domestic law that pre-existed IP Day. This means that UK and devolved legislatures (within their competence) can amend, modify, and repeal REUL, but, while it exists, REUL retains the effect it had prior to withdrawal in relation to laws enacted prior to withdrawal.
7. One of the other ways EUWA is intended to provide legal certainty is through its retention of general principles of EU law in section 6(3) for the purpose of interpreting REUL. General principles of EU law are not in the text of the Treaties. The European Court of Justice, in interpreting and applying EU law, infers the existence of general principles from

the scheme of the Treaties and from the common constitutional traditions of the Member States. Examples of 'general principles' include fundamental rights protections; legal certainty (for example, restrictions on the retroactivity of liability); proportionality; non-discrimination; amongst others.¹

8. The *Marleasing* principle is an example of a general principle that has already been relied on in REUL litigation.² This is the principle that domestic law should be interpreted 'as far as possible' to give effect to the purpose of EU directives. It has its origins in the duty of sincere cooperation owed by Member States to each other in Article 4(3) of the Treaty on European Union (TEU). The *Marleasing* principle was applied in *Re Allied Wallet Ltd* [2022] EWHC 402 (Ch), in which the High Court of England and Wales considered the *Marleasing* principle to be one of the retained principles to be used for interpretation of REUL. This means domestic law implementing a directive will continue to be interpreted consistently with the directive.

9. The benefits of REUL, as a practical solution to the legal challenges posed by Brexit, are:
 - (a) The prevention of otherwise unnecessary litigation over settled questions of law and interpretation.

 - (b) The prevention of otherwise unnecessary use of the courts' time and public resources.

 - (c) Legal certainty for businesses, keeping costs down.

 - (d) Legal certainty for citizens, meaning they can better understand their rights in the fields of equality, labour, consumer protection and data protection law, among other areas

¹ Other general principles include subsidiarity, transparency, non-arbitrariness, procedural fairness, good administration, and the protection of legitimate expectations. This list is not exhaustive. Moreover, the CJEU may develop new general principles in the future.

² This principle takes its name from Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135 (13 November 1990).

Case Study: *Walker v Innospec Ltd* [2017] UKSC 47

1. This case illustrates one of the possible consequences of a blanket repeal of REUL or the removal of the supremacy rule in s.5(2).
2. The UK Supreme Court disapplied paragraph 18 of Schedule 9 to the Equality Act 2010, insofar as it permitted the type of discriminatory treatment at issue. This was because of a conflict with Article 2 of the Framework Equality Directive 2000/78/EC.
3. The former employee of Innospec Ltd challenged the refusal of the company to agree to pay a survivor's pension to his same-sex spouse if he died first, even though such a benefit would be paid out to Mr Walker's spouse had they been a woman.
4. Innospec Ltd justified this exclusion in part by reference to paragraph 18 of Schedule 9 to the Equality Act 2010. This provision permitted employers to restrict access to occupational benefits where the right to that benefit accrued before the 5 December 2005, the date when same-sex couples became legally entitled to enter into civil partnerships.
5. This provision of the Equality Act 2010 was disapplied because it conflicted with the prohibition of discrimination under the Equality Directive.
6. This case illustrates a key feature of UK law as it developed within the EU: there are provisions of UK primary law that do not have force because they conflict with rules of EU law that post-date *and* pre-date the UK primary law in question.
7. The s.5(2) retained supremacy rule ensures that this remains the case for pre-IP day EU law. If this is removed, previously disapplied provisions of UK and devolved primary law may be 'resurrected', creating unintended unjust outcomes and considerable legal uncertainty.

RECOMMENDATIONS:

- **Legal Continuity:** the rules concerning supremacy and interpretation of REUL should be retained. A less contentious name may be 'The Retained EU Law Conflicts Rule'.
- **Area-by-Area Approach to Repeal:** a blanket repeal of REUL would undermine the purpose of the REUL concept and create the problems the concept was designed to avoid.

REUL should be repealed as and when the UK and devolved legislatures have a specific policy to enact.

- **Legal Continuity within Devolved Competences:** if the UK Parliament enacts a blanket repeal, the Scottish Parliament may want to consider legislating its own concept of REUL within its competences. This is explained in more detail in our response to the third question.

Question 2: What mechanisms exist for changing retained EU law in devolved areas and how might these change in the future?

10. This question is best addressed by explaining the mechanisms at the Union level and at the devolved level separately.

11. At the Union level, REUL may be changed by the following mechanisms:

(a) **Present**

Act of Parliament: see the Subsidy Control Act 2022 for an example of this.

(b) **Present**

Exit Regulations under EUWA, s.8 (this power expires after the end of the period of two years beginning with IP completion day, 31 December 2022; see s.8(8)).

(c) **Future**

Secondary legislation with the power to change primary legislation, or 'Henry VIII powers': it is unclear whether the Brexit Freedoms Bill will create such powers, and to whom they will be allocated. The possibilities include:

- a. Empowering UK Ministers, Scottish Ministers, or both;
- b. Creating a single power to change all areas of policy covered by REUL;
- c. Creating powers for specific policy areas;
- d. Creating the power to remove supremacy for certain kinds of law, such as EU tertiary law (delegated and implementing acts);
- e. Creating the power to modify general principles of EU law and other EU-derived methods of interpreting REUL; and/or

f. Create sunset powers or indefinite powers.

(d) **Future**

Blanket sunset for REUL: another mooted possibility is a blanket sunset for REUL; after the specified date, all REUL would cease to apply.

12. At the devolved level, REUL may be changed by the following mechanisms:

(a) **Present**

Acts of the Scottish Parliament, as constrained by the devolution statutes and temporarily constrained by regulations made under s.12 of EUWA (this s.12 power has not, at the time of writing, been used);

(b) **Possible in the present**

Henry VIII powers conferred on Scottish Ministers by the Scottish Parliament within the competence of the Scottish Parliament, subject to s.12 EUWA regulations (see above);

(c) **Future**

Henry VIII powers conferred on Scottish Ministers by the UK Parliament in primary legislation or by UK Ministers in secondary legislation (if empowered to do so by future primary legislation).

13. A broad Henry VIII power for the UK Executive to make law in any area of former EU competence would be constitutionally inappropriate. In the words of the Hansard Society, such a power would 'risk perpetuating and entrenching the lack of control that Parliament has over policy decisions in areas previously covered by EU law which would create a further democratic deficit'.³

14. The UK's system of scrutiny of delegated legislation does not have the capacity to provide proper parliamentary oversight for powers of wide breadth and scope. Delegated legislation in the UK is 'virtually invulnerable to defeat'.⁴ Only 17 statutory instruments (SI) have been voted down in the last 65 years and the House of Commons has not rejected a SI since 1979.⁵ Not a single SI was defeated during the process of legislating for Brexit and Covid-19. Since SIs are unamendable, MPs and peers feel they cannot vote down an SI with problematic provisions because the instrument in its entirety will be lost.

³ Hansard Society, Evidence to the European Scrutiny Committee Inquiry into Retained EU Law, 25 February 2022.

⁴ Adam Tucker, 'The Parliamentary Scrutiny of Delegated Legislation' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (Hart Publishing, 2018).

⁵ Hansard Society, 'Westminster Lens: Parliament and delegated legislation in the 2015-16 session' (2017) 5.

Case Study: The Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 (SI 2019/710)

1. The Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 (SI 2019/710) were 26 pages long and made 36 different amendments to existing laws.
2. Lord Tunncliffe described these amendments as having ‘no themes or interrelationship’.
3. The Regulations were debated for 11 minutes in the House of Commons.

Source (HL Deb 21 March 2019, vol 796, col 1576).

15. Conferring the power on the Executive to legislate substantive policy via secondary legislation is not only constitutionally inappropriate; the lack of scrutiny also produces poorer quality laws and policy. During the process of legislating for Brexit and Covid-19, explanatory material was of a poor quality and had to be frequently replaced. The House of Lords Secondary Legislation Scrutiny Committee (SLSC) pointed out that between July and September 2021, 12.5% of Covid-19 explanatory memoranda had to be withdrawn for errors when the benchmark is 5%.⁶ Similarly, 15% of the explanatory material for all Brexit SIs required replacement.⁷ The UK Government also laid no Impact Assessments for Covid-19 SIs and failed to publish many during the Brexit process.⁸

RECOMMENDATIONS:

- **Avoiding Executive Aggrandisement:** UK and Scottish Ministers should refrain from asking the UK and Scottish Parliaments for unduly broad Henry VIII powers. Such powers would enable Ministers to make substantive changes to primary law, and therefore policy, in broad areas of social and economic life.
- **Scrutiny:** broad Henry VIII powers, as described in the first recommendation, will reduce scrutiny of policy. This is undesirable from the perspective of (a) democratic legitimacy of executive action, (b) ensuring policy is properly explained and justified, and (c) producing more effective policy and legislation.

⁶ Secondary Legislation Scrutiny Committee 31st Report of Session 2019-21 (HL, 2019-21, 153).

⁷ Secondary Legislation Scrutiny Committee 60th Report of Session 2017-19 (HL, 2017-19, 420) at [11].

⁸ Katie Lines *18 Months of COVID-19 Legislation in England: A Rule of Law Analysis* (16 October 2021, Bingham Centre for the Rule of Law) and Joe Tomlinson and Alexandra Sinclair, *Plus ça change? Brexit and the Flaws of the Delegated Legislation System* (Public Law Project, 2020) 25.

- **Interparliamentary Collaboration:** Where Henry VIII powers are created, there may be scope for committees of the UK and devolved legislatures to work together to scrutinise proposed secondary legislation. The House of Commons Welsh Affairs Committee has a Standing Order permitting Members of the Senedd to attend, but not vote, at their meetings. Members of the Scottish Parliament may wish to approach other Commons select committees for the purpose of more effectively scrutinising UK secondary legislation that applies to Scotland and Wales.

Question 3: What would be the impact on devolved policy areas of changing the current status of retained EU law and making it easier to amend?

16. What follows is a list of some of the potential consequences of changing the current status of REUL and making it easier to amend.
- (a) Changing the status of REUL would alter the competences of the Scottish Parliament. Accordingly, the legislative consent (Sewel) convention would be engaged. The UK Government and Parliament should seek the legislative consent of the Scottish Parliament.
 - (b) The wholesale repeal of EUWA 2018 may have the effect of making something like the Continuity Bill, struck down by the UK Supreme Court in 2018, possible.⁹ Section 29(2)(c) of the Scotland Act 1998 prevents the Scottish Parliament from modifying protected enactments in Schedule 4 to that Act. EUWA amended the Scotland Act to add itself to Schedule 4. This precludes the Scottish Parliament from legislating its own scheme for REUL within its competences. If the REUL concept is removed wholesale, it may enable the Scottish Parliament to legislate its own REUL concept within its competences, including aspects of EU law deliberately omitted by EUWA, such as the Charter of Fundamental Rights,¹⁰ causes of action founded on general principles,¹¹ and *Francovich* damages.¹²

⁹ *Re The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64.

¹⁰ The Charter of Fundamental Rights of the EU is excluded from REUL by EUWA 2018, section 5(4).

¹¹ In EU law, general principles may form a free-standing basis for a cause of action (see Case C-555/07 *Kükükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365 and C-144/04 *Mangold v Helm* [2005] ECR I-9981). General principles of EU law have been retained only for the purpose of interpreting REUL (see EUWA 2018, Schedule 1, paragraph 3(1): ‘There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law’). The exclusion of general principles as a free-standing basis for an action was confirmed and applied in English and Welsh law in *Adferiad Recovery Ltd v Aneurin Bevan University Health Board* [2021] EWHC 3049 (TCC) (HHJ Keyser QC).

¹² The rule in *Francovich*, also known as the principle of state liability, is the rule that Member States are liable to pay damages to persons who suffer damages due to a breach of EU law by the Member State (for example, incorrectly

- (c) The removal of the principle of supremacy may enable Scottish Ministers to change substantive policy through the use of pre-existing powers to make secondary legislation. For example, if the Working Time Regulations (which implement the Working Time Directive) retain the status of secondary legislation but lose the protection of s.5(2), they may potentially be altered by other secondary legislation or impliedly repealed by legislation that post-dates its creation.
- (d) A blanket sunset for REUL may cause practical difficulties for the Scottish Parliament and Government. Both institutions may need to dedicate substantial parliamentary time to replacing REUL within their areas of competence to avoid an arbitrary cliff-edge set by the UK Parliament. Unlike UK Ministers, who would be able to ask the UK Parliament to change the cliff-edge, the Scottish institutions would not be able to risk missing the cut-off point.

RECOMMENDATIONS

- **Oppose a Blanket Sunset for REUL:** a blanket sunset for REUL will create considerable uncertainty for citizens and businesses. It will also place the devolved legislatures in the difficult position of having to choose whether to: (a) use up substantial parliamentary time to legislate in all areas of REUL within their competence, (b) create a separate body of REUL within their competence (and accept the complexity that would bring), (c) or take the risk that the UK Parliament will move the cliff-edge.

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

17. Our observations in response to this question are as follows.

(a) Brexit Freedoms Bill and the Sewel convention:

- i. The Brexit Freedoms Bill (BFB) will probably engage the Sewel convention. The Scottish Parliament may grant or refuse legislative consent. The UK Parliament

transposing a directive). The rule in *Francovich* has been excluded by EUWA, with only limited exceptions to this exclusion (EUWA 2018, Schedule 1, paragraph 40).

N.B.: the rule in *Francovich* takes its name from Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italian Republic* [1991] ECR I-5357.

may press ahead, despite the lack of consent.

- ii. Even if the UK Parliament ignores the lack of legislative consent, the issues underlying the lack of consent would have been aired and subject to some political scrutiny. There are strong arguments that this is not sufficient. Nonetheless, it is important for democratic accountability before the Scottish electorate that the UK Parliament is forced to squarely confront the fact that it is overriding the wishes of the Scottish Parliament.
- iii. The BFB may grant UK Ministers the power to legislate in substantive areas of devolved policy, thereby by-passing the Sewel convention. An example of such power can be found in the Professional Qualifications Act 2022, sections 1, 16 and 17. It is possible that Parliament may resort to granting such a power more often, especially if the UK Government considers such a power necessary to harmonise regulations within the UK internal market.
- iv. The Scottish Parliament may want to consider the methods and procedures it might use to scrutinise UK secondary legislation altering REUL that has a substantive policy impact in Scotland.

(b) Scrutiny of changes to REUL by secondary legislation:

- i. The modification of REUL, or the elimination of the concept, may enable Scottish and UK Ministers to alter substantive EU law via secondary legislation.
- ii. This is for two reasons:
 - i. *Converted* EU law: some EU law provisions were directly implemented into UK law by Acts of Parliament, devolved laws, and regulations under s.2(2) European Communities Act 1972. Those provisions implemented by secondary legislation, such as s.2(2) regulations, may be susceptible to modification or repeal by further secondary legislation.
 - ii. *Preserved* EU law: some EU law provisions were directly applicable in UK law without further domestic implementation, such as the General Data Protection Regulation (GDPR). If REUL was eliminated as a concept, such *preserved* provisions would need to be assigned a status within the UK legal hierarchy: primary, secondary, or some *sui generis* category of law. EU secondary legislation, such as GDPR, is equivalent to

UK primary legislation. If EU secondary legislation is given the status of UK secondary legislation, this would be the equivalent of creating a Henry VIII power, enabling ministers to change primary law by secondary law.

RECOMMENDATIONS

- **Scrutiny of Scottish Ministers Exercising Henry VIII Powers:** Scottish Ministers should refrain from seeking a broad Henry VIII power to change REUL, for the same reasons UK Ministers should refrain from seeking such a power. Where Scottish Ministers wish to be able to change primary law via secondary legislation, they should be required to ask for them in area-specific bills and to explain the need for them in parliamentary debate. This means the Scottish Parliament will know what it is authorising Scottish Ministers to do with the Scottish Parliament's legislative powers.



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