



Subject:	House of Commons Library briefing – Status of “retained EU law”
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1.0	Purpose of Report or Summary of main Issues
	The purpose of this report is to provide Members with a summary of the House of Commons Library briefing on the Status of “retained EU law” which was updated and republished on 30 July 2019.
2.0	Recommendations
	That Members note the attached summary and appended briefing paper prepared by Graeme Cowie for the House of Commons Library and published on 30 July 2019. The briefing is relatively complex and it is recommended that any specific queries in relation to individual EU law might be best raised at Committee and followed up by officers accordingly.
3.0	Main report
3.1	<u>Key Issues</u> Repeal of the European Communities Act The <i>European Union (Withdrawal) Act 2018 (EUWA)</i> repeals the <i>European Communities Act 1972 (ECA)</i> effective on “exit day” (originally 29 March 2019, now 31 October 2019). 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 <i>Treaty on European Union</i> .

	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 on Transition below).
3.2	<p>Retention of some EU law</p> <p>However, this does not mean that EU law is of no consequence to the UK after that point. The <i>EUWA</i> 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.</p> <p>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.</p>
3.3	<p>How is EU law retained?</p> <p>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:</p> <ul style="list-style-type: none"> • Section 2 preserves EU-derived domestic legislation. This (typically) concerns the regulations made (usually but not always under s2(2) <i>ECA</i>) 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. <p>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.</p>
3.4	<p>What EU law is retained?</p> <p>In practice, this means (broadly) that the UK is retaining:</p> <ul style="list-style-type: none"> • 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);

	<ul style="list-style-type: none"> • most rights and obligations that currently exist in domestic law because of s.2(1) of the <i>ECA</i> (as they existed on exit day); and • relevant case law of the <i>CJEU</i> issued before exit day (though the UK Supreme Court and High Court of Justiciary need no longer follow it). <p>But the UK is specifically not retaining:</p> <ul style="list-style-type: none"> • the <i>Charter of Fundamental Rights of the European Union</i>; • 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 <i>Francovich</i> principle of state liability (in relation to post exit facts). <p><i>(Francovich v Italy (1991) C-6/90 was a decision of the European Court of Justice which established that European Union member states could be liable to pay compensation to individuals who suffered a loss by reason of the member state's failure to transpose an EU directive into national law.)</i></p>
3.5	<p>Status of retained EU law</p> <p><u>EU derived domestic legislation</u></p> <p><i>EUWA</i> 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.</p> <p>EU law retained under Section 2 of <i>EUWA</i> already has a domestic status, as it is either secondary legislation (mainly but not exclusively made under s. 2(2) <i>ECA</i>) or in some cases Acts of Parliament.</p> <p>By way of example, EU-derived domestic legislation will include, among other instruments:</p> <ul style="list-style-type: none"> • Acts of Parliament like the <i>Equality Act 2010</i> or <i>Data Protection Act 2018</i>; • delegated legislation made by UK ministers under s. 2(2) of the <i>European Communities Act</i> like the <i>Public Contract Regulations 2015</i> or <i>Working Time Regulations 1998</i>; • delegated legislation made under Acts that implement EU law, including regulations made by UK ministers under the <i>Value Added Tax Act 1994</i> or <i>Competition Act 1998</i>; • both primary and secondary legislation made by devolved institutions, including the <i>Procurement Reform (Scotland) Act 2014</i> or the <i>Public Contracts (Scotland) Regulations 2012</i>.

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

Retained direct EU legislation

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.

The status of retained EU law not falling into existing domestic categories is defined under section 7 of *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.

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.

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).

<p>3.6</p>	<p>What this briefing paper does not cover</p> <p><u>Statutory instruments already making changes to retained EU law</u></p> <p>The <i>European Union (Withdrawal) Act 2018</i> includes several time limited delegated powers specifically concerned with making changes to retained EU law in anticipation of exit day.</p> <p>More than 550 statutory instruments have been laid in connection with EU withdrawal (mostly under section 8 of <i>EUWA</i>, 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.</p> <p><u>Primary legislation directly connected to Brexit</u></p> <p>The Government has also sought to pass several Brexit-related Acts of Parliament. Those already on the statute book include:</p> <ul style="list-style-type: none"> • <i>The Taxation (Cross-border) Trade Act 2018</i> • <i>The Nuclear Safeguards Act 2018</i> • <i>The Sanctions and Anti-money Laundering Act 2018</i> • <i>The Haulage Permits and Trailer Registration Act 2018</i> • <i>Healthcare (European Economic Area and Switzerland Arrangements) Act 2019</i> <p>There are also several Bills which have yet to complete their passage through Parliament:</p> <ul style="list-style-type: none"> • <i>The Trade Bill</i> • <i>The Agriculture Bill</i> • <i>The Fisheries Bill</i> • <i>The Immigration and Social Security Co-ordination (EU Withdrawal) Bill</i> • <i>The Financial Service (Implementation of Legislation) Bill</i> <p>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.</p>
<p>3.7</p>	<p>Transition period</p> <p>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. Part IV of that treaty text includes provisions on a “transition” or “implementation” period.</p> <p>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</p>

	<p>(including any changes that may happen during the transition period) in almost all respects until 31 December 2020.</p> <p>The <i>EUWA</i> 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 <i>European Union (Withdrawal Agreement) Bill</i>, therefore, will need to provide, among other things, a legislative mechanism to recreate most of the effects of the <i>European Communities Act</i> for that period.</p> <p>What if there is “No deal”?</p> <p>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.</p> <p>In such a scenario, it would be expected that the <i>European Union (Withdrawal) Act</i> 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).</p>
3.8	<p><u>Financial & Resource Implications</u></p> <p>Not applicable</p>
4.0	<p>Appendices – Documents Attached</p>
	<p>Appendix 1 – House of Commons Library Briefing – The status of “retained EU law”</p>