Written evidence submitted by Dr Martin Brenncke (REULB09)

1. My name is Dr. Martin Brenncke, and I am a Senior Lecturer in Law at Aston University. I am an expert in the area of retained EU law (REUL) and statutory interpretation. My expertise is evidenced by academic publications and conference presentations.

Executive Summary

2. In **Part I**, I ask the Committee/Government to reconsider the policy decision to strip REUL of some of its interpretive effects.

3. In **Part II**, I base my recommendations against the backdrop of the Government's intention to remove the principle to interpret domestic law in conformity with EU law/REUL (principle of consistent interpretation) and to strip preserved REUL of its EU-related interpretive effects. I recommend **specific amendments to the Bill**, which I believe are required to (a) remove ambiguities and (b) bring the proposed statutory words in line with the Government's intentions as expressed in the explanatory notes to the Bill and the Delegated Powers Memorandum.
   a. **Remove ambiguities**: Clause 4(1)(A1)
   b. **Bring statutory words in line with Government's intentions**: Clause 4(1)(A2), Clause 8, Clause 12(3) and Clause 13(3), Clause 12(6) and Clauses 13(5) and 13(6), Clause 14(3)(a) and Clause 16.

4. My comments in this submission are mainly limited to issues relating to **statutory language and interpretation**.

Part I

5. I have argued in the past that a good case can be made for removing the supremacy principle as an element of REUL because the supremacy principle conflicts with the orthodox doctrine of parliamentary sovereignty.[1] I am skeptical that the same/similar case can be made for removing the principle of consistent interpretation due to increases in **legal uncertainty**. Similarly, I am skeptical about **modifying or removing other principles of interpretation for REUL** due to increases in legal uncertainty. I find it difficult to see the benefits that would justify the uncertainty created by changing the interpretation of REUL.[2]

Clause 7

6. Clause 7 modifies the effect and interpretation of REUL in s. 6 European Union (Withdrawal) Act 2018 (EUWA 2018). Importantly, Clause 7 does not modify that REUL has to be interpreted

[1] Martin Brenncke, Retained EU law: Where next? – Submission of evidence, p. 4, available at https://committees.parliament.uk/writtenevidence/107092/pdf/.
[2] As expressed in *ibid.*, pp. 6-7.

in accordance with retained case law under s. 6(3) EUWA 2018. EU principles of statutory interpretation are part of retained case law, which means that EU principles of statutory interpretation continue to apply to the interpretation of REUL like retained direct EU legislation.[3] EU principles of statutory interpretation and domestic principles of statutory interpretation are not the same; both can lead to different interpretive outcomes.[4]

7. The Government intends to remove the supremacy of EU law, general principles of EU law and the duty of consistent interpretation. The latter is one example of an EU principle of statutory interpretation. A more consistent position would be to change the interpretation of REUL further and stipulate in s. 6 EUWA 2018 that **domestic principles of statutory interpretation** apply to the interpretation of REUL. This, however, would lead to significant increases in legal uncertainty compared to the status quo. By removing the principle of consistent interpretation in Clause 4(1) and by removing retained general principles of EU law from the interpretation of REUL in Clause 5(3), the Government is in effect adopting an inconsistent position that tampers with statutory interpretation and legal certainty. The existence of Clause 8, which enables the government to maintain the current legislative hierarchy between retained direct EU legislation and other domestic legislation under the EUWA 2018, also shows that the Government does not fully commit to removing the supremacy principle and the principle of consistent interpretation.

8. Importantly, the Bill contains another mechanism that allows the Government to modify the approach to the interpretation of secondary REUL if it so wishes. That is the power to restate REUL under Clause 12 of the Bill, since a restatement is not REUL. In the light of this possibility, I ask the Committee/Government not to change the interpretation of REUL (other than the supremacy principle).

9. **Recommendation**: I ask the Committee/Government to **reconsider the policy decision to modify the interpretation of REUL**.

<u>Clause 12(6) and Clauses 13(5) to 13(7)</u>

10. Clause 12(6) empowers a national authority to **reproduce the interpretive effects of REUL** like the principle of supremacy as part of a restatement to a limited extend.[5] This provides an exception to the Government's general intention to remove the interpretive effects of REUL from UK law with the Bill. The reason for this exception is that a national authority may consider it appropriate to reproduce the existing policy effects of REUL.[6] Legal certainty seems to be one underlying concern here. However, it is possible to achieve this effect with less

[3] In detail, Martin Brenncke, Statutory Interpretation and the Role of the Courts after Brexit, (2019) European Public Law 637, 643-644.
[4] *Ibid.*, 645-647, 660-661.
[5] See the limitation in Clause 14(4).
[6] Delegated Powers Memorandum, p. 21; Explanatory notes, para. 159.

complexity, less fragmentation of statutory interpretation and a higher level of legal certainty with the following two, admittedly larger-scale, amendments to the Bill:

11. (1) In the light of my recommendation to Clause 7, preserved REUL under Clause 1(2) should continue to be interpreted in accordance with retained general principles of EU law and the principle of consistent interpretation. Only the principle of supremacy of REUL should be removed from the statute book due to constitutional reasons.[7] In this scenario, the Government can simply preserve REUL under Clause 1(2) if it intends to reproduce the existing policy effects of REUL (minus the supremacy principle).

12. (2) If the Government is less concerned with maintaining the exact same interpretations of law, it can restate the law under Clause 12(1). If secondary REUL is restated, s. 6(3) EUWA 2018 no longer applies.

13. Even though the Government argues that the restatement power can be used by the Government to improve legal certainty and the clarity of the law,[8] I am skeptical that an increase in legal certainty is achievable with a restatement. The reason is that s. 6(3) EUWA 2018 no longer applies to the restated law, which means that retained case law is no longer binding. It is also not clear that UK courts would interpret restated, but otherwise unamended law consistently with the previous old REUL. That is because the use of legislative antecedents for interpreting consolidating legislation, for example, appears unsettled and complex.[9] There is thus a risk of a significant level of legal uncertainty about the interpretation of a restatement. Of course, the Government could decide to preserve the effects of retained case law under Clause 12(6), (5). However, if the Government decides to preserve the interpretive effects of REUL for the restatement, the restatement appears unnecessary as a very similar outcome could have been achieved under Clause 1(2), as explained in paragraph 11 above.

14. **Recommendation**: Delete Clause 12(6). For very similar reasons, delete Clauses 13(5) to 13(7).

Part II

15. I do understand that the Committee/Government may not share my skepticism about modifying the interpretation of REUL. Therefore, I base my submission of written evidence in this Part II against the backdrop of the Government's intention, which is to remove the

[7] I have explained elsewhere that removing the supremacy principle from the UK statue books will most likely only create negligible negative effects for legal certainty. See Martin Brenncke, Retained EU law: Where next? – Submission of evidence, p. 5, available at https://committees.parliament.uk/writtenevidence/107092/pdf/.
[8] Delegated Powers Memorandum, p. 22.
[9] For discussion, see David Lowe and Charlie Potter, Understanding Legislation: A Practical Guide to Statutory Interpretation, Hart 2018, pp. 101-104.

principle of consistent interpretation and to strip preserved REUL of its EU-related interpretive effects.

Clause 4(1)(A1)

16. **Two ambiguities** should be resolved in Clause 4(1)(A1).

17. (1) After IP completion day, EU law stopped applying in the UK, and so did the supremacy of EU law. The reference to the "supremacy of EU law" in s. 5(2) EUWA 2018 is a misnomer. What is meant is the **supremacy of REUL** over other, pre-IP completion day domestic legislation. This should be clarified as follows in Clause 4:

18. **Recommendation:** Amend Clause 4(1)(A1) as follows: "The principle of the supremacy of *retained* EU law is not part of domestic law. […]".

19. If this recommendation is adopted, consequential amendments are needed in other clauses of the Bill which refer to the supremacy of EU law.

20. (2) The principle of the supremacy of EU law and the principle of consistent interpretation are two different principles in CJEU case law. The words in Clause 4 only mention the supremacy of EU law. It appears from the explanatory notes of the Bill that this ought to cover the principle of consistent interpretation, too.[10] This is problematic because UK courts have in the past given a rather limited role to an Act's explanatory notes when construing statutory language.[11] The situation is the same under the EUWA 2018, where s. 5(2) only mentions the supremacy of EU law but not the principle of consistent interpretation, which is however mentioned in the explanatory notes of the EUWA 2018. Nonetheless, the omission of the principle of consistent interpretation in the text of s. 5(2) EUWA 2018 has led academics to argue that the principle of consistent interpretation is not covered by "the supremacy of EU law" in s. 5(2) EUWA 2018.[12] I have argued against this interpretation,[13] but my point is that this is an ambiguity that can be avoided in the Bill. Therefore, I recommend that Clause 4 explicitly mentions the principle of consistent interpretation.

21. There is another reason why it is important to explicitly mention the principle of consistent interpretation in Clause 4. The principle to interpret national law in conformity with EU directives was retained (i) in s. 5(2) EUWA 2018 in relation to pre-IP completion day domestic law and (ii) in s. 6(3) EUWA 2018 in relation to EU-derived domestic legislation.[14] Clause 4 of

[10] Explanatory notes, para. 86.
[11] For discussion, see Asif Hameed, UK Withdrawal from the EU: Supremacy, Indirect Effect and Retained EU Law, (2022) 85 Modern Law Review 726, 747-749.
[12] *Ibid.*, pp. 746-753.
[13] Martin Brenncke, Statutory Interpretation and the Role of the Courts after Brexit, (2019) European Public Law 637, 649.
[14] In detail, *ibid.*, pp. 651-653.

the Bill amends s. 5 EUWA 2018, but it does not amend s. 6(3) EUWA 2018. This may give rise to the argument that the Bill removes the principle to interpret national law in conformity with EU directives only in relation to pre-IP completion day domestic legislation but not in relation to EU-derived domestic legislation. Such an understanding of Clause 4 would undermine the Government's intention – as expressed in the Bill's explanatory notes – to remove the principle of consistent interpretation "in relation to all domestic legislation".[15]

22. **Recommendation:** Amend Clause 4(1)(A1) as follows: "The principle of the supremacy of EU law *and the principle of consistent interpretation are* not part of domestic law. […]"

23. If this recommendation is adopted, consequential amendments are needed in other clauses of the Bill which refer to the supremacy of EU law.

Clause 4(1)(A2) and Clause 7(4)

24. (1) Given that it is the Government's intention to strip preserved REUL of its interpretive effects, the new interpretive relationship between retained direct EU legislation and other domestic legislation needs to be determined. One option would have been to leave this issue unaddressed in the Bill and for the courts to determine. The Government opted for another option: a **"reverse" interpretation/priority rule** in Clause 4(1)(A2). Compared to the former option, the reverse interpretation/priority rule secures a higher level of legal certainty.

25. Existing interpretations of domestic legislation in conformity with EU Regulations remain untouched by Clause 4(1)(A2). This UK case law remains binding on courts according to domestic rules of precedent. This is one area where a reference by a lower court on retained case law under clause 7(8) of the Bill seems sensible.[16] I would add that the new interpretation/priority rule in Clause 4(1)(A2) should be taken into account by a higher court as one factor when deciding to depart from its own retained domestic case law.

26. **Recommendation:** Modify Clause 7(4) by adding the new interpretation/priority rule in Clause 4(1)(A2) as another factor that a higher court should consider when deciding whether to depart from its own retained domestic case law. This amendment of Clause 7(4) could be phrased as follows: Add "*(d) the extent to which section 5(A2) of the European Union (Withdrawal) Act 2018 would lead to a different meaning or effect of retained direct EU legislation*"

[15] Explanatory notes, para. 86.

[16] I assume here that UK case law that interprets domestic legislation in conformity with (retained) EU Regulations is retained domestic case law (s. 6(7) EUWA 2018) as it "relate[s] to" retained direct EU legislation.

27. (2) Clause 4(1)(A2) contains the phrase "**so far as possible**". A very similar phrase can be found in s. 3(1) Human Rights Act 1998 and in the EU legal duty of consistent interpretation (as expressed in CJEU case law). English judges have in the past used these interpretive duties to go beyond conventional domestic principles of statutory interpretation.[17] In particular, English judges have used the "so far as possible" interpretive duties to depart from legislative intention at the time of enactment. I have argued elsewhere that this use of s. 3 Human Rights Act 1998 and the EU legal duty of consistent interpretation exceeds the limits of the judicial role under the British constitution.[18] In a very similar vein, the Government has criticised the expansive use of s. 3(1) Human Rights Act 1998 in judicial practice.[19] It is therefore surprising to see the reference to "so far as possible" in the Bill. This reference is difficult to reconcile with the Government's view that s. 3(1) Human Rights Act 1998 should be replaced by a less expansive interpretive duty which would provide greater legal certainty and a clearer separation of powers.[20]

28. **Recommendation**: Delete "so far as possible" in Clause 4(1)(A2).

Clause 7(8)

29. In the new reference procedure, lower courts can make references on points of law which arise on retained case law and "**are relevant to proceedings before it**". The reference procedure will prolong litigation, and its success may be limited by limited resources and capacities of higher courts. Therefore, I suggest that the new reference procedure should only be used when the binding effect of retained case law affects the outcome of the case before the lower court.

30. **Recommendation:** Amend Clause 7(8) as follows: Replace "relevant to proceedings" with "relevant to *the outcome of* proceedings".

Clause 8

31. In case of conflict between retained direct EU legislation and post-IP completion day legislation, the supremacy principle does not apply. This is the effect of the current s. 5(1) EUWA 2018. Clause 8 of the Bill covers "any domestic enactment specified in the regulations", which can include post-IP completion day legislation. Clause 8(2)(b) empowers a national authority to provide by regulations that specific post-IP completion day legislation is subject

[17] In detail: Martin Brenncke, Judicial Law-making in English and German Courts, Intersentia 2018, chapters 3 and 4.
[18] *Ibid*.
[19] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, A consultation to reform the Human Rights Act 1998, December 2021, paras. 232-238. Also see my submission of written evidence in response to this consultation: Response ID ANON-3CHA-9XSU-R.
[20] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, A consultation to reform the Human Rights Act 1998, December 2021, para. 236.

to retained direct EU legislation if there is an incompatibility between both enactments. This has the de facto effect that **retained direct EU legislation is supreme over post-IP completion day legislation**. This goes beyond the current legislative hierarchy under s. 5(1) EUWA 2018, and this does not seem to be intended by the Government. The Government intends to "maintain the current legislative hierarchy" with Clause 8 in order to ensure that the "UK policy environment remains constant" if this is desirable.[21] Therefore, the current phrasing of Clause 8 should be amended so that the relationship between retained direct EU legislation and post-IP completion day legislation falls outside the scope of Clause 8.

32. **Recommendation**: In Clause 8(1)(a), "any domestic enactment" should be limited to "any domestic enactment *passed before IP completion day*".

Clause 12(3) and Clause 13(3)

33. Clause 12(3) stipulates that a restatement is not REUL. The explanatory notes clarify that "this means that section 6 EUWA (application of retained case law) will no longer apply".[22] This is not entirely correct. S. 6(2) EUWA 2018 allows courts to have regard to post-Brexit CJEU case law "so far as it is relevant to any matter before the court". The scope of s. 6(2) EUWA 2018 is not limited to the interpretation of REUL. That means that a UK court could rely on s. 6(2) EUWA 2018 to **consider post-Brexit CJEU case law** when interpreting a restatement.

34. **Recommendation**: If the Government intends to exclude s. 6(2) EUWA 2018 from the interpretation of the restatement, it should make this explicit in Clause 12(3) and, accordingly for assimilated law, in Clause 13(3).

Clause 12(6) and Clauses 13(5) and 13(6)

35. (1) A relevant authority can de facto use Clause 12(6) to alter the interpretation and application of primary legislation compared to the status quo under the EUWA 2018. The reason is as follows: A restatement can resolve ambiguities, remove doubts, etc. under Clause 14(3). Therefore, a restatement can lead to a different interpretation of a certain restated provision compared to the old retained direct EU legislation. Under Clause 12(6), this restatement could be given precedence over other primary legislation. That means that the law in its restated, amended form would have precedence even though this **goes beyond the original effects of the supremacy** of the old retained direct EU legislation. This potential effect of Clause 12(6) goes beyond the Government's intention to achieve "the same policy outcomes as the REUL being restated".[23]

[21] Delegated Powers Memorandum, pp. 19-20.
[22] Explanatory notes, para. 157.
[23] Explanatory notes, para. 159.

36. (2) Clause 12(6) empowers the relevant authority to "produce an effect that is equivalent to an effect referred to in" Clause 12(4). The purpose of Clause 12(6) is to enable "the same policy or practical outcome to be achieved as the law would have achieved had such interpretive effects continued to apply."[24] Clause 12(6) uses the word **equivalent**, and this means similar rather than identical. There is therefore a risk that Clause 12(6) will be used in order to produce policy or practical outcomes that deviate from the effects of the principle of the supremacy of EU law, etc. that are mentioned in Clause 12(5).

37. **Recommendation**: I believe that both issues can be rectified by adding a limiting condition to the wording of Clause 12(6) and Clauses 13(5) and 13(6). Amend Clause 12(6) as follows:

    Clause 12(6): "But a restatement of legislation may, if the relevant authority considers it appropriate *and in order to achieve the same policy or practical outcome as the secondary retained EU law being restated*, itself produce an effect that is equivalent to an effect referred to in subsection (4)."

38. Amend Clauses 13(5) and 13(6) accordingly.

<u>Clause 14(3)(a)</u>

39. "**Resolving ambiguities**" would allow UK ministers to choose between different possible interpretations, for example those that have been proposed in textbooks, without necessarily following domestic rules of statutory interpretations. The provision, as stated, may also allow ministers to resolve an ambiguity in an enactment in contrast to settled retained case law, which had already resolved the ambiguity but in a way that the minister does not like. This shows that the scope of this Clause creates legal uncertainty, the opposite of what the provision is aiming to achieve. According to the Delegated Powers Memorandum, a restatement "would not allow the function or substance of legislation to change nor introduce substantive policy change".[25] This intention is insufficiently expressed in the Bill. That is because a restatement could resolve an ambiguity in contrast to settled retained case law, which would in effect create a substantive policy change.

40. **Recommendation**: Amend Clause 14(3) as follows: "Resolving ambiguities *according to domestic principles of statutory interpretation and taking into account retained case law*"

[24] Explanatory notes, para. 162 (for Clause 13(5)).
[25] Delegated Powers Memorandum, p. 21.

Clause 14(3)(b)

41. "**Removing doubts**" does not specify whose doubts the provision is talking about, and it does not specify what these doubts have to be about. Presumably, it is the doubt that the relevant national authority has about the meaning of secondary REUL or secondary assimilated law. A doubt refers to a feeling of uncertainty about one's belief or opinion. I do not believe that feelings of uncertainty are sufficient to justify changes in the law. Moreover, even if the meaning of secondary retained EU legislation has been clarified extensively in settled retained case law, a minister may have doubts about this case law, which is secondary REUL. Clause 14(3)(b) would allow ministers to make significant changes to retained UK Supreme Court case law that interprets secondary REUL if the minister has doubts about this case law. Clause 14(3)(b) appears rather limitless and would allow ministers to introduce substantive policy change.

42. **Recommendation**: Delete Clause 14(3)(b).

Clause 16

43. The Delegated Powers Memorandum only refers to the power in Clause 16 in relation to legislation.[26] However, the phrase "any secondary retained EU law" in Clause 16 also includes retained case law. This scope of Clause 16 appears to have **unintended effects**, as I explain in the following. Clause 16 empowers the Government to modify retained case law, including retained **domestic case law**, with delegated legislation. The retained case law could be a UK Supreme Court decision that interprets retained primary legislation. Hence, Clause 16 empowers the Government to modify how primary legislation is being interpreted irrespective of principles of statutory interpretation, since the standard is only that the Government considers the modification "appropriate" to take account of changes in technology, etc.

44. **Recommendation**: Adopt a formulation that excludes retained case law. For example: Replace "secondary retained EU law" in Clause 16(1) and (2) with "*secondary retained EU legislation*". Replace "secondary assimilated law" in Clause 16(2) with "*secondary assimilated legislation*".

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[26] Delegated Powers Memorandum, pp. 30-31 ("piece of legislation", "UK legislation can be updated", "technical standards and regulations", "amendments to the statute book").