BRIEFING NOTE

by

THE FACULTY OF ADVOCATES

for

CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE

The Faculty of Advocates is pleased to have the opportunity to give evidence to the Committee at its evidence session on the Retained EU Law (Revocation and Reform) Bill. The Faculty should make it clear that it does not seek to comment upon issues of policy.

1. As a Member State of the EU, the UK was impacted by European legislation. In some cases, domestic legislation was passed in the UK (whether by the UK Parliament or Ministers, or the legislature or Ministers of the devolved nations) to give effect to pan-European rules, and in other cases EU legal instruments took direct effect without any need for further legislation to be passed in the UK. Whichever process was used, such rules became a part of the law of the various parts of the UK. Such rules covered many subject-areas, and some involved great technical detail.

2. Once the decision was taken that the UK should withdraw from the EU, this raised certain questions from the legal perspective, including the extent to which such rules should be retained (and their new technical legal basis, absent EU membership). It must be recalled that in the history of the UK and the predecessor nations which came together to form the UK, there have been many significant constitutional events (e.g., the Union of the Parliaments in 1707, the devolution settlements of the twentieth century), and it has not been suggested that on each such occasion there must be a total reset of the laws applicable in the country. The absence of such an approach has given certainty and continuity to citizens, and allowed the retention of pre-existing laws which have a benefit undiminished by the constitutional change. Any wholesale repeal would

have resulted in gaps in provision which would have led – at best – to uncertainty as to the position on a specific issue, with significant potential for practical difficulty.

3. With regard to the UK's withdrawal from the EU, there was naturally a concern to avoid a sudden upheaval on the day of withdrawal (or the day upon which the transition period came to an end). Accordingly a legislative device was adopted whereby, essentially, laws springing from the UK's membership of the EU would be retained in the UK, save where a decision was taken to revoke (or amend) specific laws as at the end of the transition period. Retained EU law therefore became law in the three legal systems of the UK, by means of the European Union (Withdrawal) Act 2018 ("the 2018 Act") sections 2 to 4.[1] Retained EU law is a descriptor rather than a concept. It must be understood that as far as content is concerned, that a provision may originally have stemmed from the UK's membership of the EU is simply a historical explanation for the existence of the rule. The sources of law are of little interest to consumers or commercial clients, who are interested only in knowing the content of the rules which affect their business, or daily life.

4. The UK Government has now introduced the Retained EU Law (Revocation and Reform) Bill ("the Bill"). As the Committee will be aware, a key feature of the Bill is that it has sunset clauses. Thus, retained direct EU legislation and EU-derived subordinate legislation would be revoked at the end of 2023 (this headline statement is subject to certain caveats, e.g., (i) it does not apply to instruments, or provisions within instruments, which may be specified in regulations; and (ii) there is an ability to use regulations to extend the sunset for a specified instrument or specified description of legislation, but not beyond 23 June 2026). Furthermore, section 4 of the 2018 Act is also to be repealed at the end of 2023, meaning that retained EU law by virtue of that section will not be recognised or available in the domestic law of the UK after that date. Any remaining retained EU law is to be referred to as 'assimilated law' after the end of 2023 (clause 6 of the Bill). The Bill contains an express statement of powers to restate, reproduce, replace, update or revoke certain retained EU law. We leave aside broader

[1] So far as form is concerned, section 2 of the 2018 Act is dealing with legislation which, technically, already is UK legislation. Likewise, sections 3 and 4 clothe legislation and other rules which were previously directly effective with the status of being UK law.

issues of policy, which are not for the Faculty to comment upon. However, we would make the following points:

4.1 The 2018 Act essentially transposed legislation and rules stemming from the UK's EU membership into the domestic law of the various component parts of the UK, so that in due course it could be revoked, amended, or retained without significant change. In fact, certain pieces of legislation were identified as unable to operate outwith the context of EU membership, and were repealed as at the end of the transition period; whilst others were identified as requiring revision at that time to permit their continued operation. For the remainder, their long-term future could be considered at an appropriate moment for that sector. The Bill, however, would effectively set a deadline just over one year distant for that exercise to be carried out across the board. It is not entirely clear in what way it is thought to be of benefit to the legal system, and to citizens and businesses, to introduce such a sunset clause across such a wide range of topics.

4.2 Given the sheer volume of legislation which is affected, the Bill sets a very challenging deadline. It will necessitate a consideration of numerous pieces of legislation, some very technical in nature, in order that it can be assessed whether these may be revoked as at the end of 2023, whether these require effectively to be re-enacted, or whether they require to be replaced with some other provision (with the consequent legislative drafting time).

4.3 There is an obvious danger that new legislation drafted to replace the existing rules in a particular area of the law is rushed. This may create uncertainty, and at worst may result in unintended consequences. There is also the danger that the existence or importance of a provision is overlooked in the haste, and that no replacement is in place at the time of automatic revocation – thus creating a gap in the law. All of this has the potential to create uncertainty, injustice and expense for individual citizens and businesses.

4.4 In general, it has to be recognised that such wide-ranging change in the near future may prove disruptive for the legal system, and hence for litigants, businesses and citizens. There had already been some consideration of laws stemming from our EU membership at the point of EU withdrawal and the end of the transition period, and certain rules were revoked or retained with adjustments at that point. By re-opening the issue of retention so quickly, and across the board, this re-introduces uncertainty. Businesses and citizens who

(post-EU withdrawal) have been operating on the basis of certain retained EU law rules being retained into the foreseeable future, will again be left unsure as to the legal framework in which they operate. Organisations and groups representing certain sectors may again have to focus efforts on attempting to argue for the retention of rules which they consider beneficial.

5. There are provisions of the Bill regarding parliamentary scrutiny where retained EU law is being modified or revoked. Although the questions posed by this (e.g., is there a sufficient degree of scrutiny? Will the speed at which the exercise requires to be completed have an impact on the degree of meaningful scrutiny which can be undertaken by parliamentarians?) may be thought to be primarily issues for Westminster parliamentarians to consider, at least in the first instance, they do also have the potential to impact law-making in devolved areas.

6. The Bill would also effect change to the interpretation of retained EU law. For example:
   6.1 The 2018 Act provided that the legal doctrine whereby EU law had primacy over UK domestic law would cease to apply to legislation made after the end of the transition period. Clause 4 of the Bill would abolish the legal doctrine altogether: although the point of abolition is to be at the end of 2023, it is said that the abolition would be in respect of any enactment or rule of law whenever passed or made.[2] In effect, then, the abolition will be retrospective. This has the potential impact that when a court is considering a legal case, it might not assess parties' actings in line with their understanding of the law at the time.
   6.2 The Bill would further alter the status of retained EU case law (that is, certain decisions taken by the CJEU and courts in the UK prior to the end of the transition period). The Bill would make it easier for courts to depart from such case law when interpreting retained EU law. On a point of detail, the Bill would provide that when a higher court was deciding whether to depart from retained EU case law, it would require to have regard (among other factors) to "*the extent to which the retained EU case law restricts the proper development of domestic*

[2] Similarly, clause 5 of the Bill abolishes general principles of EU law, which the 2018 Act had permitted to be called upon in interpreting retained EU law.

law" (emphasis added). It may be questioned how courts are to interpret the highlighted phrase, and hence to take account of such a factor.

7. From the particular perspective of the impact of the Bill upon the devolution framework, issues which the Committee may wish to consider and explore, might be:

7.1 The Committee will note that the Bill confers powers on Ministers of the Crown and devolved authorities (the latter being the Scottish Ministers, the Welsh Ministers, and a Northern Ireland department). Schedule 2 sets out the restrictions on the powers of devolved authorities such as the Scottish Ministers when they are exercising those powers.

7.2 It would not currently appear that the power in clause 2 of the Bill to extend the sunset, is exercisable by the Scottish Ministers, Welsh Ministers or Northern Ireland Ministers.

7.3 Where Ministers of the UK Government are able to restate, replace, or make alternative provision to, legislation stemming from EU membership, the Committee may wish to consider the interaction of this with the devolution framework. We note that the Cabinet Secretary for the Constitution, External Affairs and Culture (and, separately, the Counsel General for Wales) have raised a concern regarding consent from devolved legislatures where there is to be rule-making in devolved areas.

7.4 In terms of clause 15(5) of the Bill, a condition for the replacement of (or making alternative provision to) affected legislation, is that the regulatory burden is not increased. Burden is defined in clause 15(10) to include financial cost, administrative inconvenience, an obstacle to trade or innovation, efficiency, productivity or profitability, and a sanction affecting the carrying on of any lawful activity. One issue to consider may be to what extent this would represent a restriction on the exercise of powers by Ministers in the devolved administrations.

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