CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE

25th Meeting, 2022, Session 6

10 November 2022

Retained EU Law (Revocation and Reform) Bill (UK Parliament legislation)

1. The Retained EU Law (Revocation and Reform) Bill was introduced by the UK Government on 22 September 2022. The Bill is now at Committee stage in the House of Commons, having been considered at Second Reading on 25 October 2022, and is yet to be considered in the House of Lords.

2. The Scottish Government is expected to lodge a legislative consent memorandum shortly. In a letter to the UK Government on 22 September 2022 upon the Bill's introduction, the Cabinet Secretary for the Constitution, External Affairs outlined his "deep concern and fundamental opposition" to the Bill and noted his view that it "represents a significant further undermining of devolution".

3. At its meeting on 6 October 2022, the Committee agreed to examine the potential impact of this Bill in devolved areas, with a particular focus on the issues identified in its report on the impact of Brexit on devolution.

4. At this meeting, the Committee will take evidence from—

    - Michael Clancy, Director of Law Reform, Law Society of Scotland (online)
    - Dr Emily Hancox, Lecturer in Law, University of Bristol
    - Charles Livingstone, Partner, Brodies LLP Solicitors
    - Professor Alison Young, Professor of Public Law, University of Cambridge (online)
    - Dr Kirsty Hood KC, Faculty of Advocates

5. The following papers are attached—

    - **Annexe A:** Briefing from SPICe, Professor Tobias Lock, Dr Christopher McCorkindale, and Professor Katy Hayward (Committee advisers).
    - **Annexe B:** SPICe briefing on the Retained EU Law (Revocation and Reform) Bill.
    - **Annexe B:** Written submissions from the Law Society of Scotland and the Faculty of Advocates.

CEEAC Committee Clerks
October 2022

Constitution, Europe, External Affairs and Culture Committee

25th Meeting, 2022 (Session 6), Thursday 10th November 2022

LCM consideration: Retained EU Law (Revocation and Reform) Bill

Today is the Committee's first session considering the Retained EU Law (Revocation and Reform) Bill and associated legislative consent memorandum(LCM). At the time of writing, the LCM is still awaited.

The Committee will today hear from witnesses in a roundtable format. Those attending are:

- Michael Clancy, Director of Law Reform, Law Society of Scotland
- Dr Emily Hancox, Lecturer in Law, University of Bristol
- Charles Livingstone, Partner, Brodies LLP Solicitors
- Professor Alison Young, Professor of Public Law, University of Cambridge
- Kirsty Hood KC, Faculty of Advocates

Retained EU Law and the Retained EU Law (Revocation and Reform) Bill

SPICe has produced a briefing on retained EU law and the Retained EU Law (Revocation and Reform) Bill ["the Bill"]. A copy of the briefing can be found online and is also attached at **Annexe B.**

This paper does not repeat all of the information contained in the SPICe briefing, rather it focuses on specific areas within the Bill which the Committee may wish to explore with witnesses.

In particular, this paper highlights issues raised by the Bill which relate to concerns previously raised by the Committee, most recently in its report 'The Impact of Brexit on Devolution'.

Key points of the Retained EU Law (Revocation and Reform) Bill

- The Bill provides a "sunset" for most retained EU law (REUL), meaning that the REUL will be revoked at that point. The sunset date is 31 December 2023.
- UK Government Ministers (and in some cases Scottish Ministers) are given broad powers to allow them to amend, revoke and restate REUL. Powers in

other acts are modified to enable them to be used to amend most REUL by secondary legislation.
- The Bill changes the rules on how REUL is to be interpreted, by removing the principle of supremacy of EU law and other retained general principles of EU law.
- REUL which remains on the statute book after 31 December 2023 is renamed "assimilated law".

Legislative Consent Memorandum

At the time of writing the Scottish Government has yet to lodge a legislative consent memorandum (LCM) in relation to the Retained EU Law (Revocation and Reform) Bill.

The Scottish Government did write to the UK Government on 22 September 2022 (the date the Bill was introduced) noting its objections to the Bill and raising a number of concerns.

Impact of Brexit on Devolution Report

The Committee's report published in September 2022 highlights a number of areas of concern about the impact of EU exit on devolution and the Scottish Parliament's ability to fulfil effectively its scrutiny function. The Committee concluded that:

"This raises a number of questions which require further detailed scrutiny–

Whether it is appropriate for UK Ministers to have considerable new delegated powers in devolved areas without any overarching consideration of the impact on how devolution works;

To what extent there is a risk to the Scottish Parliament's legislative and scrutiny function from the post-EU increase in the size and use of delegated powers both at a UK level in devolved areas and by Scottish Ministers;

How the post-EU limitations of the Sewel Convention discussed above need to be addressed in considering the effectiveness of legislative consent mechanisms for secondary legislation."

The three sections below explain how provisions in the Bill relate to these three areas of concern identified by the Committee.

1. Powers for Ministers

The Bill confers nine new powers on UK Government Ministers, of which six are conferred also on Scottish Ministers (and Ministers of other devolved administrations).

In cases where powers are granted to Ministers of devolved administrations, they are conferred concurrently and jointly. "Concurrently" means that they can be used either by a UK Minister or a devolved administration independently of each other in

devolved areas. "Jointly" means a UK Minister and a devolved administration acting together.

The Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee states that this way of allocating the powers gives:

"flexibility to ensure that the most efficient and appropriate approach to amending and replacing REUL can be taken in every situation."

The significant powers are outlined below. Other powers include power to make consequential provision (clause 19) exercisable by UK Ministers only; and power to make transitional and savings provision (clause 22) exercisable by UK Ministers only.

The power to preserve REUL

The Bill (clause 1) provides that most, although not all REUL, will be repealed automatically at the end of December 2023 if steps are not taken to save it.

REUL which takes the form of primary legislation is not subject to the sunset. This applies to Acts of the UK Parliament, Acts of the Scottish Parliament, Acts of the Welsh Senedd and Northern Ireland legislation.

Clause 1(2) provides that "relevant national authorities" can specify legislation to be exempt from the sunset. This could be individual pieces of, or provisions within a piece of REUL.

"Relevant national authorities" are defined in the Bill as:

- A Minister of the Crown
- A devolved authority; or
- A Minister of the Crown acting jointly with one or more devolved authorities

A devolved authority means Scottish Ministers, Welsh Ministers or a Northern Ireland department. As such, Scottish Ministers are given a power to specify legislation to be exempt from the sunset provision.

Regulations to preserve REUL are subject to the negative procedure at the UK Parliament or relevant legislature.

UK Ministers could use the power to preserve REUL in devolved areas, and there is no consent or consultation requirement in such circumstances. Accordingly, UK Ministers could use this power in devolved areas without the consent of, and without consulting, the relevant devolved government or legislature.

From 1 January 2024 the category of domestic law known as retained EU law will be renamed "assimilated law" (clause 6). The Explanatory Notes state that:

"At all times after the end of 2023, REUL that remains in force will be known as "assimilated law"."

The power to extend the sunset

The Bill (clause 2) provides that the sunset can be extended, although not beyond 23 June 2026. UK Government Ministers are therefore able to extend the sunset by making regulations (i.e., by secondary legislation). The Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee notes that this power is a Henry VIII power (which enables secondary legislation to amend primary legislation).

The power to extend is provided to UK Government Ministers only. No equivalent power is given to Scottish Ministers (or Ministers of other devolved governments).

There is no process provided for in the Bill for devolved governments to request an extension to the sunset provision. There is neither a consent nor consultation requirement where UK Government Ministers wish to exercise the power in devolved areas.

Regulations made to extend the sunset are subject to the negative procedure in the UK Parliament.

UK Government Ministers are able to extend the sunset *"as it applies in relation to a specified instrument or a specified description of legislation within section 1(1)(a) or (b)"*. That is to say, in order to extend the sunset, UK Ministers would need to specify the individual pieces or categories of legislation for which the extension is to apply; a blanket extension of the sunset date is not envisaged.

The power to restate REUL

Clause 12 gives UK Ministers and Scottish Ministers (in addition to Welsh Ministers and Northern Ireland departments) the power to restate REUL (except that which is primary legislation) by regulations. The power is available until the sunset date which is 31 December 2023. This is a Henry VIII power.

If REUL is restated in this way, it is no longer REUL but domestic legislation and is not subject to the sunset.

The power "cannot make substantive change to the policy effect of legislation[1]". Regulations made under the exercise of the power are subject to the negative procedure or the draft affirmative procedure where an instrument amends primary legislation.

UK Ministers could use the power to restate REUL in devolved areas – there is no consent or consultation requirement in such circumstances.

The power to restate assimilated law

Clause 13 gives UK Ministers and Ministers of a devolved government a power to restate provisions of secondary assimilated law. This means that the process of clarifying, consolidating and restating legislation which is derived from the UK's

[1] The Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee

membership of the EU can continue post 31 December 2023 (where provision has been made to exclude it from the sunset provision).

The power is available until the 23 June 2026 (the tenth anniversary of the referendum on the UK's membership of the EU). Secondary assimilated law is defined as:

- Any assimilated law which is not primary legislation;
- Any assimilated law that is primary legislation the text of which was inserted by subordinate legislation.

If secondary assimilated law is restated it is no longer categorised as assimilated law.

The power is similar to the power to restate retained EU law (clause 12) but relates to assimilated law and is therefore available only after 31 December 2023. It is also a Henry VIII power.

Regulations made under the power are subject to the negative procedure unless they amend primary legislation in which case the draft affirmative procedure is to be used.

The UK Government's justification for the power is:

"to ensure legal certainty in areas of REUL where policy is not intended to immediately change following the UK's exit from the EU. It ensures that the UK Government can continue to act to maintain current policy effect (i.e., as of today) after the sunset date and before 23 June 2026, to mitigate any unintended consequences associated with the sunset and the end of the special status of REUL on 31 December 2023."[2]

UK Ministers could use the power to restate assimilated law in devolved areas – there is no consent or consultation requirement in such circumstances. Accordingly, UK Ministers could use this power in devolved areas without the consent of, and without consulting, the relevant devolved government or legislature.

The power to revoke or replace

This power, in clause 15, allows UK Ministers and devolved Ministers to revoke REUL (up until 31 December 2023) or assimilated law (from 1 January 2024) and replace it. The power is available until 23 June 2026.

Where provision is made to replace REUL or assimilated law the replacement provision can implement different policy objectives.

The UK Government's note on delegated powers from the Cabinet Office argues that the power is required because relying on primary legislation to do this job would be inappropriate:

[2] Ibid.

"The power is required as there are approximately 2000 pieces of secondary retained EU law, including RDEUL, that the Government may wish to replace with legislation more suited to the UK's needs. Doing so purely through sector specific primary legislation would take a significant amount of Parliamentary time."

It also notes that *"the Retained EU Law Substance review has identified a distinct lack of subordinate legislation making powers to remove REUL from the UK statute book where appropriate, and if required replace that provision with legislation that is more fit for purpose for the UK"*. It continues *"had the UK never been a member of the EU, many of the areas identified by the substance review would likely already have similar powers to comparable non EU policy areas to amend. The lack of powers is therefore an oddity created by our EU membership"*.

The UK Government's position is that this power affords an equivalent or a higher level of UK parliamentary scrutiny than the scrutiny that applied given to the REUL itself, given that *"REUL that this power can replace initially came into force in the UK with the scrutiny of secondary legislation or with no UK Parliament scrutiny if it was directly effective EU law…Requiring that there policy areas should now be subject to primary legislation would be a marked reduction in the UK's legislative dynamism."*[3]

The UK Government's justification for the power to revoke or replace is[4]:

"The UK is no longer part of the EU Single Market or the EU Customs Union and is therefore no longer bound by its laws and regulations. Government departments are keen to make changes to the EU-derived laws and obligations that still form part of the UK's legal system in the form of REUL, either be removing them from the statute book or by replacing that legislation with new provisions that are more fit for purpose now that the UK has left the EU. Parliament has already voted for and enacted a form of Brexit that allowed for significant regulatory divergence, so this power builds upon that decision to allow for departure from the EU acquired acquis where it is in the UK's best interests to do so and therefore capitalise on the benefits of Brexit."

Clause 15(5) imposes an important restriction on the exercise of the power, including by the devolved governments:

"No provision may be made by a relevant national authority under this section in relation to a particular subject area unless the relevant national authority considers that the overall effect of the changes made by it under this section (including changes made previously) in relation to that subject area does not increase the regulatory burden."

"Burden" is defined as including "amongst other things" –

- A financial cost
- An administrative inconvenience
- An obstacle to trade or innovation
- An obstacle to efficiency, productivity or profitability

[3] Ibid.
[4] Ibid

- A sanction (criminal or otherwise) which affects the carrying on of any lawful activity.

The Hansard Society has stated that:

"The clause thus imposes what amounts to a regulatory ceiling. This is contrary to previous claims from Ministers that in some areas REUL might be amended to enhance regulatory requirements (eg in the field of animal welfare).[5]"

At Second Reading in the House of Commons, Stella Creasy MP (Labour) stated:

"clause 15 formally confirms that we can only go down, and we can only have a race to the bottom, because it talks explicitly about not increasing burdens."

Dean Russell MP, the Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy responded:

"the Bill will ensure that we have the highest standards, and within the process of this framework we will ensure that the burdens of delivering the best possible regulatory scheme are removed, while ensuring that we have the highest standards across all we do."

Robin Walker MP (Conservative) asked for assurance on environmental and animal welfare standards, noting that during his two years in the Department for Exiting the European Union he *"gave many assurances in those years that, as we left the EU, our environmental standards and animal welfare regulations would be improved and strengthened, not weakened."*

The response was that *"We will use the powers in the Bill to ensure that our environmental law is functioning and able to drive improved environmental outcomes, with the UK continuing to be a world leader in environmental protection."*

The power to update

Clause 16 provides a power to update. This is conferred on UK Ministers and devolved authorities and is subject to the negative procedure. The power is not subject to a sunset.

The power allows Ministers to "update" secondary REUL and restated[6] REUL *"to take account of changes in technology or in developments in scientific understanding".*

The note on delegated powers states that:

"The power is not intended to make significant policy changes, but is only intended to make relevant technical updates to REUL for these specific purposes."

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[5] The Hansard Society, Five Problems with the Retained EU Law (Revocation and Reform) Bill, 24 October 2022

[6] Being legislation created under clauses 12 (the power to restate REUL), 13 (the power to restate assimilated law) and 15 (the power to revoke or replace)

The Hansard Society has described the power as *"very open-ended"*, asking:

"Should it be left to Ministerial discretion to decide whether a change in technology or a development in scientific understanding has occurred – for example with respect to Artificial Intelligence, Genetically Modified Organisms, or Net Zero – and whether changes via delegated legislation (rather than primary) are merited by those developments?"[7]

The power to set out legislative hierarchy

For completeness, the final substantive power in the Bill (clause 8(1)) which is conferred on both UK and devolved ministers relates to the removal of the principle of supremacy of EU law. The Bill reverses the principle that REUL takes precedence over incompatible domestic law. The power enables Ministers to specify that the reversal of the principle does not apply to specific pieces of domestic law and REUL, and therefore that the REUL continues to take precedence. The purpose of the power is to enable Ministers to retain the existing hierarchy where this is desirable to avoid unintended consequences or to ensure continuity of policy.

Commentary on powers from stakeholders

Before the publication of the Bill, the Public Law Project in written evidence to the House of Commons European Scrutiny Committee inquiry into Retained EU law inquiry stated that:

"broad Henry VIII power for the UK Executive to make law in any area of former EU competence would be constitutionally inappropriate."

In the view of the Public Law Project such *"a power is without precedent in the UK's legal system and would constitute an astonishing transfer of legislative competence from Parliament to the Executive."*

In its briefing ahead of the Bill's second reading the Hansard Society stated that:

"The broad, ambiguous wording of powers will confer excessive discretion on Ministers."

The Hansard Society briefing described the powers given to Ministers as:

"a series of broad 'blank cheque' powers to amend or replace REUL – including to make 'alternative provision' that they 'consider appropriate' – across policy areas as diverse as animal welfare, consumer rights, data protection, employment, environmental protection, health and safety, and VAT, and all subject to only limited parliamentary oversight."

In its report 'the Impact of Brexit on Devolution' the Committee stated that:

"The Committee's view is that the extent of UK Ministers' new delegated powers in devolved areas amounts to a significant constitutional change. We have

[7] The Hansard Society, Five Problems with the Retained EU Law (Revocation and Reform) Bill, 24 October 2022

considerable concerns that this has happened and is continuing to happen on an ad hoc and iterative basis without any overarching consideration of the impact on how devolution works."

Note from Committee adviser, Dr Chris McCorkindale on powers for UK Ministers to act in devolved areas

The Bill confers broad powers upon UK Ministers to act in devolved areas – for example, to preserve REUL, to extend the sunset on specified instruments or categories of instrument, to restate REUL, to restate assimilated law – without the need to seek consent from, or consultation with, the Scottish Government or the Scottish Parliament. As the Committee noted in its *Impact of Brexit on Devolution* report, outside of powers to make secondary legislation that implemented EU obligations, UK Ministers did not generally have powers to act in devolved areas and rarely did so (para 121). The Committee reported that Brexit has marked a step-change in this approach, with UK Ministers being conferred powers in devolved areas to manage the Withdrawal process and the UK's new relationship with the EU but also in areas not previously governed by EU law, sometimes with requirements to seek the consent of devolved counterparts, sometimes with requirements to consult with devolved counterparts and, increasingly, with no requirement to seek consent or consultation at all. The broad powers taken by UK Ministers in the REUL Bill to make secondary legislation in devolved areas do not require devolved consent or consultation. These are broad powers – that include the delegation of Henry VIII powers – that impact directly upon the devolved statute book. Quite apart from how UK Ministers might exercise specific powers in devolved areas there is a more fundamental constitutional issue at stake. That is, the more that secondary legislation in devolved areas is made and (minimally) scrutinised at the UK level – and the more that enabling legislation is made without seeking, or by overriding, legislative consent from the Devolved Administrations - the more that the reserved powers model of devolution is undermined, not by adjusting the boundaries of devolved powers but by occupying the space within devolved boundaries and thereby limiting devolved autonomy and the *effective* exercise of devolved powers.

2. Balance of powers

Sunset of REUL

As explained above, the Bill provides that most REUL will be repealed automatically at the end of December 2023 if steps are not taken to save it.

In its briefing ahead of the Bill's second reading the Hansard Society stated that:

"Acceptance of the automatic expiry (sunset) of REUL will be an abdication of Parliament's scrutiny and oversight role"

Enhancing existing powers to modify retained direct EU law

Clause 10 of the Bill does not itself introduce new powers but rather amends the European Union (Withdrawal) Act 2018 (Schedule 8, paragraph 3) to make it easier to amend retained direct EU legislation ("RDEUL") by secondary legislation. At present, the provision in the European Union (Withdrawal) Act 2018 means, broadly, that RDEUL can only by amended by new primary legislation or by secondary legislation made under a Henry VIII power (if one exists).

The effect is that the legislative status of RDEUL is downgraded from equivalent to domestic primary to equivalent to domestic secondary legislation as regards how it can be amended. This means that the Bill would allow for RDEUL to be amended by secondary legislation as a matter of course.

The Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee notes that:

"Overall, the change in status will make it possible to amend or repeal a greater amount of RDEUL using secondary legislation",

and *"Clause 10 "downgrades" retained direct principal EU legislation and any directly effective rights etc. applying under section 4 EUWA 2018, so that they are treated as equivalent to domestic secondary legislation for the purpose of determining whether powers under other statutes may be exercised to amend them. This means that powers under other statutes will be capable of amending retained direct principal EU legislation or section 4 EUWA rights, whether or not those powers are also capable of amending domestic primary legislation, provided the proposed amendments are within the scope of the enabling powers in question."*

The Hansard Society has explained the effect of clause 10 as follows:

"As a consequence, any power to make delegated legislation conferred prior to the EU (Withdrawal) Act 2018 may be used to amend REUL in future. This is a significant change to the scope of delegated powers, and its significance is enhanced further because this Bill also abolishes the 28-day pre-legislative consultation provisions that existed in relation to the exercise of the power in EUWA".

Challenges for parliamentary scrutiny

There is also a challenge for legislatures in the sheer volume of secondary legislation which may result from the Bill and the timetable within which it would require to be scrutinised (before the sunset). Speaking at Second Reading, Dean Russell MP, the Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy, stated that:

"*Together, we have identified where retained EU law must be excised from our statute book. Now, using this Bill, we will go further and faster to capitalise on the opportunities of Brexit. We will achieve that by addressing the substance of retained EU law through a sunset which means retained EU law will fall away on 31 December 2023 unless there is further action by Government and Parliament to preserve it. A sunset is the most effective way to accelerate reform across over 300 policy areas and will incentivise the rapid reform and repeal of retained EU law."*[8]

It is notable, however, that the UK Government dashboard of REUL *"is not intended to provide a comprehensive account of REUL that sits with the competence of the*

[8] House of Commons Hansard, 25 October 2022, Column 187

devolved administrations, but may contain individual pieces of REUL which do sit in devolved areas."

It is unclear whether the Scottish Government has undertaken work to identify all REUL within devolved competence in Scotland.

3. Sewel and consent

The Committee agreed in its report that:

"the Sewel Convention is under strain following Brexit and notes the view of some of our witnesses that without reform, "there is a risk of the convention, and the legislative consent process that puts Sewel into practice, collapsing altogether."

The Explanatory Notes to the Bill state that legislative consent is being sought from all devolved legislatures and that:

"The Government has proactively engaged with the Devolved Administrations in order to ensure the Bill works for all four nations".

The notes also state that the UK Government:

"remains committed to respecting the devolution settlements and the Sewel Convention, and has ensured that the Bill will not alter the devolution settlements and will not create greater inter-UK divergence."

The approach taken in the Bill is described as *"consistent with other EU exit legislation"* which *"will enable the Devolved Administrations to make provisions for REUL in areas of devolved competence."*

Angus Robertson MSP, Cabinet Secretary for Constitution, External Affairs and Culture wrote to the UK Government on 22 September 2022 (the date that the Bill was introduced in the UK Parliament). The letter expressed the *"deep concern and the fundamental opposition of Scottish Ministers to the Retained EU Law (Reform and Revocation) Bill"* arguing that it *"puts at risk the high standards people in Scotland have rightly come to expect from EU membership."*

In contrast to the comments of the UK Government in the Explanatory Notes the letter stated that:

"I am greatly concerned by the attitude of the UK Government in respect of devolved power, including the operation of the Sewel Convention with regards to this legislation – despite your assurances when we met in May that the Convention would be respected. At the time of writing, I have received no legislative consent request from you in relation to the Bill…I consider it unacceptable that we have had no advance sight of the most controversial clauses of the bill up until a few hours before today's introduction, mirroring the disappointing UK Government approach to engagement ahead of the introduction of the Northern Ireland Protocol Bill and much of the Brexit related legislation. The sunset dates in the legislation would force the Scottish Parliament and Government to reconsider, review and legislate unnecessarily over much legislation which is supposed to be clearly devolved."

The Committee's recent report 'The Impact of Brexit on Devolution' notes that the Sewel Convention applies only to primary legislation. It also sets out that Committees of the Parliament have expressed concern over the lack of a consent requirement for secondary legislation made by UK Ministers in devolved areas:

"The DPLRC and a number of subject committees have raised concerns about the lack of a statutory requirement in UK Bills to seek the consent of Scottish Ministers when using delegated powers to legislate in devolved areas. 9 of the 10 Bills for which LCMs have been lodged in session 6 so far contain at least one power for which there is no statutory consent requirement.[9]"

The Retained EU Law (Revocation and Reform) Bill confers powers in devolved areas on UK Ministers and contains neither consent nor consultation provisions. This means that:

- UK Ministers are given new powers to legislate in devolved areas
- UK Ministers are able to use these powers in devolved areas without the consent of the Scottish Parliament or Scottish Ministers.
- UK Ministers can do so without consulting the Scottish Parliament or Scottish Ministers.

Schedule 3 provides for the parliamentary procedure which is applicable to the delegated powers within the Bill. Where Scottish Ministers act alone to make regulations these are generally subject to the negative procedure except where they amend primary legislation.

The Committee's adviser, Dr Christopher McCorkindale highlights that, as the Committee noted in its *Impact of Brexit on Devolution* report, at least where Brexit and Brexit-related legislation is concerned, UK Government practice has been to legislate regardless of any decision by the Devolved Administrations to withhold consent. The question of legislative consent is particularly important to the passage of this Bill which has direct implications for the devolved statute book, which enables UK Ministers to act in devolved areas without seeking consent from – or consultation with – devolved counterparts, and which enables Scottish Ministers to amend, repeal and replace Retained EU Law subject to the negative procedure (unless the changes made are to primary legislation where they are subject to the draft affirmative procedure). In other words, if enacted in its current form there will be minimal opportunities for the Scottish Parliament to scrutinise and impact upon the *exercise* (or not – bringing the sunset clause into play) of powers (by UK and by Scottish Ministers) in devolved areas. It is important, then, that the Scottish Parliament takes the opportunity now to understand fully, to scrutinise and, where appropriate, to comment on those areas of the Bill that might impact most upon the exercise of its legislative and scrutiny functions.

[9] The Impact of Brexit on Devolution, CEEACC Committee, 22 September 2022 (paragraph 164)

New constitutional arrangements

It is likely that the Bill will have an effect on other new constitutional arrangements which the Committee takes an interest in. These are discussed below.

1. Common frameworks

Common frameworks are intergovernmental agreements about how to deal with 'retained EU law' in certain areas that were previously governed by EU regulations and are within devolved fields (although it's now clear that the scope of some frameworks is much wider than retained EU law, encompassing policies and laws which were not formerly governed at an EU level[10]).

Common frameworks allow the governments of the four parts of the UK to harmonise regulations or to agree to diverge. They may also provide for governments to make policies in these fields jointly. In practice, the most common form is an agreement to handle divergence (by, for example, setting out processes in which divergence will be discussed and agreed or not agreed).

Governments also agreed that frameworks should maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each nation of the UK as was afforded by EU rules.

Most frameworks state that they aim to prevent divergence where it would be harmful, or allow it where it would be acceptable, but frameworks are often silent on exactly what information will be taken into account when assessing whether a proposal for divergence is acceptable.

It is unclear whether framework forums will be the vehicle through which there is discussion between governments on the future of REUL, on which pieces of REUL should be allowed to expire, whether to exercise the powers provided to them in the Bill to preserve, repeal and amend REUL before the sunset, and which government will exercise the powers in each case. Similarly, it is unclear whether framework forums will be the place for discussion on future amendment of assimilated law post 31 December 2023.

Some frameworks did already note the preferred way ahead as being UK wide regulations. Nevertheless, there would appear to be a tension between the frameworks programme as a means of managing divergence and the powers given to UK Ministers to act in devolved areas without the consent of, or consultation with, Scottish Ministers, before making regulations concerning REUL (assimilated law from 1 January 2024) in devolved areas.

2. Alignment with the EU

The Committee's report considered issues around alignment with the EU and the Scottish Government's policy commitment to align where possible with EU law.

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[10] The Animal Health and Welfare Framework is an example of this type of framework where matters previously decided at an EU level, as well as those which were not, are within its scope.

The Committee in particular noted:

"that there are substantive differences between the views of the UK Government and the Scottish and Welsh Governments regarding future alignment/divergence with EU law."

The Committee concluded that this difference of views:

"raises a number of fundamental constitutional questions for the Committee and the Parliament

> *• to what extent can the UK potentially accommodate four different regulatory environments within a cohesive internal market and while complying with international agreements;*
> *• whether the existing institutional mechanisms are sufficient to resolve differences between the four governments within the UK where there are fundamental disagreements regarding alignment with EU law and while respecting the devolution settlement;*
> *• how devolution needs to evolve to address these fundamental questions."*

The UK Government's position is that the Bill *"will not create greater inter-UK divergence"*[11].

The Committee's adviser Professor Lock notes that the power to keep pace with EU law contained in s. 1 of the Continuity Act[12] will apply in parallel with the powers conferred on the Scottish Government by the REUL Bill. The Scottish Ministers retain their power to make regulations corresponding to EU legislation beyond 31 December 2023 (the date on which the power to restate retained EU law ends). This means in particular that Scottish Ministers could – so far as in devolved competence – restate sunsetted retained EU law on the basis of s. 1 Continuity Act and to restate assimilated law beyond 23 June 2026.

Dr Christopher McCorkindale, Committee adviser, highlights that while the Bill itself will not create inter-UK divergence, there is no doubt that the broad and ambiguous way in which many of these powers are drafted, and their allocation across UK and devolved administrations, no doubt enables the possibility - cutting across a range of significant policy areas - of divergence in terms of what legislation is to be made exempt from the sunsetting provision, what retained EU law is to be restated, revoked, replaced or updated and what secondary assimilated law is to be restated. Indeed, given the Scottish Government's commitment to keep pace with EU law and its fundamental opposition to the Bill at least some divergence seems likely.

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[11] Explanatory Notes, paragraph 60
[12] UK Withdrawal from the European Union (Continuity) Act 2021

3. The 'Northern Ireland Protocol'

At its meeting on 27 October 2022 the Committee considered the LCM for the Northern Ireland Protocol Bill.

At present, the Protocol means that:

- Some EU law including some made after IP completion day – 31 December 2020 – continues to apply directly in Northern Ireland
- REUL which is inconsistent with the Protocol is disapplied

The Committee's adviser, Professor Lock explains that retained EU law that has either become "assimilated law" or that has been restated would also need to comply with the requirements of the Northern Ireland Protocol as it applies in the UK. Section 7A of the European Union (Withdrawal) Act 2018 currently gives direct effect and supremacy in UK law to the rights, etc. contained in the withdrawal agreement, which includes the Protocol. Hence assimilated law and restated retained EU law would be subordinated to the Protocol in the same way as retained EU law is currently. Furthermore, any legislation put in place in lieu of formerly retained EU law (which is either sunsetted or revoked according to s. 15 of the REUL Bill) would be subject to the same restrictions arising from the Northern Ireland Protocol.

Professor Lock also points out that the NI Protocol Bill would, however, disapply elements of the Protocol (so-called 'excluded provisions') and allow UK Ministers to make regulations contrary to the Protocol. Hence excluded provisions of the Protocol would no longer have effects in the law of the United Kingdom. The applicability and effects of any assimilated law, restated law, or any new legislation replacing retained EU law would thus no longer be constrained by the Northern Ireland Protocol as far as excluded provisions are concerned.

The Committee's adviser Professor Katy Hayward highlights that a point worth noting with regard to Northern Ireland is the fact that the ongoing absence of an Assembly and Executive (and thus the existence of Assembly committees for scrutiny functions) means that there are significant doubts about how the process of reviewing and revoking, replacing, or restating retained EU law could be performed in Northern Ireland by the end of 2023.

4. UK Internal Market Act 2020

In using the powers in the Bill to amend REUL, Ministers will need to consider how an amendment or restatement may affect how UKIMA applies to that legislation.

UKIMA operates by disapplying legislation in one part of the UK which would prevent market access to goods and service providers which comply with the law in another part of the UK. Broadly speaking, UKIMA contains exemptions for legislation which was in place before the Act took effect. However, in some cases a restatement of the legislation can bring it within the scope of the Act, for example the market access principles for goods do not apply to re-enactment of pre-existing provisions without substantive change, but do apply if there is substantive change.

The Committee advisers (Dr McCorkindale and Professor Lock) highlight that the main effect of UKIMA will be felt where a devolved authority decides to deviate from legislation elsewhere in the UK. The potentially likely scenarios which may be affected by UKIMA are set out below:

1) Devolved authority assimilates pieces of REUL that other devolved authorities and/or the UK Parliament do not assimilate.
2) Devolved authority restates retained EU law but other devolved authorities and/or the UK Parliament do not.
3) Devolved authority otherwise replaces sunsetted REUL, and other devolved authorities and/or the UK Parliament either do not replace it or choose a less burdensome replacement.

Sarah McKay, SPICe research and Committee advisers – Professor Katy Hayward, Professor Tobias Lock, and Dr Christopher McCorkindale
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Retained EU Law and the Retained EU Law (Revocation and Reform) Bill

Sarah McKay

This briefing explains what retained EU law is and how it can be changed at present. It also provides an overview of the Retained EU Law (Revocation and Reform) Bill which was introduced in the UK Parliament on 22 September 2022, and discusses the implications of the Bill for Scotland.

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Summary

In essence, retained EU law is a copy of the EU law that used to apply when the UK was a member of the EU. These laws and rights were brought into domestic law as a new body of law called "Retained EU law".

Retained EU law can therefore be seen as a snapshot of many of the EU laws and rights that applied in the UK at the end of the implementation period (11pm on 31 December 2020 – the point at which EU law ceased to apply in the UK). This point in time is known as Implementation Period Completion Day, or "IP Completion Day". The whole of EU law was not included, there were some exceptions which were not copied across.

Retained EU law exists in areas previously governed by EU law. As such, retained EU law exists in both reserved areas such as labour and employment law, consumer protection law or equality law and devolved areas, notably the law on environment, agriculture, fisheries and animal welfare.

The Retained EU Law (Revocation and Reform) Bill was introduced in the UK Parliament on 22 September 2022.

> " The purpose of the Retained EU Law (Revocation and Reform) Bill is to provide the Government with all the required provisions that allow for the amendment of retained EU law (REUL) and remove the special features it has in the UK legal system."
>
> Explanatory Notes, paragraph 1

Part one of this briefings explains what retained EU law is. Part two considers the Retained EU Law (Revocation and Reform) Bill.

SPICe would like to thank Professor Katy Hayward, Professor Michael Keating, Professor Tobias Lock, and Dr Christopher McCorkindale who, in the course of their work as advisers to the Constitution, Europe, External Affairs and Culture Committee, have provided expertise which has informed this briefing. Professor Lock has also written a joint guest blog (some of which is reproduced here) for SPICe spotlight 'Retained EU law: what's it all about?'.

Part one: retained EU law

This section of the briefing explains what retained EU law is, why and how it was created. It also considers how best to understand retained EU law as a category of domestic law, and looks at how it can be changed at present.

What is retained EU law?

Retained EU law has been described as a “snapshot” of the EU law and rights that applied in the UK immediately before IP Completion Day. In essence, retained EU law (REUL) is copy of the EU law and rights that used to apply when the UK was a member of the EU, which was pasted into the domestic UK statute book. These laws and rights were brought into domestic law as a new body of law called “Retained EU law”. The whole of EU law was not included in the snapshot, there were some exceptions which were not copied across.

Retained EU law therefore exists in areas previously governed by EU law. As such, retained EU law exists in both reserved areas (such as labour and employment law, consumer protection law or equality law) and in devolved areas (notably the law on the environment, agriculture, fisheries, food and animal welfare).

EU law ceased to apply in the UK at the end of the implementation period, at 11pm on 31 December 2020. This point in time is known as Implementation Period Completion Day, or 'IP Completion Day'.

Retained EU law is an umbrella term comprising three different sub-categories:

1. Domestic law which implemented or related to EU obligations. This is called “EU-derived domestic legislation”. This was saved by section 2 of the European Union Withdrawal Act 2018 (EUWA). The most important instances of EU-derived domestic legislation are regulations which implemented EU Directives. Examples include the Working Time Regulations 1998 (a UK Statutory Instrument - a UK SI) which implemented the EU Working Time Directive in England, Scotland and Wales and the Air Quality Standards (Scotland) Regulations 2010 (a Scottish Statutory Instrument - an SSI) which implemented the EU Air Quality Directive in Scotland. The Retained EU Law (Revocation and Reform) Bill ("the Bill") mentions "EU-derived subordinate legislation" which is a sub-category of EU-derived domestic legislation.

2. EU legislation which was directly applicable in the UK, most importantly EU Regulations, which used to apply in the UK in and of themselves. This is now called “retained direct EU legislation”. It was converted into domestic law by section 3 of EUWA. Examples are the EU’s General Data Protection Regulation (known as the UK GDPR in retained EU law) or Regulation 261/2004 (the Flight Compensation Regulation). The same term - "retained direct EU legislation" is used in the REUL (Revocation and Reform) Bill.

3. Other rights, powers, obligations, remedies etc. in EU law that had direct effect in the UK. These are known as “saved EU rights” – a catch-all category for EU rights and obligations which are not captured in “direct EU legislation”. These were saved by section 4 of EUWA. Examples include directly effective rights contained in EU treaties such as the right to equal pay (TFEU article 157) and certain rights under the EU’s

international treaties.

Any EU law that came into force after 11pm on 31 December 2020 is not retained EU law.

Why was retained EU law created?

During the course of the UK's EU membership, EU law applied in the UK because of the European Communities Act 1972 (ECA). Section 1 of the European Union (Withdrawal) Act 2018 (EUWA) repealed the ECA on IP Completion Day. If the ECA had been repealed without any other provision having been made, then from the moment of repeal:

- EU law would have ceased to apply in the UK, and
- all existing domestic legislation made under the ECA 1972, which implemented EU law, would have ceased to have effect.

This would have meant that there was no law in place in the UK in the policy areas that were formerly governed by EU law. This would have resulted in very significant gaps in the statue book across a range of policy areas including food standards, environmental protection, animal welfare, and climate change.

EU law and its principles

In understanding retained EU law it is helpful to have an understanding of EU law more generally. EU law is commonly divided into primary and secondary law.

Primary EU law is the EU Treaties.

Secondary EU law is EU acts adopted on the basis of the Treaties. The different categories of secondary EU law include:

- EU Regulations which are directly applicable in the law of the member states, i.e., each member state does not have to make its own legislation in order to make the Regulation effective in its domestic law.
- EU Directives which must be implemented into the domestic law of each member state by way of domestic legislation. In the UK, this either happened by way of primary legislation (e.g., certain provisions of the Equality Act 2010) or by way of secondary legislation under s. 2 (2) of the ECA, e.g. The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017.

There is also EU “delegated” or “implementing” legislation, known as “tertiary” legislation in the EUWA, often made by the European Commission, which supplements, amends or implements the rules set out in Directives, Regulations and Decisions. An example would be implementing legislation made under an EU Regulation. It is comparable to secondary

legislation (SIs) in the UK.

A key principle of EU law is that EU law is supreme, which means that it takes precedence over conflicting domestic law within the EU's member states. Domestic laws in EU member states must therefore be disapplied by domestic courts if found to be inconsistent with EU law.

The EUWA ended the supremacy of EU law in the UK after IP Completion Day. Section 5(1) of 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 IP Completion Day."

For law made before IP Completion Day, section 5(2) of EUWA provides that the principle of supremacy is preserved, with pre-exit domestic enactments still being read subject to retained EU law and disapplied to the extent that they are inconsistent. Section 5(2) provides that:

> " 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 IP Completion Day"

The second principle is that EU law can have direct effect if it is formulated in a clear, precise and unconditional manner. This means that it can be relied upon by individuals in national court cases in EU member states. The principle of direct effect continues to be relevant in the UK for determining which rights are retained under section 4 of EUWA. As above, EU law itself ceased to have direct effect in the UK on IP Completion Day.

EUWA (as amended by the EU (Withdrawal Agreement) Act 2020) also gives effect to certain provisions in the Withdrawal Agreement, and gives them direct effect in, and supremacy over, domestic law.

Why does the status attached to pieces of retained EU law matter?

Retained EU law does not neatly fit the traditional distinction between UK primary and secondary legislation. Primary legislation is an Act of the UK Parliament or of a devolved legislature (e.g., an Act of the Scottish Parliament). Secondary legislation is legislation made under powers delegated by an Act, so for example UK Statutory Instruments made by UK Ministers and Scottish Statutory Instruments made by Scottish Ministers (secondary legislation is also known as "subordinate or delegated legislation").

The status of retained EU law in the legal order of the UK is set out in section 7 of the European Union Withdrawal Act 2018 (EUWA). The status attached to a piece of retained EU law is significant because it determines how it can be amended.

EU-derived domestic legislation which is an Act of Parliament (e.g., the Equality Act 2010) retains the status of primary legislation. Most EU-derived domestic legislation consists of statutory instruments (including Scottish Statutory Instruments) and thus retains the status of secondary legislation. Typically, therefore, an Act of Parliament which is retained EU law can only be amended by the legislature, and this would require a new Bill.

Matters are more complex where direct EU legislation is concerned. This is because direct EU legislation was EU law made by the EU institutions, which was directly applicable in UK law without the need for domestic legislation. In so far as such direct EU legislation was retained by EUWA, it has a unique status in domestic law as neither primary nor secondary legislation. Rather, it is known as “principal” or “minor” retained EU legislation.

In general, the EU Regulations which were incorporated into domestic law are now retained direct principal EU legislation[i] and all EU legislation below that level, including ‘tertiary legislation’ (typically EU Commission regulations, i.e., delegated legislation) is now retained direct minor EU legislation.

Again, the status of this retained EU law as either retained direct principal EU legislation or retained direct minor EU legislation determines how changes can be made to it by domestic legislation. EUWA makes it more difficult to repeal retained direct principal EU legislation than retained direct minor EU legislation. Retained direct principal EU legislation can be amended as provided for in section 7(2) of EUWA:

> Retained direct principal EU legislation cannot be modified by any primary or subordinate legislation other than—
>
> (a) an Act of Parliament,
>
> (b) any other primary legislation (so far as it has the power to make such a modification), or
>
> (c) any subordinate legislation so far as it is made under a power which permits such a modification by virtue of—
>
> (i) paragraph 3, 5(3)(a) or (4)(a), 8(3), 10(3)(a) or (4)(a), 11(2)(a) or 12(3) of Schedule 8,
>
> (ii) any other provision made by or under this Act,
>
> (iii) any provision made by or under an Act of Parliament passed before, and in the same Session as, this Act, or
>
> (iv) any provision made on or after the passing of this Act by or under primary legislation.

Retained direct minor EU legislation can be amended according to section 7(3) of EUWA in all of the above ways, in addition it can also be amended by secondary legislation more generally.

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i Retained direct principal EU legislation is considered primary legislation for the purposes of the Human Rights Act 1998.

Retained direct minor EU legislation cannot be modified by any primary or subordinate legislation other than—

(a) an Act of Parliament,

(b) any other primary legislation (so far as it has the power to make such a modification), or

(c) any subordinate legislation so far as it is made under a power which permits such a modification by virtue of—

(i) paragraph 3, 5(2) or (4)(a), 8(3), 10(2) or (4)(a) or 12(3) of Schedule 8,

(ii) any other provision made by or under this Act,

(iii) any provision made by or under an Act of Parliament passed before, and in the same Session as, this Act, or

(iv) any provision made on or after the passing of this Act by or under primary legislation.

Emphasis is added above to highlight difference between how retained direct principal and minor legislation can be amended.

Retained EU case law

Another important aspect of retained EU law is retained EU case law. While the UK was a member of the EU, interpretation and application of EU law relied on both the judgments of the Court of Justice of the European Union (CJEU) and of domestic courts (i.e., courts in the UK).

Domestic courts were bound to follow the CJEU which determined points of EU law. Domestic courts then applied that law to the specific facts of the case before them. To what extent and how domestic courts should take account of the view of the CJEU on the same point of law post-EU exit is set out in EUWA and generally depends on whether the CJEU judgment was made before or after IP Completion Day (31 December 2020).

EU case law (both from domestic courts and EU courts) that existed immediately before IP Completion Day continues to be binding on most courts in the UK in relation to interpreting and applying unmodified retained EU law so far as it is relevant to it.

Decisions of the CJEU made after IP Completion Day are not binding on domestic courts, but domestic courts may have regard to such a decision so far as it is relevant to the case before them.

Certain courts are able to depart from retained EU case law. For example, the UK Supreme Court is not bound by any retained EU case law and the High Court of Justiciary in Scotland is not bound in certain circumstances. The same is true for the Inner House of the Court of Session, and the Court of Appeal for England and Wales and the Court of Appeal for Northern Ireland. They may therefore depart from retained EU case law, but

'must apply the same test as [they] would apply in deciding whether to depart from [their] own case law'[ii].

How domestic courts will approach retained EU law post EU exit remains in large part to be seen. One of the first cases to consider the issue was in the Court of Appeal (England and Wales), Lipton v BA Flyer (about air passengers' rights to compensation for delayed flights), heard in March 2021. The Court of Appeal (Lord Justice Green) noted that the Court:

> " …cannot therefore assume that the old ways of looking at EU derived law still hold good. We must apply the new approach. There is much that is familiar but there are also significant differences."

On the whole the Court of Appeal held that the power to depart from retained EU case law should 'be exercised with great caution' (Chelluri v Air India, per Lord Justice Coulson).

The UK Government's 'Benefits of Brexit' paper published in January 2020 highlighted that the UK Government was considering the continued effect of supremacy of EU law over domestic law made before 31 December 2020:

> " Second, we are looking at how to remove the continued effect of supremacy of EU law over domestic law which was made before the end of the transition period. Such a change will allow Parliament to more clearly define the relationship between retained EU law and UK law. We are considering what might be the most appropriate relationship between these two bodies of law in light of the need to promote legal certainty and whether any ancillary powers will be required for the courts for these purposes. This will provide an opportunity to consider creating a bespoke rule that would address cases where retained EU law came into conflict with domestic law, that had the benefit of specific authorisation by Parliament."

Legislative competence of the Scottish Parliament

Until IP Completion Day (11pm on 31 December 2020), any legislation passed by the Scottish Parliament had to comply with EU law: it was outwith the Scottish Parliament's legislative competence to legislate incompatibly with EU law. When EU ceased to apply in the UK, this requirement was removed.

At the same time, this was replaced by a restriction on the Scottish Parliament's competence to prevent it from changing the law in any policy area that had been "frozen" by regulations made by the UK Government. This was set out in section 30A of the Scotland Act 1998 (which had been added by section 12 of the EUWA). Section 30A(1) provided that:

> " An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown."
>
> Scotland Act 1998, Section 30A

However, no "freezing" regulations were ever made, and the power to make them expired on 31 January 2022. In March 2022 section 30A of the Scotland Act was repealed. This

ii European Union (Withdrawal) Act 2018, section 6

means that in principle the Scottish Parliament has legislative competence in all areas of retained EU law in devolved areas.

While no freezing regulations were ever made, some changes to the the Scottish Parliament's legislative competence were made by other exit-related UK Parliament legislation. Subsidy Control was, for example, made a reserved matter by the UK Internal Market Act 2020, and the whole of that Act was made a "protected enactment" which the Scottish Parliament cannot modify.

Most of the European Union (Withdrawal) Act 2018 is also a "protected enactment" which the Scottish Parliament cannot modify. The Scottish Parliament cannot therefore make provision for the status or interpretation of retained EU law that is inconsistent with the protected provisions of the European Union (Withdrawal) Act 2018[iii].

How can retained EU law in devolved areas be changed at present?

The mechanism for changing Retained EU law (REUL) depends on its status.

EU-derived domestic legislation which takes the form of primary legislation retains the status of primary legislation. Most EU-derived domestic legislation, however, consists of statutory instruments and retains the status of secondary legislation. Retained EU law that was not originally domestic legislation, i.e., which was originally made by the EU institutions rather than UK institutions, is now broadly split into retained EU Regulations, which are retained direct "principal" EU law, and legislation below that level, which is retained direct "minor" EU law. Whether it can be amended by new secondary legislation, as opposed to requiring new primary legislation, will depend on its status and also on whether a delegated power exists which is capable of being used for that purpose.

One very wide power to amend retained EU law by secondary legislation was conferred in EUWA: the "deficiency-correcting" power. This power could be used by both the UK and Scottish Ministers in devolved areas to make regulations that fixed the huge number of "deficiencies", or failures of retained EU law to operate effectively, when it was copied over onto the domestic statute book. This power was used to make the hundreds of "EU Exit" SIs and SSIs which the Scottish Parliament considered either under its normal SSI scrutiny process or by way of its consideration of "SI notifications". This power expires two years after IP Completion Day, and therefore cannot be used after the end of this year (31 December 2022).

Primary legislation has already been passed at the Scottish Parliament which gives Scottish Ministers powers to amend retained EU law by secondary legislation in specific policy areas. The Agriculture (Retained EU Law and Data) (Scotland) Act 2020, for example, gives Scottish Ministers powers to make regulations which amend or replace parts of the EU Common Agricultural Policy which forms part of retained EU law. These powers expire in May 2026. Scottish Ministers were also given power in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 to make secondary legislation to "keep pace" with developments in EU law, which can involve amending retained EU law. This power expires in March 2027 (unless extended).

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iii Scottish Continuity Bill Reference [2018] UKSC 64

UK Parliament primary legislation has also amended and conferred powers to amend retained EU law by secondary legislation. For example, the Professional Qualifications Act 2022 itself revoked the European Union (Recognition of Professional Qualifications) Regulations 2015 which implemented the EU scheme for recognising professional qualifications. The 2015 Regulations became retained EU law on IP Completion Day. The Professional Qualifications Act 2022 also provides powers to enable the appropriate national authority to revoke retained EU law that relates to the recognition of overseas qualifications or overseas experience.

UK Government dashboard of retained EU law

On 22 June 2022 the UK Government published a dashboard of retained EU Law (REUL). The publication of the dashboard was the conclusion of the UK Government's review into the substance of REUL *"to determine which departments, policy areas and sectors of the economy contain the most REUL"* [1] .

The introductory text to the dashboard states that it provides *"an authoritative catalogue of REUL"*, although it is later stated that:

> " This dashboard is a tool to explore over 2400 pieces of REUL, across 300 unique policy areas and 21 sectors of the UK economy...The Government will continue developing this authoritative record of where EU-derived legislation remains and will work to identify more legislation which can be amended, repealed or replaced.""
>
> UK Government , 2022[1]

The dashboard notes that it will be updated quarterly as more REUL is *"repealed or replaced or more REUL is identified"*. It is unclear whether an update was made in September 2022.

The dashboard notes in relation to REUL in devolved areas that:

> " is not intended to provide a comprehensive account of REUL that sits with the competence of the devolved administrations, but may contain individual pieces of REUL which do sit in devolved areas."
>
> Retained EU Law Dashboard

On 27 June 2022, Mick Antoniw, Counsel General and Minister for the Constitution indicated in a Ministerial Statement the Welsh Government's view on the dashboard of REUL:

> " In contrast to the collaborative work between the UK Government and the Devolved Governments to create the body of REUL, prior to publication we were given a very limited opportunity to view the dashboard, which is unacceptable. The dashboard contains no information about which instruments of REUL are in devolved areas, despite requests for this being made by the Devolved Governments, or what legislation made in Wales could be affected by the UK Government's wider proposals to amend, repeal or replace all REUL. It is of vital importance for the people and businesses of Wales that any proposals to change REUL are fully assessed and considered in the constitutional context of the devolved settlements before any decisions are made, including respecting the provisions and ways of working reflected in agreed common frameworks. We continue to call on the UK Government to ensure that REUL in devolved areas is clearly identified as a matter of priority, and that more broadly its future actions properly respect devolved responsibilities and live up to its commitments through common frameworks."
>
> Welsh Government , 2022[2]

Background to Retained EU Law (Revocation and Reform) Bill

In 2019 the Conservative Party manifesto committed to ending the supremacy of 'European law' in the UK following the UK's exit from the European Union (EU). The party argued that this would allow the UK to be *"free to craft legislation and regulations that maintain high standards but which work best for the UK."*

In September 2021 the UK Government announced a two-pronged review into retained EU law. The review was on both the substance and status of retained EU law. [3] In a Ministerial Statement on 16 September 2021, Lord Frost explained the dual purpose of the review:

> " First, we will conduct a review of so-called retained EU law. By this, I mean the very many pieces of legislation which we took on to our own statute book through the European Union (Withdrawal) Act 2018. We must now revisit this huge, but for us anomalous, category of law. In doing so, we have two purposes in mind. First, we intend to remove the special status of retained EU law so that it is no longer a distinct category of UK domestic law but normalised within our law, with a clear legislative status. Unless we do this, we risk giving undue precedence to laws derived from EU legislation over laws made properly by this Parliament. This review also involves ensuring that all courts of this country should have the full ability to depart from EU case law, according to the normal rules. In so doing we will continue, and indeed finalise, the process of restoring this sovereign Parliament, and our courts, to their proper constitutional positions. Our second goal is to review comprehensively the substantive content of retained EU law."
>
> Lords Hansard, volume 814, Thursday 16 September 2021

In December 2021, a written Ministerial Statement provided further clarification on the review of the substance and status of retained EU law. In terms of the status of retained EU law, the statement indicated that the UK Government had identified "*seven areas where EU law concepts, retained by the EU Withdrawal Act, still affect the UK even though we have left the EU.*"

“

1. Under the European Union (Withdrawal) Act, rights under treaties and directives which had direct effect in UK law whilst we were a Member State have been incorporated into domestic law. Many of these rights - like respect for human rights and equal pay for men and women - replicate rights that were already part of UK law, separately from our EU membership. We want to ensure, to the extent appropriate, that the UK law-derived rights relied on in our legal system are not confused or overlaid with EU-derived rights. If required, we will also clarify the scope of directly effective rights in directives, saved as REUL under section 4 of the Act, to make it clear that only those rights which have already been recognised by the CJEU or the UK courts are incorporated.”

2. Even though we have left the EU, the UK courts are still required to interpret REUL in accordance with retained general principles of EU law, such as proportionality and the protection of legitimate expectations, so far as those principles are relevant. These general principles have developed in the EU over the years to apply to the laws as they exist in the EU system. But REUL is now UK law derived from EU sources - so we need to consider whether this new body of UK law should be interpreted under UK principles of interpretation, or under those that apply to the EU treaties and legislation developed for Member States. 3. Currently, under the European Union (Withdrawal) Act 2018, REUL has a special and unusual status in UK law. Whatever its original EU legislative form (for example, a regulation or treaty article), for some purposes REUL is treated as UK primary legislation, and in other cases its status depends on its original form (with a significant number automatically accorded the status of primary legislation). Accordingly, we will be revisiting the legislative framework in the European Union Withdrawal Act and the operation of such REUL, so that it is given a more appropriate status within the UK legal system for the purposes of amendment and repeal. That status should reflect the fact that Parliament had no ability to block or amend such legislation once agreed in Brussels - indeed it often had no meaningful democratic scrutiny in the UK at all. Accordingly, this aspect of the review will consider whether, and if so, how, REUL could be amended or repealed by an accelerated process, with appropriate oversight, given the unsatisfactory nature of its original incorporation. 4. The EU concept of the ‘supremacy of EU law’ - which forces all other UK legislation to be interpreted so as to give way to EU law where there is a conflict (even if EU law was overridden by subsequent non-EU sourced UK law) - has been preserved by the 2018 Act so far as relevant to the interpretation, disapplication or quashing of domestic law passed or made before the end of the transitional period. This interpretative concept is alien to the UK legislative principles, whereby later parliaments (and their laws) can override earlier parliaments. This concept never sat well with our long established democratic and parliamentary traditions, and now we have left the EU is clearly no longer appropriate. We will consider the issue and it is likely that we will propose removing the concept from the statute book. 5. Under the 2018 Act, in interpreting REUL, UK courts remain bound by EU courts and their decisions issued before the transition period ended. Only the Supreme Court or certain appellate courts have the power to depart from such case law. REUL is UK law which is derived from a (now) foreign source. In all other cases, when UK legislation draws on foreign models, its courts are not bound by foreign case law, although it may be persuasive. Accordingly, we need to consider the anomalous status of EU case law, and we will be revisiting the issue of which UK courts should be able to depart from retained EU case law, and on what basis. 6. The Court of Justice of the EU may, from time to time, declare an EU instrument invalid under EU law. In addition to the general process for addressing REUL which is no longer right for the UK, we propose to ensure that the retained

> version can be swiftly removed when the original EU law measure has been declared invalid under EU law. 7. The review will also consider any consequential actions, such as updated guidance relating to the courts (for example, on the treatment of EU case law) and the place of EU law in legal education"
>
> Brexit Opportunities, Review of Retained EU law, Ministerial Statement, 9 December 2021

On the overall purpose of the review and on the substance of retained EU law, the Statement indicated that:

> " Our overall intention remains, in time, to amend, replace, or repeal all the REUL that is not right for the UK. On the substance review, I have directed Government departments to establish the content of REUL in policy areas for which they are responsible, and to consult stakeholders as necessary. There is no authoritative assessment by Government of which policy areas are most affected by REUL. This first review will deliver such an assessment, and enable us to establish which sectors of the economy and which departments are most affected by REUL."
>
> Brexit Opportunities, Review of Retained EU law, Ministerial Statement, 9 December 2021

In January 2022, the UK Government published its Benefits of Brexit report. The report stated that the UK Government was setting:

> " a clear agenda for changing how we regulate and drive our economy forward—including how we will reform our regulatory framework, rethink how some of our regulators operate and review retained EU law. This will give us the best platform to capitalise on our regulatory freedoms for the long term."
>
> UK Government , 2022[4]

The Paper also argued that an efficient use of parliamentary time necessitated a change to the mechanism for amending retained EU law:

> " Many of these retained laws, including those containing technical detail, are afforded the status of primary legislation for the purposes of amendment. As Parliament has so many substantial policy questions to consider, the Government considers it not a good use of finite Parliamentary time to require primary legislation to amend all of these rules. A targeted power would provide a mechanism to allow retained EU law to be amended in a more sustainable way to deliver the UK's regulatory, economic and environmental priorities."

In the Queen's Speech in May 2022 a future Bill, referred to as the 'Brexit Freedoms Bill', was listed. A future 'Brexit Freedoms Bill' was, during the Queen's Speech, set in the context of economic growth and "lightening the regulatory burden" on UK businesses. The briefing notes published by the UK Government on the context of the Queen's Speech stated that the Bill's purpose would be to *"Fulfil the manifesto commitment to end the supremacy of European law and seize the benefits of Brexit by ensuring regulation fits the needs of the UK, which in turn will enable economic growth."* The briefing notes also highlighted that:

> " The Government's review of retained EU law has, to date, identified over 1,400 pieces of EU-derived law that have been transferred into UK law."
>
> UK Government , 2022[5]

The dashboard of Retained EU Law referred to above is the conclusion of the UK Government's review into REUL.

Part two: the Retained EU Law (Revocation and Reform) Bill

The Retained EU Law (Revocation and Reform) Bill was introduced in the UK Parliament on 22 September 2022.

> " The purpose of the Retained EU Law (Revocation and Reform) Bill is to provide the Government with all the required provisions that allow for the amendment of retained EU law (REUL) and remove the special features it has in the UK legal system."
>
> Explanatory Notes, paragraph 1

What does the Bill do?

The Bill will have four main effects:

1. Provide a 'sunset' on REUL, meaning that most REUL which is not specifically kept (by Ministers actively taking steps to keep a piece of legislation on the statute book) will be automatically repealed at the end of 2023 (i.e., on 31 December 2023).[iv]
2. Give powers to UK Ministers and Ministers of the devolved authorities in Scotland, Wales and Northern Ireland to enable them to amend, revoke or retain pieces of retained EU law (REUL). Powers in other acts are modified to enable them to be used to amend most REUL by secondary legislation.
3. Change the rules on how REUL is to be interpreted, by removing the principle of supremacy of EU law and other retained general principles of EU law by the end of December 2023, allowing UK courts to depart from retained case law, and requiring retained direct EU legislation to be interpreted and applied consistently with domestic legislation.
4. Rename REUL which remains on the statute book after 31 December 2023 as "assimilated law".

Sunset of retained EU law

The Bill (clause 1) provides that most REUL will be revoked automatically at the end of December 2023 if steps are not taken to save it (see Ministerial Powers section of this briefing).

> " To ensure REUL comes to an end in the near future, a sunset of REUL by the end of 2023 has been included in the Bill."
>
> UK Government printed by the UK Parliament , 2022[6] paragraph 16

The Bill provides that the following types of legislation are subject to the sunset: EU-derived subordinate legislation (i.e. legislation other than primary legislation made in England, Wales, Scotland and Northern Ireland which implements or related to EU obligations) and retained direct EU legislation.

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iv Saved EU rights (see what is retained EU law) will also sunset on the same day.

Clause 1 refers to 'EU-dervived subordinate legislation'. This is domestic law (i.e. Law within the UK) which implemented or related to EU obligations, but not primary legislation. It falls within the category of "EU-derived domestic legislation"(saved by section 2 of the European Union Withdrawal Act 2018).

EU-derived domestic legislation which takes the form of primary legislation is not subject to the sunset. The Bill defines primary legislation (clause 21) as:

- An Act of Parliament (i.e., an Act of the UK Parliament)
- An Act of the Scottish Parliament
- An Act or Measure (a lower category of primary legislation) of Senedd Cymru
- Northern Ireland legislation

An example of primary legislation not caught by the sunset would be the Equality Act 2010 which implemented EU law as well as consolidating and re-stating domestic law which applied prior to the UK's membership of the EU (e.g. the Equal Pay Act 1970).

The Bill (clause 2) provides that the sunset can be extended, although not beyond 23 June 2026. UK Government Ministers are therefore able to extend the sunset by making regulations (i.e., by secondary legislation).

The power to extend the sunset is provided to UK Government Ministers only. No equivalent power is given to Scottish Ministers (or Ministers of other devolved governments). There is also no process provided for in the Bill for Ministers of the devolved governments to request an extension to the sunset provision. Where UK Government Ministers wish to exercise the power in devolved areas there is no requirement in the Bill that they obtain the consent of the devolved authorities or consult them.

UK Government Ministers are able to extend the sunset *"as it applies in relation to a specified instrument or a specified description of legislation within section 1(1)(a) or (b)"*. That is to say UK Ministers can extend the sunset for specific pieces of REUL or for REUL that falls within a specific description that Ministers set out in secondary legislation.

The Bill (clause 6) provides that REUL which is not revoked (i.e. REUL which is not subject to the sunset or that REUL which is specifically saved) is to be known as "assimilated law" after the end of 2023 (see also section on interpretation of REUL).

Creation of new category of law: assimilated law

From 1 January 2024 (i.e. after the sunset on 31 December 2023) the category of domestic law known as retained EU law will be renamed "assimilated law". Clause 6 of the Bill provides for this.

The Explanatory Notes state that:

> " At all times after the end of 2023, REUL that remains in force will be known as "assimilated law"."

Many of the powers given to Ministers in the Bill which can be used to change REUL up until 31 December 2023 are available in relation to assimilated law after 31 December 2023 (up until 23 June 2026).

Enhancing existing powers to modify retained direct EU law

Clause 10 of the Bill does not itself introduce new powers but rather amends the European Union (Withdrawal) Act 2018 (Schedule 8) to make it easier to amend retained direct EU legislation ("RDEUL") by secondary legislation.

At present, the provision in the European Union (Withdrawal) Act 2018 means, broadly, that RDEUL can only by amended by new primary legislation or by secondary legislation made under a Henry VIII power if one exists.

> Henry VIII powers are those which enable secondary legislation to repeal or amend primary legislation. The usual constitutional principle is that primary legislation, passed by parliament, should be repealed or amended only by other primary legislation passed by parliament, not by secondary legislation made by the executive. Key to this principle is that where the executive wants to amend or repeal primary legislation which has been put in place by Parliament, it should do so by way of a bill, which will receive full parliamentary scrutiny, and which Parliament has the opportunity to amend. Secondary legislation receives a far lower level of scrutiny and Parliament cannot amend it, only approve or reject it as a whole [7] .

The effect of clause 10 is that the legislative status of RDEUL is downgraded from equivalent to domestic primary to equivalent to domestic secondary legislation as regards how it can be amended. This means that the Bill would allow for RDEUL to be amended by secondary legislation as a matter of course.

The Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee notes that:

> " *Overall, the change in status will make it possible to amend or repeal a greater amount of RDEUL using secondary legislation* "

and

> " Clause 10 "downgrades" retained direct principal EU legislation and any directly effective rights etc. applying under section 4 EUWA 2018, so that they are treated as equivalent to domestic secondary legislation for the purpose of determining whether powers under other statutes may be exercised to amend them. This means that powers under other statutes will be capable of amending retained direct principal EU legislation or section 4 EUWA rights, whether or not those powers are also capable of amending domestic primary legislation, provided the proposed amendments are within the scope of the enabling powers in question."

The Hansard Society has explained the effect of clause 10 as follows [8] :

As a consequence, any power to make delegated legislation conferred prior to the EU (Withdrawal) Act 2018 may be used to amend REUL in future. This is a significant change

to the scope of delegated powers, and its significance is enhanced further because this Bill also abolishes the 28-day pre-legislative consultation provisions that existed in relation to the exercise of the power in EUWA.

Ministerial powers to amend, retain and repeal retained EU law

The Bill confers nine new powers on UK Government Ministers, of which six are conferred also on Scottish Ministers (and Ministers of other devolved administrations).

In cases where powers are granted to Ministers of devolved administrations, they are conferred concurrently and jointly.

> "Concurrently" means that they can be used either by a UK Minister or a devolved administration independently of each other in devolved areas.
>
> "Jointly" means a UK Minister and a devolved administration acting together.

The Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee states that this way of allocating the powers gives:

> " flexibility to ensure that the most efficient and appropriate approach to amending and replacing REUL can be taken in every situation."

The significant powers are outlined below. Other powers include power to make consequential provision (clause 19) exercisable by UK Ministers only; and power to make transitional and savings provision (clause 22) both of which are exercisable by UK Ministers only.

The power to preserve retained EU law

The Bill (clause 1) provides that most REUL will be revoked automatically at the end of December 2023 if steps are not taken to save it.

REUL which takes the form of primary legislation is not subject to the sunset. Primary legislation means Acts of the UK Parliament, Acts of the Scottish Parliament, Acts of the Welsh Senedd and Northern Ireland legislation.

Clause 1(2) provides that "relevant national authorities" can specify legislation to be exempt from the sunset. This could be individual pieces of, or provisions within a piece of REUL.

"Relevant national authorities" are defined in the Bill as:

- A Minister of the Crown
- A devolved authority; or
- A Minister of the Crown acting jointly with one or more devolved authorities

A devolved authority means Scottish Ministers, Welsh Ministers or a Northern Ireland department. As such, Scottish Ministers are given a power to specify legislation to be

exempt from the sunset provision.

Regulations to preserve REUL are subject to the negative procedure at the UK Parliament or relevant legislature.

UK Ministers could use the power to preserve REUL in devolved areas, and there is no consent or consultation requirement in such circumstances. Accordingly, UK Ministers could use this power in devolved areas without the consent of, and without consulting, the relevant devolved government or legislature.

The power to extend the sunset

The Bill (clause 2) provides that the sunset can be extended, although not beyond 23 June 2026. UK Government Ministers are able to extend the sunset by making regulations (i.e., by secondary legislation). The Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee notes that this power is a Henry VIII power (which enables secondary legislation to amend primary legislation).

The power to extend is provided to UK Government Ministers only. No equivalent power is given to Scottish Ministers or Ministers of other devolved governments.

There is no process provided for in the Bill for devolved governments to request an extension to the sunset provision. There is neither a requirement to obtain their consent nor to consult them where UK Government Ministers wish to exercise the power in devolved areas.

Regulations made to extend the sunset are subject to the negative procedure in the UK Parliament.

UK Government Ministers are able to extend the sunset *"as it applies in relation to a specified instrument or a specified description of legislation within section 1(1)(a) or (b)"*. That is to say, in order to extend the sunset, UK Ministers would need to specify the individual pieces or categories of legislation for which the extension is to apply; a blanket extension of the sunset date is not envisaged.

The power to restate retained EU law

Clause 12 gives UK Ministers and Scottish Ministers (in addition to Welsh Ministers and Northern Ireland departments) the power to restate secondary REUL (which includes primary legislation the text of which was inserted by secondary legislation) by regulations. The power is available until the sunset date which is 31 December 2023. This is a Henry VIII power (which enables secondary legislation to amend primary legislation).

If REUL is restated in this way, it is no longer REUL but domestic legislation and is not subject to the sunset.

The power *"cannot make substantive change to the policy effect of legislation"* [9] . Regulations made under the exercise of the power are subject to the negative procedure or the draft affirmative procedure where an instrument amends primary legislation.

UK Ministers could use the power to restate REUL in devolved areas – there is no consent

or consultation requirement in such circumstances.

The power to restate assimilated law

Clause 13 gives UK Ministers and Ministers of a devolved government a power to restate provisions of secondary assimilated law. This allows the process of clarifying, consolidating and restating legislation derived from the UK's membership of the EU to continue post 31 December 2023 (where the legislation has been saved from sunsetting).

The power is available until the 23 June 2026 (the tenth anniversary of the referendum on the UK's membership of the EU).

Secondary assimilated law is defined as:

- Any assimilated law which is not primary legislation;
- Any assimilated law that is primary legislation the text of which was inserted by subordinate legislation.

If secondary assimilated law is restated it is no longer categorised as assimilated law.

The power is similar to the power to restate retained EU law (clause 12) but relates to assimilated law and is therefore available only after 31 December 2023. It is also a Henry VIII power (which enables secondary legislation to amend primary legislation).

Regulations made under the power are subject to the negative procedure unless they amend primary legislation in which case the draft affirmative procedure is to be used. As with the power to restate REUL, the power to restate assimilated law cannot be used to significantly change policy.

The UK Government's justification for the power is:

> " to ensure legal certainty in areas of REUL where policy is not intended to immediately change following the UK's exit from the EU. It ensures that the UK Government can continue to act to maintain current policy effect (i.e., as of today) after the sunset date and before 23 June 2026, to mitigate any unintended consequences associated with the sunset and the end of the special status of REUL on 31 December 2023."
>
> UK Government (published by the UK Parliament), 2022[9]

UK Ministers could use the power to restate assimilated law in devolved areas – there is no consent or consultation requirement in such circumstances. Accordingly, UK Ministers could use this power in devolved areas without the consent of, and without consulting, the relevant devolved government or legislature.

The power to revoke or replace

This power, in clause 15, allows UK Ministers and devolved Ministers to revoke REUL (up until 31 December 2023) or assimilated law (from 1 January 2024) and replace it. The power is available until 23 June 2026.

Where provision is made to replace REUL or assimilated law the replacement provision can implement different policy objectives.

The UK Government's note on delegated powers from the Cabinet Office argues that the power is required because relying on primary legislation to do this job would be inappropriate:

> " The power is required as there are approximately 2000 pieces of secondary retained EU law, including RDEUL, that the Government may wish to replace with legislation more suited to the UK's needs. Doing so purely through sector specific primary legislation would take a significant amount of Parliamentary time."
>
> UK Government (published by the UK Parliament), 2022[9]

It also notes that

> " the Retained EU Law Substance review has identified a distinct lack of subordinate legislation making powers to remove REUL from the UK statute book where appropriate, and if required replace that provision with legislation that is more fit for purpose for the UK". It continues "had the UK never been a member of the EU, many of the areas identified by the substance review would likely already have similar powers to comparable non EU policy areas to amend. The lack of powers is therefore an oddity created by our EU membership."
>
> UK Government (published by the UK Parliament), 2022[9]

The UK Government's position is that this power affords an equivalent or a higher level of UK parliamentary scrutiny than the scrutiny that applied to the REUL itself, given that *"REUL that this power can replace initially came into force in the UK with the scrutiny of secondary legislation or with no UK Parliament scrutiny if it was directly effective EU law…Requiring that these policy areas should now be subject to primary legislation would be a marked reduction in the UK's legislative dynamism."*[9]

The UK Government's justification for the power to revoke or replace is:

> " The UK is no longer part of the EU Single Market or the EU Customs Union and is therefore no longer bound by its laws and regulations. Government departments are keen to make changes to the EU-derived laws and obligations that still form part of the UK's legal system in the form of REUL, either be removing them from the statute book or by replacing that legislation with new provisions that are more fit for purpose now that the UK has left the EU. Parliament has already voted for and enacted a form of Brexit that allowed for significant regulatory divergence, so this power builds upon that decision to allow for departure from the EU acquired acquis where it is in the UK's best interests to do so and therefore capitalise on the benefits of Brexit."
>
> UK Government (published by the UK Parliament), 2022[9]

Clause 15(5) imposes an important restriction on the exercise of the power, including by the devolved governments:

> " No provision may be made by a relevant national authority under this section in relation to a particular subject area unless the relevant national authority considers that the overall effect of the changes made by it under this section (including changes made previously) in relation to that subject area does not increase the regulatory burden."

"Burden" is defined as including "amongst other things" –

- A financial cost
- An administrative inconvenience
- An obstacle to trade or innovation
- An obstacle to efficiency, productivity or profitability
- A sanction (criminal or otherwise) which affects the carrying on of any lawful activity.

The Hansard Society has stated that:

> " The clause thus imposes what amounts to a regulatory ceiling. This is contrary to previous claims from Ministers that in some areas REUL might be amended to enhance regulatory requirements (e.g. in the field of animal welfare)."
>
> The Hansard Society, 2022[10]

At Second Reading in the House of Commons, Stella Creasy MP (Labour) stated:

> " clause 15 formally confirms that we can only go down, and we can only have a race to the bottom, because it talks explicitly about not increasing burdens."

Dean Russell MP, the Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy responded:

> " the Bill will ensure that we have the highest standards, and within the process of this framework we will ensure that the burdens of delivering the best possible regulatory scheme are removed, while ensuring that we have the highest standards across all we do."

Robin Walker MP (Conservative) asked for assurance on environmental and animal welfare standards, noting that during his two years in the Department for Exiting the European Union he *"gave many assurances in those years that, as we left the EU, our environmental standards and animal welfare regulations would be improved and strengthened, not weakened."*

The response from the UK Minister was that *"We will use the powers in the Bill to ensure that our environmental law is functioning and able to drive improved environmental outcomes, with the UK continuing to be a world leader in environmental protection."*

The power to update

Clause 16 provides a power to update REUL. This is conferred on UK Ministers and devolved authorities and is subject to the negative procedure. The power is not subject to a sunset.

The power allows Ministers to "update" legislation *"to take account of changes in technology or in developments in scientific understanding".*

The note on delegated powers states that:

> " The power is not intended to make significant policy changes, but is only intended to make relevant technical updates to REUL for these specific purposes."
>
> UK Government (published by the UK Parliament), 2022[9]

The power is exercisable in relation to REUL (up until the 31 December 2023 sunset) and then in relation to assimilated law up until 23 June 2026. It can also be exercised in relation to any legislation made under clauses 12 the power to restate REUL), 13 (the power to restate assimilated law) and 15 (power to revoke or replace REUL and assimilated law) of the Bill. This means that Ministers effectively have a rolling power to make 'technical' updates to this body of legislation.

The Hansard Society has described the power as *"very open-ended"* [8] , asking:

> " Should it be left to Ministerial discretion to decide whether a change in technology or a development in scientific understanding has occurred – for example with respect to Artificial Intelligence, Genetically Modified Organisms, or Net Zero – and whether changes via delegated legislation (rather than primary) are merited by those developments?"
>
> The Hansard Society , 2022[8]

Interpretation: ending the principle of supremacy and general principles of EU law

Clause 8(1) provides a power for Ministers (UK Ministers and Ministers of devolved authorities) to specify the legislative hierarchy between pieces of domestic legislation and provisions contained in retained direct EU law.

This power is connected with clause 4 of the Bill, which removes the principle of supremacy of EU law. The principle of supremacy of EU law is that EU law (or for present purposes REUL) takes precedence over inconsistent domestic law, that domestic law must (as far as possible) be interpreted in accordance with EU law, and has the result that UK courts can strike down domestic law that is inconsistent with EU law.

In its preparations for the UK leaving the EU, and for EU law ceasing to apply in the UK on 31 December 2020, the UK Parliament had to decide how to regulate potential conflicts that could arise between domestic legislation and REUL post-exit. It decided to retain the existing hierarchy, under which EU law took precedence, but in relation to pre-exit legislation only. This was done in the European Union (Withdrawal) Act 2018 (section 5). This means that pre-exit legislation continued to be interpreted in the same way before and after exit.

Clause 4 of the Bill reverses the hierarchy, so pre-exit domestic law will take precedence over inconsistent preserved REUL.

The power in clause 8(1) enables Ministers to provide that the clause 4 reversal of the hierarchy does not apply to specific pieces of domestic legislation and REUL, and therefore that the REUL still takes precedence. This power expires on 23 June 2026.

The UK Government's justification for taking the power is that it *"enables the government to mitigate unintended consequences associated with the end of supremacy… This will ensure that, where it is desirable to do so, the UK policy environment remains constant."*

The courts and retained EU case law

The Bill (clause 7) relates to the role of courts. An earlier section of this briefing 'Retained EU case law' explains the situation at present, that EU case law from before IP Completion Day continues to be binding on most UK courts when interpreting and applying REUL, but that the higher courts[v] can depart from it.

The Bill sets out new tests which the higher courts must apply when considering whether to depart from retained EU case law and retained domestic case law. The test consists of a *"non-exhaustive list of three factors for the higher courts to consider"* [6] .

> " (a) The extent to which the retained domestic case law is determined or influenced by retained EU case law from which the court has departed or would depart, (b) Any changes or circumstances which are relevant to the retained domestic case law, and (c) The extent to which the retained domestic case law otherwise restricts the proper development of domestic law."
>
> UK Government printed by the UK Parliament , 2022[6]

The lower courts and tribunals cannot at present depart from pre-IP completion day retained EU case law[vi]. The Bill creates a new reference procedure. This will allow a lower court to refer a point of law to a higher court (which is not bound by retained EU case law) for a decision.

The Bill also provides for a new reference procedure by a law officer of the UK Government or devolved administrations. Clause 7(8) of the Bill provides for this procedure by which a law officer can refer a point of retained case law to a higher court.

Reception of the Bill

The Hansard Society has been highly critical of the approach taken in the Bill. In a briefing ahead of the Bill's Second Reading on 25 October 2022, the Society stated:

> " The Government's approach to REUL in this Bill is fundamentally and irresponsibly flawed."
>
> The Hansard Society , 2022[8]

The Hansard Society briefing identified the five problems with the Bill as:

v Meaning the UK Supreme Court (which is currently not bound by any retained EU case law); and courts including the High Court of Justiciary in Scotland, the Inner House of the Court of Session, the Court of Appeal for England and Wales and the Court of Appeal for Northern Ireland (which are currently not bound by retained EU case law in certain circumstances).

vi Section 6 European Union (Withdrawal) Act 2018

“

1. Acceptance of the automatic expiry (sunset) of REUL will be an abdication of Parliament’s scrutiny and oversight role;”

2. It will introduce unnecessary uncertainty – legal, economic and political – into the REUL review process;”

3. The broad, ambiguous wording of powers will confer excessive discretion on Ministers;”

4. Parliamentary scrutiny of the exercise of the powers will be limited; and”

5. There are potentially serious implications for devolution and the future of the Union.”

The Hansard Society , 2022[8]

Sir Jonathan Jones KC, former head of the UK Government Legal Department, has raised concerns about the impact of the Bill on legal certainty, saying:

> “ I think it is absolutely ideological and symbolic rather than about real policy...As far as I can see there is no indication of which areas the government is thinking of retaining and which it is getting rid of. So there is no certainty about what laws we will have and what will replace them.”
>
> The Guardian, 2022[11]

The Federation of Small Businesses has also highlighted the concerns of business.

> “ Among widespread economic instability and rampant inflation, changes to the regulatory environment for small firms must be carefully weighed up so as not to add an extra burden to already very difficult trading conditions. A year just isn’t long enough for small businesses to work out how their operations will need to change in response to a fundamental shift in the regulatory environment, such as the one proposed by the EU revocation and reform bill.”
>
> The Guardian, 2022[11]

In a blog on the Bill, Dentons (a law firm) indicated the effect that the Bill could have on employment law.

> “ The scope of the Bill is broad, with more than 2,400 pieces of retained EU legislation falling within it, and much of the EU derived secondary legislation applicable in the UK is anticipated to be affected. This includes the Working Time Regulations 1998, the Agency Workers Regulations 2010, the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, and the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).”

Following the new Prime Minister taking office, there has been speculation that the UK Government may not move as quickly to revoke REUL [12] . This could, for example, be achieved by the sunset date in the Bill being changed to a later date.

Scottish Government view of the Bill

At the time of publication the Scottish Government has not yet published a legislative consent memorandum (LCM) for the Retained EU law (Revocation and Reform) Bill. Once the LCM is available it will be published on the Scottish Parliament website.

Angus Robertson MSP, Cabinet Secretary for Constitution, External Affairs and Culture, did however write to the UK Government on 22 September 2022 (the date that the Bill was introduced in the UK Parliament). The letter read:

> " I am writing to express again my deep concern and the fundamental opposition of Scottish Ministers to the Retained EU Law (Reform and Revocation) Bill, introduced today by the UK Government. This bill puts at risk the high standards people in Scotland have rightly come to expect from EU membership. You appear to want to row back 47 years of protections in a rush to impose a deregulated, race to the bottom, society and economy. This is clearly at odds with the wishes of the vast majority of the people of Scotland who will be dismayed at the direction the UK Government is taking. This bill also represents a significant further undermining of devolution. By allowing UK Government ministers to act in policy areas that are devolved, and to do so without the consent of Scottish Ministers or the Scottish Parliament, is in direct contradiction to devolution and, in particular, the Sewel convention which was given statutory footing in the Scotland Act 1998, in 2016. The speed at which the legislation is being pursued – no impact assessment or basic evaluation has been shared with my officials – is nothing short of reckless, compounding the recklessness of the propositions themselves."

The letter continued to list *"some of the important standards and practices which are woven into our society and which people in this country, quite rightly, take for granted in their daily lives, which you are now putting at risk with this bill's introduction":*

“

- obligations to label food for allergens to consumers;”
- holiday pay, safe limits on working hours and parental leave will all become subject to amendment by a UK Government with an open ambition for deregulation;”
- over 100 pieces of legislation ensure the health and welfare of both humans and animals by providing a last line of defence against importing dangerous pests and pathogens;”
- laws which, were they to be removed, could result in GMO food and feed being placed on the UK market without any food safety assessment taking place, nor any obligation to label such food for consumers;”
- legal limits on chemical contaminants in food, with possible consequences to human health;”
- restrictions on use of decontaminants on meat, such as the chlorine washes on chicken, and businesses’ minimum hygiene standards more generally;”
- incredibly, protections in relation to the safety and compositional standards of baby foods. Without legal standards, there would be no enforcement leaving some of our most vulnerable groups, and the public more generally, without any substantive protection.”

The letter also highlighted concerns about how the Sewel Convention (the mechanism for obtaining the consent of the devolved legislature where the UK Parliament intends to pass primary legislation in a devolved area) is operating.

> “ I am greatly concerned by the attitude of the UK Government in respect of devolved power, including the operation of the Sewel Convention with regards to this legislation – despite your assurances when we met in May that the Convention would be respected. At the time of writing, I have received no legislative consent request from you in relation to the Bill. As a matter of urgency, could you please clarify that you will be seeking this from the Scottish Parliament. I consider it unacceptable that we have had no advance sight of the most controversial clauses of the bill up until a few hours before today’s introduction, mirroring the disappointing UK Government approach to engagement ahead of the introduction of the Northern Ireland Protocol Bill and much of the Brexit related legislation. The sunset dates in the legislation would force the Scottish Parliament and Government to reconsider, review and legislate unnecessarily over much legislation which is supposed to be clearly devolved. This work will badly disrupt the Scottish Parliament’s legislative timetable. The Parliament and Government will find themselves consumed with unnecessary work to save important legislative provisions from being lost, when it should be acting to address pressing issues such as the cost-of-living and energy crisis, judged by real priorities.”

The Scottish Government had raised concerns over the effectiveness of the administration of the Sewel Convention in its LCM on the Northern Ireland Protocol Bill, stating that it was not involved in the preparation of the Bill and *“was provided with a copy of it only two hours before it was introduced”.*

It is unclear whether the Scottish Government has undertaken work to identify all REUL within devolved competence in Scotland. The Welsh Government raised concerns in

relation to the lack of work to identify REUL in devolved areas when the UK Government published its dashboard of REUL.

Devolution issues and the work of the Constitution, Europe, External Affairs and Culture Committee

The Constitution, Europe, External Affairs and Culture Committee (CEEAC) is expected to be the lead subject committee for the LCM to the Bill.

On 22 September 2022 the CEEAC Committee published its report 'The Impact of Brexit on Devolution'. In that report the Committee commented on a number of over-arching themes which are relevant to the Retained EU Law (Revocation and Reform) Bill.

Powers for UK Ministers to act in devolved areas

The CEEAC Committee reported that since 2016 there has been a marked increase in the number of delegated powers taken by UK Ministers to act in devolved areas. These are powers both in areas formerly governed by EU law and in areas not previously within the scope of EU law. Examples are seen in the Police, Crime, Sentencing and Courts Act 2022 and the Health and Care Act 2022.

> " Delegated powers are powers to make secondary legislation which are delegated by a parliament/legislature to government ministers"
>
> The Scottish Parliament , 2022[13]

The result is that more secondary legislation which is within the Scottish Parliament's competence may be made in the UK Parliament rather than in the Scottish Parliament. The protocol between the Scottish Government and Scottish Parliament gives the Parliament a voice in relation to proposals for some of the secondary legislation being made by UK Ministers in devolved areas. This is limited, however, to scrutinising the Scottish Government's decision to consent to such legislation, not scrutinising the legislation itself.

The CEEAC Committee has said that:

> " the extent of UK Ministers' new delegated powers in devolved areas amounts to a significant constitutional change. We have considerable concerns that this has happened and is continuing to happen on an ad hoc and iterative basis without any overarching consideration of the impact on how devolution works."
>
> The Impact of Brexit on Devolution, paragraph 178

As the CEEAC Committee report explains:

> " When the Scottish Parliament was established in 1999, UK Ministers' powers to make secondary legislation in devolved areas were transferred to Scottish Ministers with only a few exceptions. A key exception was the power to make secondary legislation that implemented EU obligations. This power was not removed from UK Ministers and was available to both Scottish Ministers and UK Ministers. Before EU exit, UK Ministers regularly used that power, with the Scottish Government's consent. However, that power was for implementing policy decisions that had been agreed at EU level rather than implementing the UK/Scottish Governments' own policy...Beyond this key exception, the UK Government did not generally have powers to make secondary legislation in devolved areas and did not often do so."

The Sewel Convention and consent

The Sewel Convention is the mechanism for obtaining the consent of the devolved legislature where the UK Parliament intends to pass primary legislation in a devolved area.

The Scottish Parliament is currently seeing an upwards trend in legislative consent memorandums (LCMs). In session 4, 39 LCMs were published; in session 5, 52 LCMs were considered and as at 1 November 2022, 28 LCMs have been published to date in session 6.

The Convention was engaged more than 140 times before 2015, but the Scottish Parliament had only withheld consent once in relation to the Welfare Reform Bill in 2011. The result of the Scottish Parliament withholding consent in that instance was that the UK Parliament amended the Bill to address the Scottish Parliament's concerns.

Analysis from the Institute for Government shows LCMs up until December 2021 and indicates every occasion on which consent has been refused.

The Institute for Government has stated that:

Until 2016, the Sewel Convention largely operated with remarkably little controversy…Devolved engagement on UK legislation has usually begun at an early stage, private conversations have helped to address problems and, if necessary, the threat of withholding consent has allowed the devolved administrations to extract concessions…But this approach requires trust, compromise and good and open communication, all of which have been in increasingly short supply since the 2016 EU referendum.

As such, the UK's exit from the EU can be seen as a point at which there was a break with the general trend of no refusals of consent.

The European Union (Withdrawal) Act 2018 was passed by the UK Parliament despite the Scottish Parliament withholding consent. The European Union (Withdrawal Agreement) Act 2020 was passed by the UK Parliament without the consent of any of the devolved legislatures. This was the first time that the devolved legislatures had all refused consent for a UK Bill. Subsequent legislation, such as the European Union (Future Relationship) Act 2020, the UK Internal Market Act 2020, and the Professional Qualifications Act 2022 have also passed without the consent of the Scottish Parliament.

The CEEAC Committee agrees that:

> " the Sewel Convention is under strain following Brexit and notes the view of some of our witnesses that without reform, "there is a risk of the convention, and the legislative consent process that puts Sewel into practice, collapsing altogether."
>
> The Scottish Parliament , 2022[13]

Through the course of its inquiry into the impact of Brexit on devolution, the CEEAC Committee heard from a number of witnesses concerns *"about the extent to which leaving the EU and its aftermath has exposed the limitations of the facilitative function of the Convention"* [13] . That is to say how well the intergovernmental process to facilitate the Convention operates. The report noted that both the Scottish Government and Welsh Government have "raised concerns in recent Legislative Consent Memorandums about the lack of meaningful engagement prior to the introduction of UK Bills. [13] ". Both the Scottish and Welsh Governments have also raised concerns about the operation of the Sewel Convention in relation to the Retained EU Law (Revocation and Reform) Bill (see Scottish Government view of the Bill).

The Committee's view was that[vii]:

> " there is a need for a much wider public debate about where power lies within the devolution settlement following the UK's departure from the EU. In particular…this needs to address the extent of regulatory autonomy within the UK internal market. Any reform of the Convention needs to flow from the outcome of this discussion which also needs to be inter-parliamentary."
>
> The Scottish Parliament , 2022[13]

Keeping pace with EU law

The Scottish Government's 'keeping pace commitment' relates to keeping pace with 'new' EU law (i.e. law that took effect since IP completion day). Retained EU law consists of the EU law in force in the UK immediately before IP completion day. Under the power to 'keep pace' in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, if the Scottish Government wants to keep pace with EU law it can make regulations which amend any devolved legislation, including REUL.

The CEEAC Committee report considered issues around alignment with the EU and the Scottish Government's policy commitment to align where possible with EU law. The Committee in particular noted:

> " that there are substantive differences between the views of the UK Government and the Scottish and Welsh Governments regarding future alignment/divergence with EU law."
>
> The Scottish Parliament , 2022[13]

The Committee concluded that this difference of views *"raises a number of fundamental constitutional questions for the Committee and the Parliament"* which it stated as:

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vii The Constitution, Europe, External Affairs and Culture Committee launched an inquiry 'How is Devolution Changing post EU' on 6 October 2022.

• the extent to which the UK can potentially accommodate four different regulatory environments within a cohesive internal market and while complying with international agreements;

• whether the existing institutional mechanisms are sufficient to resolve differences between the four governments within the UK where there are fundamental disagreements regarding alignment with EU law and while respecting the devolution settlement;

• how devolution needs to evolve to address these fundamental questions.

New constitutional arrangements

To manage the UK's exit from the EU UK wide legislation and a number of new constitutional arrangements have been put in place.

The Bill will need to work alongside other legislation and is likely to affect how new constitutional arrangements work in practice. Some of the key issues are discussed below.

The UK Internal Market Act 2020

The UK Internal Market Act 2020 (UKIMA) sits across all UK legislation, whether retained EU law or not, and whether made at the UK Parliament, the Scottish Parliament, the Welsh Senedd or the Northern Ireland Assembly.

As such, any changes to retained EU law which do not comply with the market access principles of UKIMA will be disapplied in the same way as if the changes were to any other type of legislation.

A number of SPICe blogs on UKIMA are available on SPICe Spotlight. This includes a blog 'Scotland's Ban on Single-Use Plastics: a case study of the impact of the UK Internal Market Act'.

Common frameworks

Common frameworks are intergovernmental agreements about how to deal with REUL in certain areas that were previously governed by EU regulations and are within devolved fields[viii]. In its Benefits of Brexit paper the UK Government stated that:

viii It is now clear that the scope of some frameworks is much wider than retained EU law, encompassing policies and laws which were not formerly governed at an EU level. The Animal Health and Welfare Framework is an example of this type of framework where matters previously decided at an EU level, as well as those which were not, are within its scope.

> " Common Frameworks ensure a common approach is taken where powers and law have returned from the EU which intersect with policy areas that fall within devolved competence. Some reviews and proposals will fall within the policy areas and retained EU law covered by these frameworks. We have not highlighted each instance where this is the case, but we will continue to work jointly with the Scottish Government, the Welsh Government and the Northern Ireland Executive through the Common Frameworks programme in the development of policy proposals where appropriate. The Government is committed to the proper use of Common Frameworks and will not seek to make changes to retained EU law within Common Frameworks' without following the ministerially-agreed processes in each framework."

Governments agreed that frameworks should maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each nation of the UK as was afforded by EU rules [14] .

Common frameworks allow the governments of the four parts of the UK to harmonise regulations or to agree to diverge. Most frameworks state that they aim to prevent divergence where it would be harmful, or allow it where it would be acceptable, but frameworks are often silent on exactly what information will be taken into account when assessing whether a proposal for divergence is acceptable.

Section 30A of the Scotland Act was repealed in March 2022 (see legislative competence of the Scottish Parliament). This means that in principle the Scottish Parliament has legislative competence in all areas of retained EU law in devolved areas.

Three SPICe blogs on common frameworks are available. The blogs consider:

- What common frameworks are
- Why common frameworks should be scrutinised
- How common frameworks can be scrutinised

SPICe has also published briefings on every common framework which is relevant to Scotland. The briefings are available on the SPICe Common Frameworks Hub.

The Northern Ireland Protocol

The Protocol on Ireland/Northern Ireland ("the Protocol") is part of the EU-UK Withdrawal Agreement. It sets out special arrangements for Northern Ireland to protect the Belfast/ Good Friday Agreement, to avoid a hard border on the island of Ireland and to protect the integrity of the EU's single market. It came into effect on 1 January 2021 but is yet to be fully implemented.

At present, the Protocol means that:

- Some EU law including some made after IP completion day – 31 December 2020 – continues to apply directly in Northern Ireland
- Domestic law (including REUL) which is inconsistent with the Protocol is disapplied

Section 7A of the European Union (Withdrawal) Act 2018 (EUWA) gives effect in domestic

law to the rights, etc. contained in the withdrawal agreement, which includes the Protocol. The REUL (Revocation and Reform) Bill does not amend section 7A of EUWA.

As such, retained EU law that is restated or which becomes 'assimilated law' would also need to comply with the requirements of the Northern Ireland Protocol as it applies in the UK.

The UK Government introduced the Northern Ireland Protocol Bill in the House of Commons on 13 June 2022. If passed as introduced, the Bill will do two key things.

First, it disapplies elements of the Protocol. The Explanatory Notes state: “the Bill ends the effect of – i.e. disapplies – specific areas of the Northern Ireland Protocol in domestic law”.

Second, it allows UK Ministers to disapply further elements of the Protocol and relevant parts of the Withdrawal Agreement in domestic law, and to make 'new law' in its place.

This means that domestic law, including REUL (and including assimilated law after 31 December 2023) may not require to be compatible with section 7A of EUWA.

A SPICe joint guest blog with Professor Katy Hayward considers the Northern Ireland Protocol Bill.

Trade and the EU-UK Trade and Cooperation Agreement

The EU-UK Trade and Cooperation Agreement (TCA) includes "level playing field obligations" (i.e. non-regression from levels of protection) in some devolved areas such as the environment as well as in reserved areas like employment.

These obligations do not, however, mean that retained EU law cannot be changed. Rather, they mean that the overall balance of legal protection provided in an area (for example, the environment) should not be weaker than the overall level of protection afforded before the UK left the EU.

The “level playing field” obligations are not therefore about preventing the amendment/ repeal of individual pieces of retained EU law but rather about maintaining the level of protection they afforded collectively.

If retained EU law in an area subject to “level playing field” obligations was changed to the point that the EU felt the overall protection in the UK was weaker, the EU could raise a dispute with the Panel of Experts for Non-Regression Areas (and vice versa). Temporary remedies are also available which would ultimately allow a party to suspend its own obligations under certain clauses – these are, for example, available if a party ignores a report of the TCA’s Panel of Experts for Non-Regression Areas. It is also worth noting that significant decrease or increase in overall standards, if it has a material impact on trade or investment between the parties, could entitle the other party to take “rebalancing” measures. This applies in the fields of labour and social law, environmental and climate protection and subsidy control.

Section 29 of the European Union (Future Relationship) Act 2020 provides that any pre-existing domestic law is to be read as being compatible with the TCA. New domestic law is not affected.

Challenges for parliamentary scrutiny

There is a significant challenge for legislatures in the sheer volume of secondary legislation which may result from the Bill and the timetable within which it would require to be scrutinised (before the sunset). Speaking at Second Reading, Dean Russell MP, the Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy, stated that:

> " Together, we have identified where retained EU law must be excised from our statute book. Now, using this Bill, we will go further and faster to capitalise on the opportunities of Brexit. We will achieve that by addressing the substance of retained EU law through a sunset which means retained EU law will fall away on 31 December 2023 unless there is further action by Government and Parliament to preserve it. A sunset is the most effective way to accelerate reform across over 300 policy areas and will incentivise the rapid reform and repeal of retained EU law."
>
> UK Parliament Hansard, 2022[15]

It is notable, however, that the UK Government dashboard of REUL *"is not intended to provide a comprehensive account of REUL that sits with the competence of the devolved administrations, but may contain individual pieces of REUL which do sit in devolved areas."*

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Law Society of Scotland

Written evidence to Constitution, Europe, External Affairs and Culture Committee

Retained EU Law (Revocation and Reform) Bill

November 2022

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to provide evidence to the Scottish Parliament's Constitution, Europe, External Affairs and Culture Committee in connection with the Retained EU Law (Revocation and Reform) Bill[1] (the Bill). Our specific comments on the Bill, which we have provided to the House of Commons' Public Bill Committee, can be found in the annex to this document (page 4 onwards).

General comments

In the foreword to *Legislating for the United Kingdom's withdrawal from the European Union* (CM 9446, 2017) the then Prime Minister, Teresa May MP, stated "Our decision to convert the 'acquis' – the body of European legislation – into UK law at the moment we repeal the European Communities Act is an essential part of this plan. This approach will provide maximum certainty as we leave the EU. The same rules and laws will apply on the day after exit as on the day before. It will then be for democratically elected representatives in the UK to decide on any changes to that law, after full scrutiny and proper debate".

If we accept the premise that retaining EU law in UK law provided "the maximum certainty" as the UK left the EU, then subject to any particular amendments which are necessary to keep the body of law up to date and functioning, there is no reason why retained EU law (REUL) cannot be considered a sustainable concept. On the other hand, it would be equally possible following a thorough review and relevant amendments that incorporation into domestic law in the four UK jurisdictions could be completed.

The review of REUL has been begun in terms of that announced by Lord Frost: UK Government - Retained EU Law Dashboard | Tableau Public as paragraph 13 of the Explanatory Notes ("EN") states that:

> "now the Government is in a position to ensure that REUL can be revoked, replaced, restated, updated and removed or amended to remove burdens."

[1] https://bills.parliament.uk/bills/3340

The Bill intends to further facilitate the review and provides that it should be carried out by the end of 2023. However, given the fact that there are 2,400 pieces of REUL (see EN paragraph 16), we are concerned that this does not appear to allow sufficient time to enable the review to be completed properly after due consultation with the devolved authorities and relevant stakeholders including UK Parliamentary and Devolved Legislature Committees[2].

We are also concerned that the process of moving from the "maximum certainty" of REUL to domestic provisions in such a short time could result in less certainty and more confusion with consequent adverse impact on individuals and businesses affected.

This is particularly so in the case of Scotland in view of the current policy of the Scottish Government and Parliament under the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 to keep pace with EU law so far as possible. This is likely to result in considerable divergence between what domestic provisions replace REUL in Scotland and the rest of the UK which may result in difficulties in connection with the United Kingdom Internal Market Act 2020. This is despite what is stated in paragraph 60 EN that:

> "The Government remains committed to respecting the devolution settlements and the Sewel convention and has ensured that the Bill will not alter the devolution settlements and will not create greater intra-UK divergence."

If the Bill is to proceed, it will require considerable amendment to ensure that there is adequate consultation with relevant stakeholders before moving from the current arrangements of REUL to domestic provisions.

All clauses and schedules of the Bill extend and apply to Scotland. A number of provisions of the Bill set out restrictions on the powers of the devolved authorities. Legislation which affects the legislative competence of the Scottish Parliament or executive competence of the Scottish Ministers engages the legislative consent convention. As highlighted in the Explanatory Notes to the Bill[3], a number of the provisions engage the Legislative Consent Motion process. We have highlighted that the UK Government should ensure that where the convention applies in relation to the Bill, it should be complied with. At the time of writing, the Scottish Government is yet to publish the Legislative Consent Memorandum on the Bill.

[2] See comments on parliamentary consultation contained in the European Scrutiny Committee report: Retained EU Law: Where next? - European Scrutiny Committee (parliament.uk).
[3] 60 EN, Annex A

Annex: Specific comments on the Bill

Clause 1 Sunset of EU-derived subordinate legislation and retained direct EU legislation

Subsection (1) provides for the revocation of all (a) EU-derived subordinate legislation and (b) retained direct EU legislation (RDEUL) at the end of 2023.

The reference to the "end of 2023" in subsection (1) is vague. It is suggested that this reference should be defined in clause 21(1) as "11.59 p.m. on 31 December 2023" following the precedent of the European Union (Withdrawal Agreement) Act 2020. This comment applies throughout the Bill and is not repeated.

Subsection (2) enables regulations made by a relevant national authority (i.e. Minister of the Crown or a devolved authority) to exempt from the revocation under subsection (1) of specified provisions of EU-derived subordinate legislation or RUEUL. This will provide a safety net to enable such specified provisions to be preserved after the end of 2023. These preserved provisions will in terms of section 6 become assimilated law.

Subsection (4) defines EU-derived subordinate legislation as any domestic subordinate legislation so far as — (a) it was made under section 2(2) of, or paragraph 1A of Schedule 2 to the European Communities Act 1972, or (b) it was made, or operated immediately before IP completion day, for a purpose mentioned in section 2(2)(a) of that Act (implementation of EU obligations etc.), and as modified by any enactment.

This definition, and particularly the use of the words "so far as", means that it could be very difficult to identify the relevant parts of the subordinate legislation which fall within the definition. It will be difficult to do this thoroughly and evaluate it in the time available before the end of 2023.

Clause 2 Extension of sunset under section 1

Clause 2 provides that a Minister of the Crown may by regulations provide that the reference in section 1(1) to the end of 2023 should specify a "later time".

Clause 2(3) provides that the "later time" cannot be later than the end of 23 June 2026. This is the tenth anniversary of the date in June 2016 on which the referendum on UK membership of the European Union was held. Government policy in relation to the applicability of Retained EU law should not be made on the basis of symbolism which reflects political doctrine. The choice of date should be made on the application of a more rational thought process including consultation with those who will be affected by the changes in the regulations. Both the references to "the end of" in section 3 should be amended to be more specific and less vague. This comment applies throughout the Bill and is not repeated.

Clause 3 Sunset of retained EU rights, powers, liabilities etc.

Clause 3(1) provides that Section 4 of the European Union (Withdrawal) Act 2018 (EUWA) is repealed at the end of 2023. The comments made above in relation to the vagueness of the phrase "end of 2023" apply.

Clause 4 Abolition of supremacy of EU law

This clause amends EUWA by repealing as from the end of 2023 the principle of the supremacy of EU law in relation to any domestic legislation whenever made.

That principle is currently applied to domestic legislation made on or before 31 December 2020 by section 5 EUWA. Clause 4 replaces subsections (1) to (3) of section 5 with new subsections (A1), (A2) and (A3).

Subsection (A1) provides that the principle of the supremacy of EU law is not part of domestic law and disapplies it in relation to any legislation or rule of law whenever made from the "end of 2023".

Subsection (A2) which provides that RDEUL must, so far as possible, be read and given effect in a way which is compatible with all domestic enactments, and is subject to all such enactments, so far as it is incompatible, or in conflict, with them. In other words, it establishes a new priority rule by in effect reversing the principle of the supremacy of EU law.

Subsection (A3) provides that subsection (A2) is subject to sections 183 and 186 of the Data Protection Act 2018 which makes its own provision as to the priority between various provisions of data protection legislation in RDEUL and domestic legislation; and (b) any provision to the contrary made in regulations under clause 8 (Compatibility) of the Bill.

The principle of the supremacy of EU law was developed by the CJEU and provides that where there is a conflict between national law and EU law, EU law will prevail. It is key to the EU legal order and ensures consistent application across the EU. Duh and Rao in *Retained EU Law - A Practical Guide,* comment on the application of the principle. They note the comment by the House of Lords Constitution Committee that it is impossible "to see in what sense "the principle of the supremacy of EU law" could meaningfully apply in the UK once it has left the EU" and then explain that the reason it is retained is because one of the stated aims of the EUWA is to incorporate EU law into domestic law. To incorporate EU law into the domestic statute book while retaining the principle would imbalance the statute book. It is logically consistent therefore that when retained EU is being abolished the principle should be disapplied also.

However, we question whether the abolition of this principle will not affect the interpretation of EU law when it becomes assimilated and is this not a factor to be taken into account in considering how to assimilate that law?

Clause 5 Abolition of general principles of EU law

This clause amends EUWA so that the general principles of EU law are not part of domestic law as from the end of 2023.

Will not the abolition of these general principles affect the interpretation of EU law when it becomes assimilated and is this not a factor to be taken into account in considering how to assimilate that law?

Clause 5 amends various sections of the EUWA, so that retained general principles of EU law are no longer part of UK law from the end of 2023. This clause will achieve the Government's policy of removing retained general principles of EU law.

Clause 6 "Assimilated law"

Clause 6(1) provides that, after the end of 2023, any REUL which remains in force is to be known as "assimilated law". This introduces the concept of assimilated law as a new body of law.

Clause 6(2) provides that, in consequence of subsection (1), provision may be made by regulations under clause 19 (power to make consequential provision) of the Bill to amend EUWA so that references to "retained EU law" and similar terms may be changed to references to assimilated law.

We have no comments to make upon this clause.

Clause 7 Role of courts

Clause 7 amends section 6 of the EUWA which dealt with the interpretation of REUL and the application of retained case law by domestic courts.

As the amendments made by clause 7 are quite complicated and convoluted, it is difficult to understand the effect of the amended provisions. We therefore suggest that it would be clearer if clause 7 simply substituted a new section 6 of EUWA.

New Section 6B which clause 7(8) proposes to insert into the EUWA provides that UK or devolved Law Officers can make a reference to the Supreme Court, the High Court of Justiciary or to the appropriate relevant appeal court (as defined by section 6A):

(a) where proceedings before a court or tribunal (other than a higher court) have concluded,

(b) no reference was made under section 6A in relation to the proceedings, and

(c) either— (i) there has been no appeal, or (ii) any appeal has been finally dealt with otherwise than by a higher court.

Even although section 6B(7) provides that "[any decision by the court to which reference is made] does not affect the outcome of the proceedings…", we consider it contrary to the interests of justice that the Law Officers can be empowered to make a reference in a civil case which has been concluded and where there has been either no appeal or the appeal itself has been concluded. This contravention of the principle of finality and interference by the State in civil litigation needs to be explained and justified by the Government.

Moreover, this innovation would apply only on a point of law "on retained case law", thus diluting the unity of the civil law. Further, any such power of reference would not be comparable, for instance, to the role of the Attorney General or the Lord Advocate in criminal proceedings. There, such Law Officers have a direct interest and an integral role to play in all such proceedings, including instituting appeals or references on points of law. Law Officers do not currently have that role in civil proceedings, and it remains to be seen why they should have it in respect of one particular category of civil case law.

In relation to new section 6B(2) we have some observations. This new subsection identifies the Law Officers who can make a reference.

The Lord Advocate's power to make a reference is limited to where the point of law relates to the meaning or effect of relevant Scotland legislation. There is no corresponding restraint on the powers of any UK Law Officer to either the law of England and Wales or a matter of law on reserved matters. We question whether it is appropriate that any UK Law Officer (other than the Advocate General for Scotland) should be able to make a reference to the High Court of Justiciary or a relevant appeal court which is a Scottish court on a matter of Scottish legislation see *Taylor Clark Leisure PLC v The Commissioners for Her Majesty's Revenue [2015] CSIH 32.*

New Section 6C provides that each UK Law Officer and devolved Law Officer is entitled to notice of proceedings. The Lord Advocate's power to intervene is limited to where the argument relates to the meaning or effect of relevant Scotland legislation. There is no corresponding restraint on the powers of any UK Law Officer to either the law of England and Wales or to the law on reserved matters.

We question whether it is appropriate that any UK Law Officer (other than the Advocate General for Scotland) should be able to intervene on a matter of Scottish legislation before the High Court of Justiciary or a relevant appeal court which is a Scottish court.

Clause 8 Compatibility, Clause 9 Incompatibility orders, Clause 10 Scope of powers and Clause 11 Procedural requirements

Clause 8 enables regulations to be made which preserve the equivalent to the principle of supremacy in relation to RDEUL or to specified provisions of RDEUL over specified domestic legislation or provisions of it.

Clause 9 makes provisions as to the remedies which a court may grant following the abolition of the principle of supremacy.

Clause 10 amends the provisions in EUWA which modify the powers in other statutes with regard to their use to amend RDEUL or section 4 EUWA rights.

Clause 11 repeals the parliamentary scrutiny requirements which apply to the amendment or revocation of subordinate legislation made under section 2(2) of ECA.

We have no comments to make on these clauses.

Clause 12 Power to restate retained EU law

This clause provides that a relevant national authority may by regulations restate any secondary retained EU law. The restatement is not retained EU law. Will the restatement be capable of further amendment in the future?

Clause 13 Power to restate assimilated law or reproduce sunsetted retained EU rights, powers, liabilities etc.

This clause provides that a relevant national authority may by regulations restate any secondary assimilated law. This operates in a similar way to clause 12 but to operate after the end of 2023. Will the restatement be capable of further amendment in the future?

Clause 14 Powers to restate or reproduce: general

Clause 14 provides further detail on what on what a national authority can do when exercising its powers to make regulations under clauses 12 and 13.

Subsection (2) provides that a national authority can use different words or concepts from those used in the secondary retained EU law which is being reinstated.

The Government should explain what is meant by “restatement” if the restated law is different in concept from the original law. To what extent can “different words” be used before the restatement changes into a new and distinct law?

However, subsection (3) appears to set out limitations on what changes can be made. It provides that a national authority may make changes which it considers appropriate for the purpose of:

(a) resolving ambiguities;
(b) removing doubts or anomalies; or
(c) facilitating improvement in the clarity or accessibility of the law (including by omitting anything which is legally unnecessary).

These are laudable objectives for creating better legislation, but we take the view that it would be important for the national authority to consult broadly on the nature of the changes contemplated before proceeding to legislate.

It is also suggested that subsection (3) should make it clear that these are the only changes which can be made by using different words or concepts.

Subsection (5) provides that the provision that may be made by regulations under section 12 or 13 may be made by modifying any enactment. This is a very wide Henry VIII power the necessity for which the Government should explain.

Clause 15 Powers to revoke or replace

Clause 15(1) is a declaratory principle that a national authority may revoke any secondary retained EU law without replacing it.

Subsection (2) and (3) provide that a national authority may either replace the revoked law with a provision which it considers appropriate to achieve the same or similar objectives or make an alternative provision as it considers appropriate. We take the view that the national authority should be under an obligation to consult those who may be affected before revoking, replacing or enacting an alternative provision. Will the replacement be capable of further amendment in the future?

Subsection (4) sets out the parameters for both the replacement and alternative legislation. This provision should reflect the analogous provision in section 8 of the EUWA.

Subsection (9) provides that no regulations may be made under this section after 23 June 2026. Our previous comments in relation to this formulation apply.

Subsections (5) and (6) require that no provision may be made by a national authority unless the authority considers that the overall effect of the changes does not increase the regulatory burden.

Subsection (10) defines “burden” as including (among other things)— (a) a financial cost; (b) an administrative inconvenience; (c) an obstacle to trade or innovation; (d) an obstacle to efficiency, productivity or profitability; (e) a sanction (criminal or otherwise) which affects the carrying on of any lawful activity.

This definition is slightly different from the definition of “burden” in section 1(3) of the Legislative and Regulatory Reform Act 2006 which means any of the following—

(a) a financial cost;
(b) an administrative inconvenience;
(c) an obstacle to efficiency, productivity or profitability; or
(d) a sanction, criminal or otherwise, which affects the carrying on of any lawful activity.

"Burden" defined under the Bill is in a non-exhaustive list – and "among other things" extends to include "an obstacle to trade or innovation". The Government should explain how the two statutory definitions of "burden" apply especially as section 1(6) of the Legislative and Regulatory Reform Act 2006 is amended by clause 17 of the Bill but section 1(3) is not.

Clause 16 Power to update

We note that the national authority is given power to update regulations any secondary retained EU law, or of any provision made by virtue of section 12, 13 or 15 to take account of— (a) changes in technology, or (b) developments in scientific understanding.

This limitation on the reason for such updating should also reflect other activities such as changes in society or economics.

Clause 17 Power to remove or reduce burdens and Clause 18 Abolition of business impact target

We have no comment to make on these clauses.

Clause 19 Consequential provision

Clause 19 provides that a Minister of the Crown may by regulations make such provision as the Minister considers appropriate in consequence of this Act. We take the view that the Minister should only make regulations which are necessary and therefore objectively justifiable rather than according to the more subjective test of being "appropriate".

Clause 20 Regulations and Clause 21 Interpretation

We have no comment to make on these clauses.

Clause 22 Commencement, transitional and savings

We note that financial services regulations are excepted from the impact of the bill.

Clause 23 Extent and short title

We have no comment to make.

Schedule 1 — Amendment of certain retained EU law

We have no comment to make.

Schedule 2 — Regulations: restrictions on powers of devolved authorities

With regard to Paragraph 4 it would be helpful if the Government could explain what are the regulations to which this provision applies, particularly having regard to paragraph 4(4)(b).

Schedule 3 — Regulations: procedure

What is Paragraph 1(2) intended to achieve? Section 27 of the Interpretation and Legislative Reform (Scotland) Act 2010 defines that is meant by a “Scottish statutory instrument” but where are the provisions which provide that Scottish Ministers may make a Scottish statutory instrument? Is it intended that regulations made by Scottish Ministers should be made by SSI as defined in section 27? If so, that should be stated on the face of the bill.

Is Paragraph 2 intended to apply to Scotland?

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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