

Net Zero, Energy and Transport Committee

26th Meeting, 2023 (Session 6)

Tuesday, 19 September 2023

UK subordinate legislation: consideration of consent notification

Introduction

1. This paper supports the Committee's consideration of a 'type 1' consent notification sent by the Scottish Government relating to the following proposed UK statutory instrument (SI)— The Retained EU Law (Revocation and Reform) Act 2023 (Revocation and Sunset Disapplication) Regulations 2023

Process for parliamentary scrutiny of consent notifications in relation to UK statutory instruments

2. The process for the Scottish Parliament's consideration of consent notifications is set out in a [Protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit](#).

3. The Protocol provides for the Scottish Parliament to scrutinise the Scottish Government's decisions to consent to certain subordinate legislation made by the UK Government: specifically, UK Government subordinate legislation on matters within devolved competence in areas formerly governed by EU law. It sets out a proportionate scrutiny approach and categorises SIs as 'type 1' or 'type 2'.

4. Type 2 applies where all aspects of the proposed instrument are clearly technical (e.g., they merely update references in legislation that are no longer appropriate following EU exit) or do not involve a policy decision. For type 2 SI consent notifications, the Scottish Government will notify the Scottish Parliament within five days *after* giving consent. The relevant committee will be notified of the legislative proposal, but they do not need to formally consider it at a committee meeting. The protocol includes a number of review mechanisms and the categorisation of type 2 notifications will be monitored in this way.

5. All other proposals are type 1. In this case, the Scottish Parliament's agreement is sought *before* the Scottish Government gives consent to the UK Government making subordinate legislation in this way. Each type 1 notification must be considered by the relevant Committee.

6. The Committee’s role in relation to type 1 notifications is to decide whether it agrees with the Scottish Government’s proposal to consent to the UK Government making Regulations within devolved competence, in the manner that the UK Government has indicated to the Scottish Government.

7. If Members are content for consent to be given, the Committee will write to the Scottish Government accordingly. The Committee may also wish to note any issues in its response or request that it be kept up to date on any relevant developments.

8. If the Committee is not content with the proposal, however, it may make one of three recommendations—

I. That the Scottish Government should not give its consent to the provision being made in a UK SI and that the Scottish Government should instead produce an alternative Scottish legislative solution;

II. That the Scottish Government should not consent to the provision being made in a UK SI laid solely in the UK Parliament and should instead request that the provision be included in a UK SI laid in both Parliaments under the joint procedure; or

III. That the provision should not be made at all (that is, that the Scottish Government should not consent to the provision being included in a UK SI, nor should the Scottish Government take forward an alternative Scottish legislative solution).

Retained EU Law (Revocation and Reform) Act 2023 (Revocation and Sunset Disapplication) Regulations 2023

9. On 5 September 2023, the Cabinet Secretary for Transport, Net Zero and Just Transition wrote to the Committee to notify the UK SI. This correspondence is in **Annexe A**. The SI notification is available in **Annexe B** and the summary notification in **Annexe C**. The UK Government laid the UK SI on **4 September 2023**.¹

10. As the SI has been laid already, the Scottish Government has asked the Committee to respond to the consent notification as soon as possible so that response might be considered in advance of any debate on the SI.

11. The SI serves two purposes. Firstly, it preserves certain identified pieces of legislation that were incorrectly identified by the UK Government for revocation in Schedule 1 of the Retained EU Law (Revocation and Reform) Act 2023 ("the REUL Act"), including two relating to the EU Commission Decisions on Biocidal Products that fall within devolved competence. This is the first SI that will have been made under the power to “save” legislation that is listed for revocation on Schedule 1. The power itself can only be used until 31 October 2023, so this may be the only SI of its kind.

¹ The SI is available here: [The Retained EU Law \(Revocation and Reform\) Act 2023 \(Revocation and Sunset Disapplication\) Regulations 2023 \(legislation.gov.uk\)](https://www.legislation.gov.uk/uksi/2023/1000). It is subject to the affirmative procedure so has been laid in draft until it has been approved by both Houses of the UK Parliament.

12. Secondly, the SI seeks to revoke nearly 100 additional instruments in addition to those included in Schedule 1 of the REUL Act. These are agreed by the UK and Scottish Governments to be reserved and/or inapplicable in Scotland. In relation to this aspect, consent is therefore not being sought and the committee does not have a decision to make.

13. The SI therefore preserves the status quo in Scotland. As such, there are no policy issues to highlight.

Next steps

14. If the Committee wishes to consent to the Regulations, it may, in doing so, set out any observations or concerns in its letter to the Scottish Government that it thinks are relevant.

15. If the Committee recommends that the Scottish Government should not consent, it should write to the Scottish Government, setting out which of the three options for non-consent (see paragraph 8), reflects its view. The Scottish Ministers have 14 days under the Protocol to respond. They could—

- Agree. If so, the Scottish Ministers would then withhold their consent.
- Not agree. If so, Parliament will debate the issue.

16. If the Parliament agrees to the Committee's recommendation—

- The Protocol provides that the Scottish Ministers should “normally not consent” to the UKSI or should “consider and formulate an alternative Scottish legislative solution”, depending on what the Committee recommended.
- However, the Protocol also provides that if the Scottish Ministers consider that the Committee's proposed alternative cannot be achieved, they may consent to the UK SI. If so, they must explain why they are doing so to the Scottish Parliament.

Clerks
Net Zero, Energy and Transport Committee

Annexe A: Correspondence from the Cabinet Secretary for Transport, Net Zero and Just Transition

Sir Edward Mountain MSP
Convener of the Net Zero, Energy and Transport Committee
c/o Clerk to the Committee, Room T3.40
Scottish Parliament
Edinburgh
EH99 1SP
Copied to UKSIs@parliament.scot

5 September 2023

Dear Edward,

**THE *RETAINED EU LAW (REVOCATION AND REFORM) ACT 2023*
(*REVOCATION AND SUNSET DISAPPLICATION*) REGULATIONS 2023 - EU
EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT**

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to proposals by the Scottish Ministers to consent to the making of UK secondary legislation affecting devolved areas arising from EU Exit.

That protocol, as agreed between the Scottish Government and the Parliament, accompanied the letter from the then Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, to the Conveners of the Finance & Constitution and Delegated Powers and Law Reform Committees on 4 November 2020 and replaced the previous protocol that was put in place in 2018.

I attach a Type 1 notification which sets out the details of the SI which the UK Government laid yesterday and the reasons why I am content that Scottish devolved matters are to be included in this SI.

The SI comprises two distinct elements. The first relates to preserving certain identified pieces of legislation that were incorrectly identified by the UK Government for revocation in Schedule 1 of the Retained EU Law (Revocation and Reform) Act 2023 ("the REUL Act"), including two relating to the EU Commission Decisions on Biocidal Products that fall within devolved competence. I am satisfied that preservation is important for reasons of public health protection and that, in this case, inclusion of devolved competence within a UK SI is acceptable.

The second element to the SI seeks to revoke nearly 100 additional instruments in addition to those included in Schedule 1 of the REUL Act, which UK Government has identified as reserved. Scottish Government's assessment is that the instruments are reserved and/or inapplicable in Scotland. Further details of our assessment on preservation and revocation elements is included in the full notification paper.

I must record that it is very disappointing that the UK Government has not taken this opportunity to include within its SI the preservation of important provisions, requiring the UK to produce a National Air Pollution Control Programme (NAPCP), that were

revoked by the REUL Act (regulations 9 and 10 of the National Emissions Ceiling Regulations 2010). The Scottish Government strongly objected to their revocation in the May 2023 Supplementary Legislative Consent Memorandum, and this was reiterated by the Cabinet Secretary for Constitution and External Affairs in a letter to the Constitution, Europe, External Affairs, and Culture Committee. Given the limitation under the Act on the use of the preservation power to 31 October 2023, this is the last opportunity to seek preservation of the air quality provisions through a UK SI. By choosing to omit these air quality provisions from this SI, the UK Government is creating unnecessary uncertainty while it develops replacement NAPCP proposals. My officials are engaging with their DEFRA counterparts on the proposed replacement and I will write to update you once the proposition is clearer. Although the provisions fall within devolved competence in relation to air quality, it would not be possible to make a preservation SSI in relation to these provisions as they confer functions on the UK Secretary of State – and not Scottish Ministers – in relation the NAPCP.

The UK Government has laid the SI under the preservation power in section 1(4) of the Retained EU Law (Revocation and Reform) Act 2023 in relation to preservation of legislation (as well as section 14(1) to revoke further retained EU law). As section 1(5) limits the use of the preservation power to the 31 October 2023, the UK Government laid the SI under the affirmative procedure in the UK Parliament on 4 September in order to ensure that the SI can complete its parliamentary process in time to be made before the power expires. I am disappointed that this does not afford the Scottish Parliament the 28 day scrutiny period in line with the protocol. I am also disappointed that I wrote to the UK Government to seek their assurance that they will not debate the SI until the Scottish Parliament has had time to consider but I have not yet had the necessary assurance on that point, and the instrument has now of course been laid.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee and the Convenor of the Constitution, Europe, External Affairs and Culture Committee,

I look forward to hearing from you at your earliest convenience.



MAIRI MCCALLAN

Annexe B: NOTIFICATION TO THE SCOTTISH PARLIAMENT**Name of the SI(s) (if known) or a title describing the policy area**

The Retained EU Law (Revocation and Reform) Act 2023 (Revocation and Sunset Disapplication) Regulations 2023

Is the notification Type 1 or Type 2

Type 1

Brief overview of the SI

The Retained EU Law (Revocation and Reform) Act 2023 (Revocation and Sunset Disapplication) Regulations 2023 (“the 2023 Regulations”) have been made under section 1(4), 14(1) and 20(1) of Retained EU Law (Revocation and Reform) Act 2023 (“the REUL Act”) and will disapply Schedule 1 (Sunset of subordinate legislation and retained direct EU legislation) of the REUL Act in relation to certain specified pieces of legislation that were incorrectly identified by the UK Government for revocation. Two pieces of retained EU law to be preserved, made in relation to the EU Biocidal Products Regulation (retained as the GB Biocidal Products Regulation, “GB BPR”), fall within devolved competence.

In addition, the 2023 Regulations revoke a number of pieces of UK subordinate legislation and retained direct EU legislation with effect from the end of 2023. The Scottish Government assessment is that all revoked instruments included in the 2023 Regulations are reserved and/or inapplicable in Scotland.

The UK Government laid the 2023 regulations at Westminster under the draft affirmative procedure on 4 September 2023. The 2023 regulations will come into force at the end of 2023.

Details of the provisions that Scottish Ministers are being asked to consent to.Commission Decisions relating to the GB BPR (*preservation element of the SI*)

Included in the preservation element of this UKSI are two EU Commission Decisions, as follows, that relate to the continued placing on the market and use of biocidal products containing copper for essential uses for the protection of public and worker health under the retained GB BPR. Both of these instruments fall within devolved competence and the essential uses to which they refer are applicable across GB. It is for the preservation of these two instruments that UKG has formally sought the consent of Scottish Ministers under this UKSI.

- *Commission Decision of 13 February 2014 concerning the placing on the market for essential use of biocidal products containing copper (2014/85/EU)*
- *Commission Decision of 24 June 2014 concerning the placing on the market for essential use of biocidal products containing copper (2014/395/EU)*

These Decisions allow the continued marketing and use of products containing copper for the disinfection of water for a variety of uses to protect human health directly and indirectly, in the absence of formal authorisation under the EU Biocidal Products Regulation (EU BPR) for these uses. They apply to named EU Member States that had applied for the uses, including the UK, and were enacted following demonstration of the essential nature of the

use. Uses range from legionella control in water supplies in hospitals and public buildings, to preventing blockages in water inlets on offshore installations. These uses are common across the UK and current, and concern both public and worker health protection.

The GB BPR, which replaced the equivalent EU BPR at the end of the EU exit transition period, concerns the placing on the market and use of biocidal products. Only authorised biocidal products that contain approved “active substances” can be made available for use, following evaluation of a company’s authorisation application by the competent authority (provided by the Health and Safety Executive, “the HSE”, across GB under Memoranda of Understanding with Scottish Ministers and Welsh Ministers).

As part of transitional arrangements put in place upon EU exit to ensure the GB BPR could operate in a GB-only context, GB-based suppliers of biocidal active substances and products were required to re-submit to the HSE applications for approval where the UK had not been the lead evaluating competent authority under EU BPR (owing to a centralised procedure under the EU BPR, one Member State can evaluate an active substance application on behalf of other Member States). Under these arrangements the HSE received a large number of applications. Scottish Ministers previously gave consent to regulations in 2022 that extended the deadlines by which these applications must be evaluated to allow the HSE additional time to complete evaluations. The Biocidal Products (Health and Safety) (Amendment) Regulations 2022 were notified to the Scottish Parliament and the Parliament consented to them.

Both Commission Decisions *2014/85/EU* and *2014/395/EU* that are subject to the preservation element of this UKSI allowed for two circumstances where biocidal products containing copper could continue to be supplied and used in the Member States that had applied for these uses, based on their essential nature, in the absence of formal authorisation:

- Under Article 2, products could remain on the Member States’ markets so long as a dossier (application) had been submitted to and validated by the evaluating Member States by 31 December 2014 . This article continues to apply until such time that the Member State’s evaluation is completed
- Under Article 3, where no application was received by any of the relevant member States before 31 December 2014, then relevant products could no longer be placed on the market after 31 December 2017

One of the many re-submitted applications received by HSE under EU exit transitional arrangements concerns the combination of active substance and uses to which the Commission Decisions *2014/85/EU* and *2014/395/EU* refer, and the original application had been made under the EU BPR before the 31 December 2014 deadline. This evaluation was originally submitted to another EU Member State competent authority and that decision-making had been prolonged so that it had not been completed before the end of the EU exit Implementation Period. As a result, Article 2 of each of these Commission Decisions still has effect to authorise these uses of biocidal products containing copper and these two instruments need to be preserved.

Summary of the proposals

The purpose of the 2023 regulations is two-fold: (1) to prevent a number of pieces of retained EU legislation from being sunsetted by the end of 2023, where it has transpired that these were incorrectly scheduled by the UK Government for revocation (two of these pieces of legislation fall within devolved competence, specifically the marketing for identified

essential uses of biocidal products containing copper); and (2) to revoke nearly 100 instruments which UK Government asserts are all reserved.

Scottish Ministers' consent has been sought in relation to two pieces of legislation so that they continue to have effect in Scotland. These are the only pieces of legislation proposed by the UK Government to be preserved in this UKSI that fall within devolved competence:

- COMMISSION DECISION of 13 February 2014 concerning the placing on the market for essential use of biocidal products containing copper (2014/85/EU)
- COMMISSION DECISION of 24 June 2014 concerning the placing on the market for essential use of biocidal products containing copper (2014/395/EU)

Chemicals policy, including in relation to biocides, engages a complex mixture of reserved and devolved competence. Environmental protection, waste management and public health are devolved while product safety, animal testing as well as health and safety at work are reserved.

As the UKG is seeking to preserve these two EU Commission Decisions that relate to the EU Biocidal Products Regulation following their erroneous inclusion in Schedule 1 of the REUL Act by the UK Government, agreeing to their preservation will bring Scotland, and the UK as a whole, back into alignment with the EU. These EU Commission Decisions provide a basis for the continued use of copper in biocidal products pending an authorisation decision being taken under the EU BPR (for EU uses) and separately now under the GB BPR (for GB uses). There is potential for loss of alignment with EU BPR depending on when authorisation decisions are taken respectively in the EU and in GB in relation to these applications for authorisation of copper in biocidal products. Differences in outcomes of evaluations could also give rise to a loss of alignment. There may also be applications for authorisations of different uses of biocidal products in GB compared to EU applications. The Scottish Government will continue to press for EU decisions to be taken into account in GB BPR decision-making in order to ensure that standards in Scotland remain aligned to the EU as closely as possible.

The Scottish Government assessment is that the other preservation proposals included in Parts 1 and 2 of Schedule 1 of the 2023 Regulations are reserved. The three Food Promotion instruments set out in Part 3 of Schedule 1 of the 2023 Regulations for the purposes of preservation in Northern Ireland only were earlier assessed to be devolved but obsolete in Scotland so the Scottish Government has not been seeking their preservation in Scotland.

The 2023 Regulations have the secondary and unrelated purpose of revoking around one hundred pieces of retained EU law (UK subordinate legislation and retained direct EU legislation). The UK Government has advised that its view is that these instruments are wholly reserved and therefore Scottish Ministers' consent has not been sought in relation to the revocation of these instruments. The Scottish Government assessment is that all revoked instruments are reserved and/or inapplicable in Scotland. Since none fall within devolved competence the Scottish Government does not consider it appropriate for the Scottish Government to offer a view on the appropriateness of revocation of these particular instruments.

Does the SI relate to a common framework or other scheme?

Yes. The GB BPR forms part of the Chemicals and Pesticides Common Framework.

Summary of stakeholder engagement/consultation

Our stakeholders were previously made aware of the general approach we took to correcting deficiencies in environmental legislation. However, these new preservation measures are aimed solely at ensuring the functioning of the GB BPR and, therefore, we have not undertaken any engagement, or any formal consultation, about these specific amendments.

A note of other impact assessments, (if available)

No additional impact assessment has been prepared. The proposals do not constitute a policy change and are aimed at ensuring effective operation of the GB BPR.

Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislation

Scottish Ministers have previously communicated to UK Government their concerns with the REUL Act and the Scottish Parliament did not give legislative consent to any aspect of it. While this instrument concerns that Act, one of its purposes is to preserve pieces of retained EU legislation from being revoked before the end of 2023. To ensure continued access to important products for the protection of public health, Scottish Ministers believe consent should be granted.

As for previous UKSIs concerning chemicals regulation and safety, Scottish Ministers believe including these devolved provisions in a UKSI is appropriate based on the fact that the GB BPR applies across GB, the nature of the chemicals market and that the public health concern in this case is common across GB.

The Scottish Government's assessment that the biocidal products instruments are devolved, and that it was not immediately obvious that they could safely be sunsetted, was recorded in [Update and response to Supplementary Legislative Consent Memorandum SLCM report – August 2023](#).

Intended laying date (if known) of instruments likely to arise

This instrument is subject to the draft affirmative procedure and has been laid for sifting at Westminster on 4 September 2023.

If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister's proposal to consent, why not?

The incorrect listings in schedule 1 of the REUL Act were only identified after the REUL Act became law. The powers contained within the REUL Act at section 1(4) are limited to 31 October 2023. This means that to ensure legislation is made and enacted before the end of October 2023, it is not possible to follow Scottish Parliamentary protocol for considering proposals. Scottish Ministers have requested UK Government do not move to debates before the consent of the Scottish Parliament has been granted.

The timing of receiving confirmation from the UK Government of the list of retained direct EU legislation which will be revoked by the 2023 Regulations did not allow time for the full 28 days' Scottish Parliamentary consideration of this notification.

Information about any time dependency associated with the proposal

The incorrect listings in schedule 1 of the REUL Act were only identified after the REUL Act became law. The powers contained within the REUL Act at section 1(4) are limited to 31 October 2023.

Are there any broader governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?

None

Any significant financial implications?

None

Lead Official: Dan Merckel, and Luke Boddice

Lead SGLD Lawyer: Ailsa Heine

Annexe C: SI NOTIFICATION: SUMMARY

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| <p>Title of Instrument</p> <p>The Retained EU Law (Revocation and Reform) Act 2023 (Revocation and Sunset Disapplication) Regulations 2023</p> |
| <p>Laying date at Westminster</p> <p>4 September 2023</p> |
| <p>Date by which Committee has been asked to respond</p> <p>I have asked the UKG not to debate the SI until the Scottish Parliament has considered, but I have had no formal response to this request, nor any indication of when the debates might be held. I would therefore be grateful if the committee could consider the notification as soon as possible.</p> |
| <p>Power(s) under which SI is to be made</p> <p>Section 1(4), 14(1) and 20(1) of the Retained EU Law (Revocation and Reform) Act 2023</p> |
| <p>Categorisation under SI Protocol</p> <p>Type 1</p> |
| <p>Purpose</p> <p>The purpose of the Retained EU Law (Revocation and Reform) Act 2023 (Revocation and Sunset Disapplication) Regulations 2023 (“the 2023 Regulations”) is two-fold. Firstly, the 2023 Regulations disapply Schedule 1 (Sunset of subordinate legislation and retained direct EU legislation) of the Retained EU Law (Revocation and Reform) Act 2023 to remove certain specified pieces of legislation that were incorrectly identified by the UK Government for revocation. Two pieces of legislation, made in relation to the EU Biocidal Products Regulation, fall within devolved competence.</p> <p>Included in this UKSI are two EU Commission Decisions: <i>Commission Decision of 13 February 2014 concerning the placing on the market for essential use of biocidal products containing copper (2014/85/EU)</i> and <i>Commission Decision of 24 June 2014 concerning the placing on the market for essential use of biocidal products containing copper (2014/395/EU)</i>. These two decisions relate to the continued placing on the market and use of biocidal products containing copper for the essential uses related to protection of public and worker health under the retained version of the EU Biocidal Products Regulation. These uses are common across the UK and current. UK Government has formally sought consent for the inclusion of these two pieces of legislation in the SI.</p> <p>Secondly, the 2023 Regulations revoke around 100 pieces of UK subordinate legislation and retained direct EU legislation from the end of 2023. UK Government asserts these instruments are reserved and, consequently, is not seeking Scottish Ministers’ consent on their revocation. Scottish Government’s assessment is that all the instruments proposed for revocation are reserved and/or inapplicable in Scotland.</p> |
| <p>Other information</p> <p>The Scottish Government’s assessment that the biocidal products instruments are devolved, and that it was not immediately obvious that they could safely be sunsetted, was recorded in Update and response to Supplementary Legislative Consent Memorandum SLCM report – August 2023.</p> |

SG Policy contact:

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