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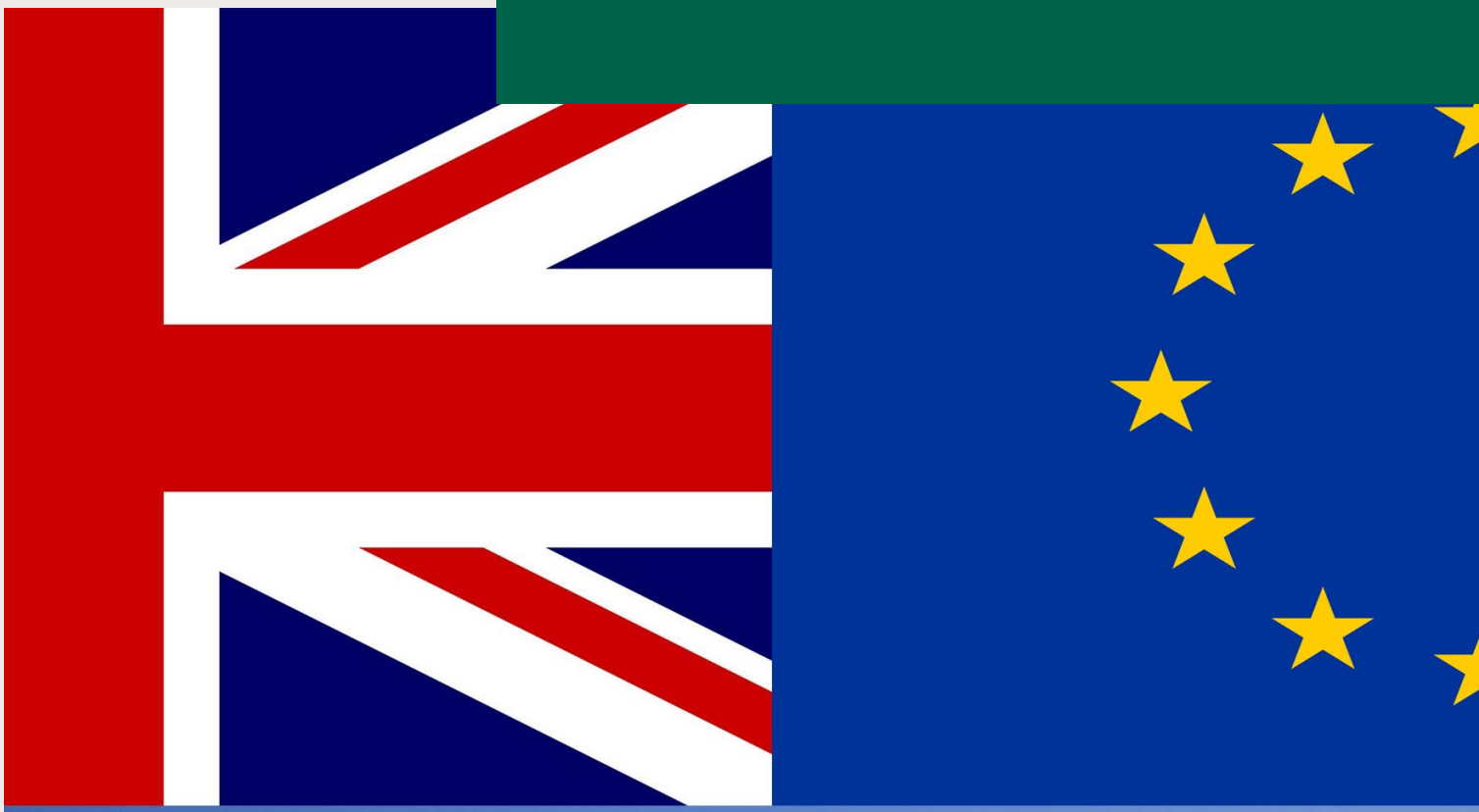
By Graeme Cowie

Retained EU Law (Revocation and Reform) Bill 2022-23



Contributing Authors
Ali Shalchi, Business Impact Targets, Section 9

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Summary

The Retained EU Law (Revocation and Reform) Bill (Bill 156) was presented to the House of Commons for its first reading on Thursday 22 September 2022. No date has yet been indicated for Its Commons second reading.

The Bill would completely overhaul a body of UK domestic law known as "retained EU law" (REUL). That body of law was created by the EU (Withdrawal) Act 2018 (EUWA) as amended by the EU (Withdrawal Agreement) Act 2020 (EUWAA) and came into existence at the end of the post-Brexit transition period (ie the end of 2020).

What is retained EU law?

Retained EU law is a form of UK domestic law. It was created to preserve the substantive law of the UK after EU law was "cut-off" as a source. The purpose of doing this was to provide legal continuity and certainty in the aftermath of Brexit, for individuals, government, businesses and other organisations.

There are (broadly) five main categories of retained EU law, the source of which was either created or preserved under EUWA 2018:

- **EU-derived domestic legislation** (section 2 EUWA)
  - This is legislation that was passed by Parliament, the devolved legislatures, or under delegated powers, to help implement the UK's EU obligations
- **Retained direct EU legislation** (section 3 EUWA)
  - This includes EU regulations, relevant EU decisions directed at the UK, and EU tertiary legislation, but does not include EU directives
- **Retained directly effective provisions of EU law** (section 4 EUWA)
  - This most notably includes the direct effects of EU treaties and directives, and seeks to preserve law previously given effect automatically under section 2(1) of the ECA
- **Retained EU and domestic case law** (section 6 EUWA)
  - This consists of decisions of the Court of Justice of the European Union (CJEU) and UK domestic courts, whenever they adjudicated on the meaning and effect of EU law and EU-derived domestic laws

- **Retained general principles of EU law** (section 6 EUWA)
  - These core principles inform (among other things) the hierarchy and interpretation of laws of EU-origin, and in particular the interaction between REUL and other domestic law

Other parts of EUWA also determined:

- which parts of EU law are excluded from REUL (section 5 and Schedule 1)
- the rules for amending, revoking and replacing different types of REUL, including specifying when delegated legislation can and cannot be used (section 7)
- the form of legislative scrutiny that would apply when REUL is proposed to be amended or revoked (Schedules 7 and 8)

EUWA notably also conferred temporary delegated powers in connection with the UK's withdrawal from the EU. These powers, among other things, allowed ministers to anticipate or correct "deficiencies" in REUL. Most of those powers expire at the end of 2022 (two years after the end of the transition period).

Why is the Government revisiting EUWA?

During the summer of 2021, the Brexit Opportunities Unit (BOU) was set-up within the Cabinet Office. Lord (David) Frost, then the Cabinet Office minister with responsibility for the BOU, indicated in two ministerial statements (one in September 2021 and one in December 2021) dissatisfaction with the constitutional settlement in EUWA, as well as broader concerns about the volume of REUL that remained on the domestic statute book.

This gave rise to a two-part retained EU law "review" within government.

- Firstly, departments would audit the REUL impacting their areas of responsibility, and identify where REUL should be removed, replaced or updated. This (still ongoing) audit led to the creation of the government's Retained EU law dashboard.
- Secondly, the government would revisit the EUWA settlement, amending it with primary legislation, to address some of its constitutional concerns about REUL.

Although this Bill was developed by the Cabinet Office, the responsible Minister in the Commons is the current Secretary of State for Business, Energy and Industrial Strategy, Jacob Rees-Mogg. He had previously succeeded Lord Frost as the minister with responsibility for the Brexit Opportunities Unit in February 2022. It is understood that responsibility for this Bill moved from Cabinet Office to BEIS following the change of Prime Minister, and this is expected to be reflected in other machinery of government changes.

What were the Government's constitutional concerns

Lord Frost outlined the Government's main objections to the EUWA settlement in a ministerial statement in December 2021:

1. That REUL often replicated and overlapped with domestic legal schemes, which had the potential to cause confusion and uncertainty

2. That the general principles of EU law were of questionable relevance to UK law in a post-Brexit world

3. That too much retained EU law was (on one view) effectively given the same status and protection in domestic law as primary legislation (making it harder to amend or repeal otherwise than by further primary legislation)

4. That the continuing role for the supremacy of EU law, even in a modified form, was inconsistent with the UK's democratic and parliamentary traditions

5. That it was not justified to give CJEU case law an elevated status in UK law (post-Brexit) that would not also be given to the case law of other "foreign" courts

6. That there needed to be greater flexibility to remove REUL quickly if the EU law from which it was derived has subsequently been declared invalid by the CJEU

7. That guidance to courts, and the role of EU law in legal education, should be reviewed in light of Brexit and the aforementioned proposed changes

What does the Bill do?

The current Bill goes considerably further than was indicated in the December 2021 ministerial statement. It completely overhauls the constitutional architecture of REUL, making it (on the whole) much easier to revoke, modify or replace through secondary legislation. The Bill, most notably would:

- place a "sunset" on REUL – causing most, but not all, of it to expire at the end of 2023

- enable, via statutory instrument, most REUL (if it takes the form of legislative instruments) to be exempted from the sunset

- enable the "sunset" to be postponed (for some but not all REUL) until as late as 23 June 2026, via statutory instrument

- rename any remaining retained EU law after 2023 "assimilated law"

- formally abolish, for wholly domestic law purposes, the principle of supremacy and other general principles of EU law after 2023
- enable the effects of supremacy and general principles of EU law to be preserved or recreated in specific cases, via statutory instrument
- give the UK courts a new legal framework for reconciling inconsistent sources of law when they include those of EU origin, which ministers can influence via statutory instrument
- grant a suite of delegated powers to UK ministers and devolved authorities to revoke, restate, replace or update REUL/assimilated law by statutory instrument
- remove or downgrade existing forms of Parliamentary scrutiny of statutory instruments when they propose to modify or revoke law of EU origin
- expand the permitted use of Legislative Reform Orders (LROs) so that they can revoke retained direct EU legislation
- abolish the Business Impact Target in the Small Business, Enterprise and Employment Act 2015 (SBEEA)

What is the significance of these changes?

It is difficult to assess the impact this Bill will have on the substantive law of the UK. If it is enacted, and nothing is done legislatively thereafter, vast reams of REUL would fall away at the end of 2023. This would create precisely the "gaps" in domestic law the EU (Withdrawal) Act 2018 was designed to avoid. This is a very unlikely outcome, however.

It is more plausible that the different powers in the Bill, to preserve, restate, replicate, revoke, replace and update parts of REUL, will be used extensively before the end of the sunset period. What is difficult to predict, however, is exactly how those powers will be used, and which powers the UK Government (and devolved authorities) will rely on most heavily. The complexity of the new legislative regime could create some degree of legal uncertainty in policy areas heavily impacted by REUL.

This Bill would enable far more decisions about the content of REUL to be taken by the UK and devolved executives, rather than by legislatures. Moreover, to the extent legislatures are still involved, those decisions would be taken with less oversight than there is at the moment. Organisations including the Hansard Society and Public Law Project have expressed concerns about Parliament being marginalised.

1 Legislative Background

1.1 How the UK implemented EU law until 2021

EU membership and EU obligations

The UK followed EU law (previously known as Community law) since it joined the EEC in 1973.[1] This persisted not just until the UK's withdrawal from the EU (at the end of January 2020) but also for the duration of the post-Brexit transition period too (which expired at the end of 31 December 2020).

EU law has a variety of different sources, though the primary source is ultimately the main two EU treaties.[2] Those provide the authority for various EU institutions to enter into other treaties and to make secondary law, most notably including EU regulations, directives and decisions. Secondary EU legislation may also further delegate decision-making, for example to EU regulatory bodies. Those bodies make what is known as tertiary legislation.

These sources of law are not directly analogous to the domestic distinction between primary and secondary legislation. EU law, even of a secondary or tertiary kind, took precedence over UK primary legislation by virtue of treaty obligations. This hierarchy shaped domestic legislation in important ways.

Where the EU exercised competencies, developments in UK law often tended to be delivered via that EU law or EU-derived domestic legislation. There was simply no need, for example, for a comprehensive domestic agriculture policy, because many decisions were already being made under the EU's Common Agriculture Policy. UK legislation would, however, sometimes "gold-plate" EU laws or consolidate EU-derived rights into specific legislation.

How did the UK give effect to EU law?

The UK gave effect to all directly applicable EU law via section 2 of the European Communities Act 1972 (ECA).[3] Most importantly, this section gave

1 For ease of reading, this paper will refer to the "EU" and take this to include the "European Community" or "EEC", unless the context otherwise requires it.

2 The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) are the two principal EU treaties, and provide the basis for EU actions and activities. This treaty framework has been successively amended by EU treaties, most recently the Lisbon Treaty, which came into force in 2009.

3 For the arrangements during the post-Brexit transition period, see the (now repealed) section 1A of the European Union (Withdrawal) Act 2018.

domestic effect to general principles of EU law, including but not limited to the principles of "supremacy" and "direct effect".

"Primacy" or "supremacy" of EU law

The principle of "primacy" or "supremacy" of EU law was fully established in the European Court of Justice (ECJ) case of *Costa v ENEL* in 1964, some nine years before the UK joined the EEC.[4] This principle requires EU law to take priority over national law, to the extent that the two are inconsistent.

The UK courts explicitly recognised this principle in the *Factortame* litigation in 1990. In that dispute there was a conflict between the EU treaties and the Merchant Shipping Act 1988. The judicial House of Lords resolved that conflict by disapplying the incompatible domestic legislation.

The primacy of EU law was politically controversial in the UK. Some regarded it as incompatible with the UK's constitutional tradition of Parliamentary sovereignty. However, as Lord Bridges famously said in *Factortame (No. 2)*:

> whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.[5]

"Direct effect" of certain EU law

The other key principle, to which section 2(1) of the ECA gave effect, was the principle of "direct effect" of EU law. "Direct effect" means that not all EU law requires specific implementing legislation before individuals can rely on it in domestic courts. It has been an established part of EU law since at least the 1963 case of *Van Gen en Loos*.[6]

In some cases, direct effect is explicitly contemplated under the EU treaties, by virtue of an instrument's direct applicability. This is the case, for example with EU regulations and, where relevant, EU decisions.[7] However, direct effect is of broader application, and also covers provisions of the EU treaties, certain treaties entered into by the EU, and (in a more limited vertical-only form) EU directives.[8]

Other implementation of EU law

EU law was not implemented exclusively via supremacy and direct effect, however. In many cases, there was a need for supporting or implementing domestic legislation. Section 2(2) of the ECA provided a general implementing

4 *Case 6/64 Costa v ENEL* [1963] ECR 1.
5 *R (Factortame (No. 2)) v Secretary of State for Transport* [1991] 1 AC 603.
6 *Case 26/62 Van Gend En Loos v Nederlandse Administratie der Belastigen* [1963] ECR 1.
7 Article 288 TFEU.
8 *Case 41/74 Van Duyn v Home Office* [1974] ECR 1337.

power, whereby domestic regulations could facilitate the implementation of any EU obligations.

This power was critical for implementing EU directives, but also supported implementation of EU treaty obligations, regulations and tertiary legislation.[9]

Although most domestic implementing legislation was made directly under the ECA, not all if it was. Some such law took the form of UK primary legislation (including, notably, the Equality Act 2010). Sometimes delegated powers contained in other Acts of Parliament were also relied upon.

1.2 Proposals for a "Great Repeal Bill"

In 2017 the (then) UK Government intended that, following the UK's withdrawal from the EU (and the disapplication of the EU treaties) the ECA 1972 would be repealed. The vehicle for this repeal would be the "Great Repeal Bill" – an Act of Parliament.[10] However, the 2017 white paper, Legislating for the United Kingdom's withdrawal from the European Union, acknowledged that bare repeal would present major challenges. An absence of saving provision would be especially problematic:

> If the Great Repeal Bill did not convert existing EU law into domestic law at the same time as repealing the ECA, the UK's statute book would contain significant gaps once we left the EU. There are a large number of EU regulations and many other EU-derived laws which form part of our law which, if we were to repeal the ECA without making further provision, would no longer apply, creating large holes in our statute book.[11]

The intention, therefore, was to legislate to "convert" or "retain" the vast majority of the domestically enforceable law that the UK had accrued by virtue of its membership of the EU.

This new body of law – "retained EU law" – would break the UK's dynamic alignment with the EU (ie it would not automatically track developments in EU law). However, it would provide a post-Brexit starting point: the substantive law would stay the same or very similar for those affected by it. The intention was that Parliament and the devolved legislatures would subsequently decide whether to modify this law, or to repeal or replace it entirely:

> In order to achieve a stable and smooth transition, the Government's overall approach is to convert the body of existing EU law into domestic law, after which Parliament (and, where appropriate, the devolved legislatures) will be able to decide which elements of that law to keep, amend or repeal once we

9 Tertiary legislation being legislation made under the authority of secondary legislation.

10 The ECA remained in force beyond January 2020, despite its repeal, until the end of December 2020. The post-Brexit transition period required the UK to continue to follow (most of) EU law on the same basis as it had done as a member state. See section 1A of the EU (Withdrawal Agreement) Act 2020.

11 Department for Exiting the European Union, Legislating for the United Kingdom's withdrawal from the European Union, March 2017, para 1.13.

have left the EU. This ensures that, as a general rule, the same rules and laws will apply after we leave the EU as they did before.[12]

1.3 The EU (Withdrawal) Act 2018

The proposed "Great Repeal Bill" morphed into the EU (Withdrawal) Act 2018 (EUWA). That Act was originally designed to deal with a different situation than the one that eventually transpired. In its original form, it anticipated, and made provision for, what would happen if the UK left the EU without a deal. In those circumstances, major changes would all take place on "exit day" (ie immediately after the UK ceased to be a member state).

Key features of EUWA

The EU (Withdrawal) Act 2018 provided the original framework for retained EU law. Of direct relevance were the following provisions of the Act:

- **Section 1** provided for the repeal of the ECA on "exit day";
- **Section 2** would thereafter preserve EU-derived domestic legislation, including but not limited to regulations made under section 2(2) of the ECA;[13]
- **Section 3** would thereafter convert directly applicable EU legislation into a domestic equivalent, known as "retained direct EU legislation";[14]
- **Section 4** would thereafter preserve most, but not all, other directly effective provisions of EU law;[15]
- **Section 5 and Schedule 1** set out the main exceptions and qualifications to the retention of EU law;[16]
- **Section 6** addressed the role of the courts in interpreting REUL, and the future status of CJEU case law;[17] and

12 ibid. para 1.12.

13 This would also include consolidating Acts of Parliament that implement EU obligations (like the Equality Act 2010) and anything done through delegated powers under other primary legislation to the extent that it implemented EU obligations.

14 This includes EU regulations, EU decisions (so far as directed at the UK) and EU tertiary legislation

15 This was a "sweeping" provision, which preserves among other things, EU treaty obligations, the direct effects of EU directives, and other directly effective

16 Most notably, the Charter of Fundamental Rights was excluded, as was the principle of state liability (also known as "Francovich damages"), and EU directives were not, in and of themselves, preserved.

17 Retained direct EU legislation notably would take precedence over all domestic law enacted before the end of transition, preserving the hierarchy between those instruments. However, REUL would not take precedence over new domestic legislation.

- **Section 7** set out new rules governing the amendability and revocability of different sources of REUL.

The Act also contained time-limited delegated powers (the most notable being in **section 8**). The purpose of those powers was to allow the Government to make changes to REUL, and other domestic law, to deal with "deficiencies" that would otherwise arise in connection with EU withdrawal. For example, retained legislation might refer to EU agencies that no longer had a role in a post-Brexit UK, or to quotas or restrictions that would no longer be relevant if the UK was no longer part of common EU schemes.

The "deficiencies" or "correcting" power could be used to re-allocate responsibilities to domestic bodies, or to remove completely law that lacked continuing relevance to the UK in a post-Brexit context.

1.4 The EU (Withdrawal Agreement) Act 2020

When the UK reached a withdrawal agreement with the EU, this included a transition period. The UK would be expected to continue to follow almost all EU law, on the same basis as a member state would, until at least the end of 2020. This required EUWA to be updated, to postpone the "switch-over" date to retained EU law, and anything connected to it.

To that end the EU (Withdrawal Agreement) Act 2020 (EUWAA), which also implemented the rest of the Withdrawal Agreement, was enacted shortly after the December 2019 general election.

Postponing key milestones to do with REUL

EUWAA postponed most of the effects of EUWA, so that the REUL "switch-over" would happen at the end of transition ("IP completion day"). This had a knock-on effect on things like delegated powers, which would consequentially "sunset" 11 months later than was previously intended under a no-deal scenario.[18]

However, the Government wished to proceed with the repeal of the ECA 1972 on "exit day" rather than at the end of transition. EUWAA therefore had to recreate the effect of the ECA, "as though" it had not been repealed, for the purposes of the transition period.[19]

[18] For example, the section 8 "correcting" power in EUWA will now expire 2 years after "IP completion day" (by the end of 2022) instead of two years after "exit day", which would have been the end of January 2022.

[19] Section 1A EU (Withdrawal) Act 2018 (inserted by section 1 of the EU (Withdrawal Agreement) Act 2020).

Primacy and direct effect for the Withdrawal Agreement

Although the Withdrawal Agreement is a treaty between the EU and the UK, rather than as such an EU treaty, it shares many of the characteristics of the EU treaties. The enforcement mechanisms for Part 2 of the Agreement (on citizens' rights) and the Northern Ireland Protocol, in particular, bear a striking resemblance to those found in EU law, and often expressly incorporate EU law and remedies by direct reference.

The UK's domestic implementation of the Withdrawal Agreement also uses similar provisions to those in the European Communities Act 1972. The Withdrawal Agreement is effectively given something akin to supremacy and direct effect in certain contexts, even though that language is not explicitly used.

This is because under Article 4 of the Withdrawal Agreement, the UK must produce, via primary legislation, the "same legal effects" domestically as are produced in EU Member States by the Withdrawal Agreement. Inconsistent domestic law, whatever its source and origins, must be read "subject to" the UK's obligations under the Withdrawal Agreement, and given effect in domestic courts to whatever extent required by the treaty.

1.5 The Trade and Co-operation Agreement

The UK and EU have a Trade and Co-operation Agreement (TCA) which governs their post-2020 trading relationship. The UK implements this agreement through domestic law, primarily through the EU (Future Relationship) Act 2020.However, it also relies on other domestic law, in the relevant affected policy areas, to honour its commitments under that agreement. This includes retained EU law, as many of the commitments in the TCA deal with similar policy issues as do the EU treaties and legislation.

Unlike the EU treaties, or the Withdrawal Agreement, the TCA does not give the CJEU jurisdiction to enforce key parts of the agreement in the UK. However, it does include other enforcement mechanisms, designed to protect key commitments and standards such as the level playing field provisions.

Among those commitments are "non-regression" undertakings in relation to employment and environmental law. If changes to labour or environmental protections in either the UK or the EU have the effect of distorting UK-EU trade or investment, by significantly reducing the cost to businesses, this could trigger mechanisms enabling "rebalancing measures" under the level playing mechanisms.

This could potentially mean the imposition of tariffs by the EU. There are also wider dispute settlement provisions in the TCA that could be invoked where

one of the parties is in breach of the treaty provision. These could ultimately lead to retaliatory disapplication of parts of the TCA.[20]

1.6 Northern Ireland Protocol Bill

The UK Government is in the process of legislating to disapply some of the key enforcement mechanisms for the Withdrawal Agreement's Protocol on Ireland/Northern Ireland. The Northern Ireland Protocol Bill is currently being considered by the House of Lords.

To the extent that it is currently being implemented, the Northern Ireland Protocol depends upon a variety of sources of EU law, incorporated by reference. Not all of these are directly effective (given effect under section 7A of EUWA) and therefore some parts of the Protocol depend on other UK domestic law for their implementation. This includes instruments now forming part of retained EU law (for example) but which were originally made under section 2(2) of the ECA.[21]

[20] For further detail, see Commons Library, The UK-EU Trade and Cooperation Agreement: Level Playing Field and The UK-EU Trade and Cooperation Agreement: governance and dispute settlement.

[21] There are powers to make new provision to implement the Protocol (under section 8C of EUWA) but those SIs would not form part of retained EU law.

2 Policy Background

2.1 Taskforce on Innovation, Growth and Regulatory Reform (TIGRR)

Commissioning by the Prime Minister

In February 2021, the (then) Prime Minister Boris Johnson commissioned a "Taskforce on Innovation, Growth and Regulatory Reform" (TIGRR), to be led by three Conservative MPs (Sir Iain Duncan Smith, Theresa Villiers and George Freeman). When announcing this Taskforce, the Government published a policy document setting out its terms of reference.[22] The high-level goal of the review was set out as follows:

> The UK's exit from the EU with a new Trade and Cooperation Agreement presents us with new opportunities to redesign or change how we implement regulation across the economy. As the Government seeks to reignite the economy to help it recover from the impacts of Covid, we should consider all the options available to us to stimulate business dynamism and innovation, ensure that our markets are open and competitive and that businesses can scale up unencumbered by any unnecessary administrative burdens.

The report

TIGRR published its report in May 2021.[23] One of its observations concerned the restrictions imposed by EUWA on amending retained direct principal EU legislation (ie EU regulations):

> As a result of the 'onshoring' exercise to retain regulations at the end of the Transition Period, combined with the EU practice of regulating through prescriptive legislation that is transposed into Member State law, the UK statute book now has a significant amount of inflexible regulation. In many cases this can only be amended by bringing forward primary legislation.[24]

The review's authors argued that, particularly in the context of financial services, Parliament should relocate primary responsibility for developing and changing the relevant law with regulators, rather than Parliament.[25]

22 HM Government, Taskforce on Innovation, Growth and Regulatory Reform (TIGRR) Terms of Reference, 2 February 2021.
23 Taskforce on Innovation, Growth and Regulatory Reform, May 2021.
24 As above, para 84.
25 As above, paras 83-88.

As a "counterweight", it recommended that MPs widen the remit of and strengthen the House of Commons Regulatory Reform Committee. In particular, it argued the committee should have a greater role in relation to oversight of regulators, and should be resourced accordingly.[26]

TIGRR also raised concerns about the constrains on lower courts imposed by retained EU case law.

> The EU (Withdrawal) Act 2018 severely restricted the ability of the lower courts to depart from EU case law relating to unmodified retained EU law, even if there is a good reason to do so. Government could make the necessary changes to retained EU law to give the UK courts more freedom to make judgements that are in the best interests of UK business. When the Government modifies the substance of a piece of retained EU law, it allows the lower courts more freedom to make judgements, and case law, on it that depart from EU precedent. This is because the provision of the Withdrawal Act that restricts the ability of the lower courts to depart from EU case law only applies if that law has not been modified in substance.[27]

The Government had, before this report, already relaxed the rules on following precedent at the Court of Appeal (and equivalent) level, using powers inserted into EUWA by EUWAA.[28] However, those regulations relaxing the rules do not extend to first instance courts or to tribunals.[29]

On financial services regulation, specifically, the TIGRR report called for a return to what it called "a common law principles based approach" and a move away from "grand codified schemes" that were "imposed" by EU law[30]. This appears, at least in part, to have been reflected in the Financial Services and Markets Bill 2022-23, which if enacted would facilitate the repeal and/or replacement of hundreds of EU or EU-derived financial services instruments.

The rest of the report focused on specific policy areas where the authors believed EU laws should be revoked and replaced, including on data protection, energy, transport, science and health research, and agriculture.

Government response

The (then) Prime Minister Boris Johnson welcomed the TIGRR report on 15 June 2021, promising a fuller response at a later date.[31] He also announced the establishment of the "Brexit Opportunities Unit" within the Cabinet Office (see **Section 2.2** below).

On 16 September 2021, Lord Frost, (then) a Cabinet Office Minister, wrote to Sir Iain Duncan Smith thanking the TIGRR for their report, and gave the

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26 As above, paras 89-102.

27 As above, para 116.

28 See section 6(5A-D) EUWA inserted by section 26 EUWAA.

29 The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525).

30 Taskforce on Innovation, Growth and Regulatory Reform, para 158.

31 HM Government, Press Release: Prime Minister welcomes independent report on re-imagining regulation in the UK, 15 June 2021.

Government's full response.[32] The response included specific commitments about a review into the future of retained EU law.

2.2 The Brexit Opportunities Unit

In June 2021, the Government announced the creation of the Brexit Opportunities Unit (BOU), based within the Cabinet Office, launching a recruitment exercise for a Director of the Unit. As to the BOU's remit, it said:

> The new Cabinet Office unit will play a crucial role in setting the strategy for the Government's ambitious approach to regulation, reviewing and reforming existing policy and regulation, and supporting the scrutiny and introduction of new regulation.[33]

The BOU would later be tasked with co-ordinating the cross-government review of retained EU law, including a scoping exercise.

2.3 Frost review of retained EU law

The BOU initiated a government-wide review of retained EU law. This has covered two distinct aspects: the **legal status** and the **substance** of that law. Lord Frost was the lead minister in this area until his resignation from the government on 18 December 2021.

From 8 February 2022 onwards, this work has been led by Jacob Rees-Mogg, then Minister of State for Brexit Opportunities and Government Efficiency, and now Secretary of State for Business, Energy and Industrial Strategy.

Formal response to TIGRR

Lord Frost announced, in the Government's formal response to TIGRR, his intention to conduct a review of retained EU law.

As context for this review, the Government argued that the EU (Withdrawal) Act 2018 (EUWA) was intended as a stop-gap, rather than a permanent settlement for legacy EU law. The law retained by EUWA "should not remain on the statute books indefinitely where it does not work for the UK":

> Too much of our statute book is made up of retained EU law, established only to maximise continuity following Brexit. It should not remain on the statute books indefinitely where it does not work for the UK.[34]

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32 Letter from Lord Frost to Sir Iain Duncan Smith (PDF), 16 September 2022.

33 HM Government, Press Release: Search for head of the new Brexit Opportunities Unit begins, 16 June 2021.

34 Letter from Lord Frost to Sir Iain Duncan Smith (PDF), 16 September 2022, Annex, para 55.

As for **the legal status review**, the response said that the BOU would seek to:

- clarify any uncertainty in relation to the scope of EU law in UK law;
- ensure that Retained EU law is not a separate category of UK domestic law, but normalised within our law with a clear status of either primary or secondary legislation;
- revisit the EU concept of 'supremacy of EU law' in the context of retained EU law;
- consider whether to extend the power to depart from retained EU case law to all UK courts; and
- consider how to allow REUL to be challenged.[35]

On the **substantive content review**, it said:

> The review will also consider changes to the substantive content of REUL. We will look at all options for doing so, including the possibility of a tailored mechanism or process for dealing with REUL, which reflects the fact some of these laws, especially those which entered into force after 23 June 2016, have less democratic legitimacy than laws initiated by the UK Government.

The response to TIGRR also indicated these changes would require primary legislation, to amend (among other things) the EU (Withdrawal) Act 2018.

Ministerial statement 16 September 2021

These plans were reaffirmed in an oral ministerial statement, delivered by Lord Frost on 16 September 2021. On the **legal status review**, he said:

> 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.[36]

On the **substantive content review**, he said:

> Our second goal is to review comprehensively the substantive content of retained EU law. Some of that is already under way—for example, our plans to reform the procurement rules we inherited from the EU, or the plan announced

[35] As above, para 56.

[36] HL Deb 16 September 2021 c1532-1534 and HC Deb 16 September 2021 cc1148-1150.

> last autumn by my right honourable friend the Chancellor to review much financial services legislation. We will make this a comprehensive exercise.[37]

He confirmed that this would require primary legislation, but with a view to relying more extensively on delegated and accelerated mechanisms for amendment and repeal of REUL:

> I want to be clear: our intention is eventually to amend, replace or repeal all retained EU law that is not right for the UK. That problem is obviously a legislative one. Accordingly, the solution is also likely to be legislative. We will consider all the options for taking this forward. In particular, we will look at developing a tailored mechanism for accelerating the repeal or amendment of this retained EU law in a way which reflects the fact that, as I have made clear, laws agreed elsewhere have intrinsically less democratic legitimacy than laws initiated by the Government of this country.[38]

Further ministerial statement 9 December 2021

A further update was made by way of a written statement on 9 December 2021. In that statement, Lord Frost re-iterated his desire to "amend, replace or repeal all the REUL that is not right for the UK".[39]

On the **legal status review**, Lord Frost identified seven areas of concern with regard to the continuing role of legacy EU law:

1. the extent to which EU-derived rights (under section 4 of EUWA) "confuse" or "overlay" UK law-derived rights;

2. the continuing role of the retained general principles of retained EU law, and their suitability to interpret domestic legislation in the absence of a continuing treaty relationship;

3. some retained EU law shares constitutional characteristics with primary legislation (with regard to its interpretation, amendment and repeal);

4. the continuing role of supremacy of EU law (albeit in a modified form) and its interaction with the UK's "long established democratic and parliamentary traditions";

5. the fact that legacy CJEU case law is treated as binding, giving it a status that is not extended to the case law of other foreign courts;

6. the lack of a domestic mechanism to remove the retained versions of EU instruments (from the UK statute book) if the CJEU has subsequently declared it to be invalid; and

7. the need for updated guidance in relation to courts and the role of EU law in legal education.

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37 As above.

38 As above.

39 HLWS445 9 December 2021.

On the **substantive content review**, Lord Frost confirmed that he had:

> directed Government departments to establish the content of REUL in policy areas for which they are responsible, and to consult stakeholders as necessary.

He further explained the need for such a scoping exercise:

> 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.[40]

2.4 The Retained EU law dashboard

In June 2022, the UK Government published the Retained EU law dashboard. This dashboard was compiled using data collected in a cross-Whitehall scoping exercise. It is described by the Government as an "authoritative catalogue" of retained EU law.

The dashboard does not claim to be exhaustive (notably acknowledging omissions in policy areas covered by the Department for the Environment, Food, Rural Affairs). However, it seeks to identify as much retained EU law as possible, and categorises it by type, policy area, responsible department, and whether it has been modified, revoked or replaced.

At launch, the dashboard had identified:

- 2,417 distinct sources of retained EU law
  - 2,006 of which had not been substantively changed
  - 182 of which had been substantively changed
  - 196 of which had been repealed without substantive replacement
  - 33 of which had been repealed and replaced

Following the dashboard's publication, the Welsh Government criticised the fact that it does not clearly distinguish whether and when retained EU law is devolved, and therefore susceptible to amendment or revocation by devolved legislatures or authorities.[41]

40 HLWS445 9 December 2021.

41 Mick Antoniw, Counsel General and Minister for Constitutional Affairs, Written Statement: Retained EU Law Interactive Dashboard, 27 June 2022.

The European Scrutiny Committee also asked the Government to indicate more clearly how exhaustive its scoping exercise had been for law retained under section 4 of EUWA.[42]

2.5 Policy paper: The Benefits of Brexit

In January 2022, the Government published a policy paper entitled: The Benefits of Brexit: How the UK is taking advantage of leaving the EU.[43]

In that document, it set out some further objections to the current scheme of retained EU law. One concern was that REUL was too difficult to amend:

> Currently, many changes to these retained EU laws require primary legislation, even if amending technical details that would more usually sit in domestic secondary legislation—for example, certain energy performance certificates are in retained EU law and require primary legislation to change. This means that any changes to this, or other retained EU law, will take a lot longer to deliver, even if minor or technical in nature.[44]

The reliance on primary legislation to make changes was understood as putting too much pressure on Parliamentary time:

> The pipeline of primary legislation would dominate the legislative agenda for several Parliaments, reducing the ability to deliver more fundamental domestic reforms. We are determined to maximise the opportunities of Brexit and to rebuild the economy as we emerge from the Covid pandemic. We cannot delay much needed regulatory change, or risk baking in outdated EU law.[45]

The policy paper also set out, in greater detail, some of the intended policy goals of the forthcoming "Brexit Freedoms Bill" or Retained EU Law Bill. These broadly reflected the areas of constitutional concern raised by Lord Frost in previous ministerial statements.[46]

2.6 Parliamentary scrutiny of proposals

The European Scrutiny Committee (ESC) conducted an inquiry into the future of retained EU law in the first half of 2022. It published its report, Retained EU

42 European Scrutiny Committee, Retained EU Law: Where next? (PDF), HC 122, 21 July 2022, para 192.
43 HM Government, The Benefits of Brexit: How the UK is taking advantage of leaving the EU, January 2022.
44 As above, page 30.
45 As above.
46 As above, pages 32-33.

Law: Where next? in July 2022.[47] This work was carried out prior to the publication and introduction of the current Bill.

At the time of writing, the Government has not formally responded to the Committee's report.

Supremacy and EU general principles/case law

The ESC described it as "regrettable" that the Government "ha[d] not given a firmer indication of what it propose[d] to do" with regard to the supremacy of EU law. It urged further consultation with the ESC before the promised Bill's introduction.[48]

However, the Committee's report broadly endorsed proposals to remove the principle of supremacy, emphasising that retained EU law "lacks the democratic legitimacy of an Act of Parliament".[49] It expressed similar sentiments about the continuing role of EU general principles and case law.[50]

Delegated powers

The ESC also argued in favour of a "wide amending power" to make changes to retained EU law, while warning that "delegated powers… should, however, be carefully drawn".[51]

Sunset provisions

The ESC endorsed the idea of a "sunset clause" for retained EU law "subject to consultation", so as to accelerate decision-making about the expiry or retention of retained EU law. However it warned that "careful consideration and sufficient human resources" needed to be given to replacement legislation "to avoid gaps on the statute book and legal uncertainty".[52]

47 European Scrutiny Committee, Retained EU Law: Where next? (PDF), HC 122, 21 July 2022.
48 As above, para 40.
49 As above, para 44.
50 As above, paras 132-134.
51 As above, paras 82-83.
52 As above, para 95.

3 The Bill

The current Bill, legislatively, is best understood as an overhaul of the European Union (Withdrawal) Act 2018 (EUWA). It sets up a framework for the expiry of most, but not all, of the law that EUWA converted and preserved (or "retained") at the end of 2020 ("retained EU law" or "REUL").

This briefing paper subdivides the Bill into six distinct, but related, parts:

- **Section 4** explains the sunset provisions (which govern the expiry, or otherwise, of REUL by the end of 2023);
- **Section 5** explains the assimilation provisions (which remove EU law concepts and terminology from domestic law after 2023);
- **Section 6** explains the interpretation provisions (which deal with the validity, hierarchy, meaning and effect of REUL/assimilated law);
- **Section 7** explains the scrutiny provisions (which make it easier to amend or revoke REUL/assimilated law);
- **Section 8** explains the Bill's key delegated powers (which enable REUL to be restated, revoked, replaced or updated by regulations); and
- **Section 9** explains the abolition of the Business Impact Target and final provisions.

Thereafter, the Bill is considered more thematically.

- **Section 10** considers the devolution and legislative consent issues associated with the Bill.
- **Section 11** signposts to commentary about and scrutiny of the Bill.

4 The sunset provisions

4.1 Overview

Clauses 1-3 provide the main framework for the expiry or "sunsetting" of REUL.

- **Clause 1** deals with the revocation of legislative instruments of both UK and EU origin (originally retained under sections 2 and 3 of EUWA).
- **Clause 2** provides flexibility to postpone the revocation of specified legislative instruments covered by **clause 1**.
- **Clause 3** deals with the revocation of law that has been retained under section 4 of EUWA (directly effective rights and obligations etc).

4.2 Clause 1 – revocation of EU and EU-related legislative instruments

The first clause is a "sunset clause". It would cause two categories of retained EU law (REUL) to expire at the end of 2023. These are:

- **EU-derived subordinate legislation** or **EDSL** (a subset of EU-derived domestic legislation)
- **Retained direct EU legislation** or **RDEUL** (retained EU regulations, decisions and tertiary legislation)

Revocation of EDSL

EDSL includes of most, but not all, of the REUL that is retained by section 2 of EUWA (i.e. EU-derived domestic legislation).

The vast majority of EDSL consists of regulations that were made under section 2(2) of the ECA.[53] However it also includes:

- Orders in Council made under section 2(2) ECA;

[53] This includes legislation made under relevant saving provisions during the Brexit transition period See section 1A of EUWA.

- other delegated legislation if it refers to EU instruments; and
- delegated legislation made under other enactments, but for the purposes of implementing (what were then) EU obligations.[54]

Based on the information available on the Government's Retained EU Law dashboard, there are more than 700 pieces of non-primary EU-derived domestic legislation still on the statute book. Of these more than 500 instruments appear to be susceptible to revocation under **clause 1**.[55]

What EU-derived domestic legislation does EDSL not cover?

The sunset clause does not apply to anything contained in primary legislation. The Bill defines as primary legislation anything contained in:

- a UK Act of Parliament;
- an Act or Measure of a devolved legislature; or
- Northern Ireland legislation.[56]

Hence, for example, the Equality Act 2010 and the Health and Safety at Work Act 1974, would not expire under **clause 1**, even though they are EU-derived domestic legislation under section 2 of EUWA. They would instead form part of "assimilated law" from 2024 onwards (see **clause 6**).

The Government's Retained EU law dashboard suggests that there are more than 130 distinct pieces of domestic primary legislation, still in force, that form part of retained EU law, and which would become part of assimilated law from 2024 onwards.

Although that primary legislation would remain on the statute book, **clause 1** would revoke, at the end of 2023, subordinate legislation made under it (to the extent it implemented EU obligations prior to the end of the transition period). **The clause 1 revocation provision is not confined to statutory instruments made under the ECA.**

Revocation of RDEUL

The second category of REUL to be revoked by **subsection 1(1)** would be retained direct EU legislation (RDEUL). This consists mainly of EU regulations,

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54 This does not appear to cover legislation made only under section 2(2)(b) of the ECA, which is more loosely connected with EU obligations. Note the difference between subsection 1(4)(b) of this Bill compared with subsection 1B(7)(b) of EUWA.

55 Almost 200 financial services instruments would be revoked/replaced separately under the Financial Services and Markets Bill.

56 This is of greatest significance when UK Ministers have, in the past, exercised "Direct Rule" powers in respect of Northern Ireland, under Orders in Council. Although those Orders are technically made "under" various UK Acts, they are treated as though they are, themselves, primary legislation.

decisions and tertiary legislation. All of this law was preserved at the end of the Brexit transition period under section 3 of EUWA.

Under the current settlement in EUWA, some of these legislative instruments are more difficult to revoke than others, unless it is being done via primary legislation.

Retained direct "principal" EU legislation (ie EU regulations) would be treated similarly to UK primary legislation, whereas retained direct "minor" EU legislation (ie EU tertiary legislation) would be (broadly) as easy to amend as UK secondary legislation.

According to the Government's Retained EU Law Dashboard, there are more than 700 EU instruments, retained by section 3 of EUWA, still in UK law, which would be revoked under **clause 1** at the end of 2023.[57]

The power to preserve and exclusions from revocation

Under **subsection 1(2)** any Minister or devolved authority would have the power to exclude an instrument, of EDLS or RDEUL, from the sunset clause (the "power to preserve"). This can be done by regulations, subject to only the negative resolution procedure in the relevant legislature or legislatures.[58]

If an instrument becomes excluded from the sunset clause, it will, by default, form part of "assimilated law" at the end of 2023 (see **clause 6**).

Additionally, **subsection 22(5)** would provide a financial services "carve-out" from this legislation. **Clause 1** would not affect legislation concerned with financial services and markets regulation.

It is proposed instead that the Financial Services and Markets Bill, as and when it becomes an Act, would deal with the revocation, restatement and replacement of EU-derived financial services regulation separately.[59]

4.3 Clause 2 – delay of revocation of EU and EU-derived legislative instruments

Under the **clause 2**, a Minister of the Crown (ie a UK Government Minister) would have the power to specify that one or more pieces or types of EDSL or RDEUL will not expire on 31 December 2023, and will instead expire on any

[57] This figure excludes more than 30 financial services instruments, which would be revoked/replaced separately under the Financial Services and Markets Bill.

[58] UK Ministers would have the power to exempt an instruments in devolved areas, and would not need to secure the consent of devolved authorities to make this provision.

[59] See Chapter 1 and Schedule 1 of the Financial Services and Markets Bill.

specified date after that, but not later than 23 June 2026.[60] There will therefore potentially be different sunset dates for different legislation.

The power in **clause 2** is exercisable by regulations under the negative resolution procedure ie subject to annulment by either House of Parliament (see **Part 2 of Schedule 3**). It is not exercisable by devolved authorities, unlike the exemption provision in **clause 1(2)** or other delegated powers later in the Bill.

The Bill's Delegated Powers Memorandum (PDF) acknowledges that this power could be used more than once, including in relation to the same provisions. However, the Government expects that it will not have "wide usage" and that it is a "fail-safe" in case of "extenuating circumstances".[61]

4.4 Clause 3 – repeal of section 4 of EUWA

Under **clause 3**, section 4 of EUWA would be repealed after 2023.

What does section 4 of EUWA currently preserve?

Whereas sections 2 and 3 of EUWA currently preserve EU and EU-derived **legislation**, section 4 of EUWA is a residual, or "sweeper" provision. It preserves certain **legal effects** of EU law, as they stood at the end of transition, rather than, as such, **legislative provisions**. The most notable such preserved legal effects are:

- the direct effect of relevant EU treaty provisions and of other treaties entered into by the EU; and
- the vertical direct effect of EU directives.

Previous revocation of directly effective EU law

Prior to the current Bill, the Government had already passed laws disapplying legacy rights, powers, liabilities, obligations, restrictions, remedies and procedures arising by virtue of section 4 EUWA, but only in specific cases.

One high profile example of this was the Immigration and Social Security Co-Ordination (EU Withdrawal) Act 2020. It disapplied EU treaty provisions concerned with the free movement of persons (ie it "ended free movement").[62]

60 This backstop date appears to have been chosen deliberately to coincide with the tenth anniversary of the Brexit referendum.

61 Delegated Powers Memorandum (PDF), pp18-19.

62 See Schedule 1 of the Immigration and Social Security Co-Ordination (EU Withdrawal) Act 2020.

How is revocation different in this case?

The significance of **clause 3** is that it would revoke this legacy law (of EU origin) across the board, not just in specific policy contexts. The revocation is targeted at the "retention rule" itself, rather than the remaining direct effect of specific treaty provisions or specific directives. This distinguishes it from other efforts to remove retained direct EU law from the UK statute book.

Assessing the implications of the repeal of section 4 of EUWA is more challenging than assessing the revocation of specific EU or EU-derived instruments (as provided by **clause 1**). Whether, or to what extent, specific EU treaty or EU directive provisions were directly effective at the end of 2020 is a question that can sometimes only be answered with some degree of judicial input. Section 4 of EUWA only preserved effects "of a kind" recognised by the CJEU or domestic courts before the end of the transition period.

The Government's Retained EU Law dashboard has sought to capture examples of section 4 of EUWA retaining rights, powers, liabilities, obligations, restrictions, remedies and procedures. However, it is unlikely, by its very nature, to be exhaustive, as the European Scrutiny Committee observed following its launch.

The domestic effect of law retained by section 4 EUWA also cannot be understood in a vacuum. This is because EU regulations, EU directives, and domestic implementing legislation, were made **against the backdrop of key EU treaty provisions having direct effect**. Had there been no direct effect for the treaty provisions, those rights might instead have been contained more explicitly in the secondary EU legislation or UK implementing legislation.

No power to extend the clause 3 sunset

Unlike with the instruments to be revoked under **clause 1**, there is no flexibility in the Bill, as introduced, to delay the changes that would be brought about by **clause 3**. These changes will come into effect at the end of 2023, and cannot be further postponed. The same is also true of other changes to be brought about at the end of 2023, including those in **clauses 4-6** (see **Section 5** below).

5 The assimilation provisions

5.1 Overview

Clauses 4-6 are the assimilation provisions. They change the status of retained EU law (REUL), and (from 2024) the name used to describe it.

- **Clause 4** would remove the EU principle of supremacy or primacy of EU law from the UK statute book (currently section 5 of EUWA retains it in a more limited form).
- **Clause 5** would remove the general principles of EU law from the UK statute book (currently section 5 of EUWA retains these in a limited form).
- **Clause 6** would rename any "retained EU law" that is still in existence after 2023. It would thereafter be called "assimilated law".

5.2 Clause 4 – abolition of supremacy

The principle of supremacy (or primacy) of EU law continues to exist in a limited domesticated form in UK law, under subsections 5(1-3) of EUWA. **Clause 4** would formally abolish this from 2024 and replace it with a new domestic hierarchy of laws (so far as they concern laws of EU origin).

The position until the end of 2020

Until the end of the post-Brexit transition period, the UK had to give "supremacy" or "primacy" in UK law to EU law over other sources of domestic law. So, for example, any EU regulation or tertiary legislation would take precedence over an incompatible UK Act of Parliament. This was what happened in *Factortame (No. 2)* when the House of Lords disapplied the Merchant Shipping Act 1988 to the extent it was incompatible with the Common Fisheries Policy.[63]

This relationship between EU and domestic law was explicitly contemplated by section 2(4) of the ECA. It said that "any enactment passed or to be passed… shall be construed and have effect subject to" EU law.

[63] *R (Factortame (No. 2)) v Secretary of State for Transport* [1991] 1 AC 603.

The current position under EUWA

After the Brexit transition period, the UK was no longer bound by the same suite of EU obligations as an EU member state. Retained EU law was therefore intended to operate in a fundamentally different context than the EU law from which it was derived. It was intended to be domestically amendable in a way that EU law was not.

It was explicitly contemplated that Parliament and the devolved legislatures would take the major decisions to amend or repeal or replace REUL, using domestic legislation.[64] Had supremacy been fully preserved, rather than kept in a modified form, such decisions would not have been possible. New laws would have continued to be "read down" in light of retained EU law, regardless of what kind it was.

The desire to have "amendability" in the new scheme was reflected in section 5(1) of EUWA. It says the EU principle of supremacy "does not apply to any enactment or rule of law passed" after the post-Brexit transition period. Section 7 of EUWA then set out rules governing the ease (or otherwise) with which domestic delegated powers could be used to modify different types of retained EU law.[65]

However, the principle of supremacy still applies to domestic legislation passed before 2021. When those laws were originally passed, they were intended to be interpreted and given effect "subject to" the UK's (then) EU obligations, in conformity with section 2(4) of the ECA.

The content of that pre-2021 domestic legislation must be understood in light of that (then) treaty-based relationship. By retaining supremacy in a more limited form, the legislative context of domestic instruments would be preserved more fully, and with it, greater continuity as to their legal effect.

Section 5(3) of EUWA does enable supremacy to be preserved in the context of pre-2021 legislation even if it is subsequently modified. If the principle of supremacy "is consistent with the intention of the modification" then it still applies to the legislation "as modified".

What changes would clause 4 make?

Subsections 5(1-3) of EUWA would be repealed by **clause 4**, formally abolishing the supremacy of EU law (even in its modified form). A new scheme would be put in its place.

Under the new proposals, retained direct EU legislation (including retained EU regulations, decisions and tertiary legislation) would have to be read and

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64 Department for Exiting the European Union, Legislating for the United Kingdom's withdrawal from the European Union, March 2017, para 1.12.

65 This gave rise, for example, to the distinction between retained direct "principal" EU legislation, which was generally (though not always) more difficult to amend otherwise than by an Act of Parliament than retained direct "minor" EU legislation.

given effect "so far as possible" compatibly with domestic legislation, or failing that, "subject to" all other domestic legislation. Even if RDEUL is "newer" than domestic enactments, the latter take priority. This new rule is the reverse of what happens at the moment under the (modified) supremacy of EU law.

Retained direct EU legislation (RDEUL) would have a lesser domestic legal status than domestic delegated legislation, whereas at the moment it takes (limited) priority over Acts of Parliament and delegated legislation passed before 2021.

This change would require key areas of domestic law to be reinterpreted after 2023, so far as any RDEUL has not yet expired under **clause 1**.

This new rule is itself subject to two key exceptions.

- Firstly, it does not apply to certain aspects of data protection law. In that context, RDEUL (most notably including the General Data Protection Regulation or GDPR) would continue to take priority in the event of certain conflicts of law.[66]

- Secondly, regulations made under **clause 8** of this Bill by UK Ministers or devolved authorities, could (de facto) reinstate supremacy in relation to specific situations and instruments. This power to make regulations is a temporary one and expires on 23 June 2026. See **Section 6.3** for further details on **clause 8**.

5.3 Clause 5 – abolition of general principles of EU law

The changes in **clause 5** are of a similar kind to those in **clause 4**, except that they concern the retention and expiry of the general principles of EU law, rather than the principle of supremacy. Under **clause 5** the general principles would cease to form part of UK domestic law from 2024 onwards. The requirement to interpret REUL in accordance with those principles would therefore fall away.

The current position under EUWA

Subsection 6(3)(a) of EUWA requires REUL to be interpreted by UK courts and tribunals "in accordance with… any retained general principles of EU law".

The general principles of EU law are interpretive constructs that improve the coherence and consistency of different sources of EU law. They include, non-

[66] The affected parts of data protection law include a provision of the Data Protection Act 2018 (DPA) that does not yet exist. Parliament is currently considering the Data Protection and Digital Information Bill, clause 43 of which would insert new section 183A into the DPA.

exhaustively: fundamental rights, proportionality, legal certainty, equality before the law, legitimate expectations, and subsidiarity. In the environmental policy space, the precautionary principle has also been accepted in CJEU case law as a general principle of EU law.[67]

Implications of repeal of the general principles

The significance of the repeal of the general principles of retained EU law will depend on how much REUL is kept beyond the end of 2023. If relatively little such law is retained, the absence of the general principles might not be expected to make a great deal of difference (except in relation to primary legislation that is EU-derived). It will be more significant, however, if key instruments are preserved or restated.

It is not clear – from either the Bill itself or its explanatory materials – what principles the courts will be expected to use instead of the retained general principles of EU law, when construing the meaning and effect of assimilated law. UK common law principles partly overlap with the EU general principles, and would likely need to adapt to fill any gaps.

It appears, from **clause 13**, that assimilated law will, where necessary or desirable, be "restated" in such a way as to recreate the effects of the general principles. However, it is not yet clear how such a restatement would be articulated, or how routinely and how extensively. These decisions would ultimately be those for UK ministers and/or devolved authorities.

5.4 Clause 6 – renaming REUL as assimilated law

At the end of 2023, the category of domestic law currently known as "retained EU law" will be renamed "assimilated law". This body of law will include:

- primary legislation that is EU-derived domestic legislation;
- any unexpired subordinate legislation that is EU-derived domestic legislation; and
- any unexpired retained direct EU legislation (RDEUL).

Clause 6 includes delegated powers to update references in other legislation to reflect this change of nomenclature.

This name change appears to be symbolic, rather than of practical consequence. The name given to this body of law will have no effect on its legal status.

[67] *Case T-74/00 Artegodan* [2002] ECR II 4948.

6 The interpretation provisions

6.1 Overview

Clauses 7-9 would make significant changes to the way that UK courts interpret, apply, and resolve conflicts in (what is currently called) retained EU law (REUL). This is partly, but not exclusively, a consequence of revoking direct effect, supremacy and the general principles of EU law in **clauses 3-5**.

6.2 Clause 7 – CJEU and domestic case law

Although the UK has left the EU, the decisions of the CJEU, especially from before 2021, continue to influence the decisions of UK courts. This is because retained EU law must be interpreted in accordance with "retained case law" handed down before the end of 2020. Such case law is, for lower courts, binding, with the position being more complex for higher courts.

Clause 7 of the current Bill seeks to relax the domestic rules on judicial precedent. This would make it easier for appellate courts (like the Court of Appeal in England and Wales or the Inner House of the Court of Session in Scotland) to depart from retained case law.

Clause 7 would also provide a mechanism by which first instance courts (like the High Court in England and Wales or the Outer House of the Court of Session in Scotland) or tribunals (like the Upper Tribunal or First-tier Tribunal) could depart from otherwise binding retained case law.

These courts and tribunals would do so by referring relevant points of retained EU case law to an appellate court, which could then issue a binding decision about whether lower courts should depart.

The Government's intention appears to be to encourage domestic courts to depart more often from both CJEU case law and related pre-2021 domestic case law. The Explanatory Notes describe UK courts as being "unduly constrained" by the "continuing influence of previous EU case law".[68] Professor Catherine Barnard of the University of Cambridge has suggested that **clause 7** is intended as a "nudge" to the judiciary, observing that judges have been reluctant to depart form CJEU case law since the end of 2020.[69]

[68] Explanatory Notes (PDF) para 35.

[69] Monckton Chambers, Webinar on the Retained EU Law (etc.) Bill, 28 September 2022.

Case law during EU membership and the post-Brexit transition

While the EU treaties applied to the UK, domestic courts were obliged to follow the case law of the CJEU. This was a combined consequence of (a) direct effect (b) supremacy and (c) domestic implementation of EU treaty obligations. Arrangements also had to be made to enable "references" to the CJEU where the validity, meaning or effect of EU law was disputed.[70]

Additionally, UK domestic courts would often rule on matters of EU law, or on the validity, meaning and effect of EU-derived law (such as statutory instruments made under section 2(2) of the ECA). The ordinary domestic law on precedent would apply in those cases (eg decisions of the UK Supreme Court would bind the Court of Appeal in England and Wales). But those domestic judicial decisions, themselves, would often be heavily and directly influenced by the wider framework of EU law and CJEU precedent.

What is the current situation under EUWA

Section 6 of EUWA mostly broke the UK's dynamic link with the CJEU, effective from the end of 2020.[71] No new case law would be binding on UK domestic courts, but they could continue to "have regard" to it so far as it was relevant to matters before them. Section 6 also ended the possibility of direct CJEU references: it was not considered appropriate for that supranational court to adjudicate on **retained** EU law, as REUL is a purely domestic form of law.

Different rules apply to "retained case law" however. "Retained case law" consists of pre 2021 CJEU decisions, and relevant domestic case law, concerned with (what was then) EU law or EU-related domestic law. The default expectation, under EUWA, is that REUL will be interpreted and applied "in accordance with" this case law.

This means that, for non-appellate courts and for tribunals, this case law remains "as binding" now as it was before 2021. It only falls away so far as relevant EU law has been revoked or substantially amended, or if higher courts have already departed from it. By way of illustration, the High Court of England and Wales must still follow:

- relevant CJEU decisions (if handed down before 2021); and
- relevant decisions of the UK Supreme Court and the Court of Appeal (regardless of when they were handed down).

The UK's "apex" courts are treated differently. The UK Supreme Court (UKSC), and (in Scotland) the High Court of Justiciary (when sitting as a criminal

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70 Article 267 TFEU.

71 The Withdrawal Agreement and the EU (Withdrawal Agreement) Act 2020 expressly preserve, through separation agreement law, a role for the CJEU, most notably in relation to citizens' rights and the Northern Ireland Protocol. For present purposes this is disregarded. This Bill has no effect on the enforcement of the Withdrawal Agreement's treaty obligations.

appeal court) are not (as such) bound by CJEU decisions, including those handed down before 2021. They are expected to treat pre-2021 precedents in the same way as they would treat their own precedents: as "normally binding" but capable of being departed from. In practice, this means departing from CJEU case law very sparingly.

When do UK apex courts depart from precedent?

Before July 1966, the Appellate Committee of the House of Lords departed from its own judicial precedents extremely rarely. A very high priority was placed on legal certainty, so that individuals could reliably conduct their affairs in light of settled law and legal principles. There was never, however, a statutory test dictating the circumstances in which the final appeal court could depart from its own precedents.

The judicial House of Lords' relaxed its approach slightly in July 1966, following a practice statement made by the then Lord Chancellor, Lord Gardiner.[72] He acknowledged the importance of precedent, and in particular the legal certainty that it afforded individuals. However, he also acknowledged that "too rigid an adherence to precedent" could:

- give rise to injustice in particular cases
- unduly restrict the proper development of the [common] law.

It was therefore proposed, from that point onwards, that the judicial House of Lords would treat its own precedent as "normally binding" but would depart "where it appears right to do so". Account would always be taken of:

- the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into
- the especial need for certainty as to the criminal law.

Since its creation in 2009, the UK Supreme Court has adopted the same approach as its predecessor, but also without any statutory underpinning for the test. The 1966 practice statement is cited with approval in both the UKSC Practice Direction 3 and the UKSC case of *Austin v Mayor and Burgesses of the London Borough of Southwark*.[73]

Section 6(5) of the EU (Withdrawal) Act 2018 extends this test to CJEU judgments handed down before the end of 2020. If the UKSC wishes to depart from such a decision, it must adopt the "same test" as it would use when departing from its own precedents. Other appellate courts with the power to depart must also adopt the UKSC's test.[74]

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72 HL Deb 26 July 1966 Vol 276 col 677.

73 [2010] UKSC 28.

74 See regulation 5 of the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525).

The position of other appellate courts is more complicated. The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 extend, in part, the flexibilities conferred on the UKSC to other appellate courts.

Hence, for example, the Court of Appeal can depart from a CJEU decision, applying the same test as the UKSC would. However, the Court of Appeal remains bound by post-transition UKSC decisions which apply (or modify the application of) any CJEU decisions.[75]

Changes to be made by clause 7

Clause 7 would make several distinct but related changes to section 6 of EUWA. It would:

- confirm in primary legislation that specific appellate courts can depart from legacy CJEU case law;[76]
- impose a (non-exhaustive) statutory test for higher courts when deciding whether to depart from CJEU case law;
- impose a related statutory test for higher courts when deciding whether to depart from retained domestic case law;
- enable first instance courts, and tribunals, to refer points of law arising in retained case law to higher courts for determination; and
- enable law officers to make similar such references, or to intervene in cases concerned with departures from retained case law.

Statutory test for departing from CJEU case law

Subsection 7(3) would introduce a new statutory test for higher courts when they are considering whether to depart from pre-2021 CJEU case law. **New subsection 6(5) of EUWA** would mean that, when so considering, the court must "among other things" have regard to three factors:

1. the fact that decisions of a foreign court are not (unless otherwise provided) binding;
2. any changes in circumstances which are relevant to the retained EU case law; and
3. the extent to which the retained EU case law restricts the proper development of domestic law.

[75] As above, regulation 4(2).

[76] These provisions would no longer be contained in the 2020 regulations, made under section 6(5A-D) of EUWA.

The Explanatory Notes refer to the March 2021 decision in *TuneIn Inc v Warner Music UK Limited*, indicating that it had inspired these (non-exhaustive) statutory criteria.[77] In *TuneIn*, the Court of Appeal dismissed various arguments, advanced by TuneIn, that it should depart from legacy CJEU case law (in the context of an intellectual property dispute). Arnold LJ gave several distinct reasons why, in that particular case, such a departure was not warranted, including that:

- the relevant domestic legislation (which was closely related to EU frameworks) had not changed since the end of 2020;
- the relevant international legislative framework had not changed;
- the CJEU had, in the specific context "unrivalled experience" in confronting the relevant issues;
- academic commentary and criticism of the case law did not provide a clear basis for departing;
- the case law of jurisdictions with largely unrelated statutory frameworks (such as Australia, Canada and the USA) was, contrastingly, of no assistance;
- departing from CJEU case law would create "considerable legal uncertainty" in the particular context; and
- there was no coherent and consistent way to depart from some of the case law, but not other parts of it.

In a recent webinar on the Bill, Philip Moser KC questioned whether there is a meaningful link between the Court of Appeal case and the proposed statutory test contained in **subsection 7(3)**. He pointed out that the relevant statutory words (or similar sentiments) do not appear in the *TuneIn* judgment, and that other important factors mentioned in the judgment (that typically weigh against departing from existing CJEU case law) have been omitted.[78]

Statutory test for departing from retained domestic case law

Subsection 7(4) would introduce a related statutory test for higher courts when they are considering whether to depart from their own retained domestic case law. The (non-exhaustive) list of factors to take into account in those instances are:

77 [2021] EWCA Civ 441 and Explanatory Notes (PDF) at para 106.

78 Monckton Chambers, Webinar on the Retained EU Law (Revocation and Reform) Bill, 28 September 2022.

1. 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;

2. any changes of circumstances which are relevant to the retained domestic case law; and

3. the extent to which the retained domestic case law restricts the proper development of domestic law.

Retained case law reference procedure

Clause 7 would also introduce **new sections 6A-C into EUWA**. They are concerned with the making of "references" (a type of legal proceeding) to a higher court.

What are reference procedures?

Reference procedures are unusual in the UK's constitutional tradition. The normal course of litigation is for a court of first instance (like the High Court in England and Wales, or a tribunal) to determine a legal dispute, and for its judgment, if contested, then to be appealed to higher courts. If those higher courts conclude that a lower court made the wrong decision, they will overturn it; otherwise they will uphold it.

This approach tends to mean that legal disputes (in the UK) are resolved against a specific set of factual circumstances, rather than in the abstract.[79]

References "short circuit" this normal approach. They allow a (usually preliminary) legal question to be aired and settled by a higher court more directly. The case may then be sent back to a lower court to settle a specific dispute, with the benefit of a binding ruling on the relevant point of law.

The perceived advantage of references is that they can improve the predictability of the law, enhancing legal certainty. Higher courts can issue binding and up-to-date interpretations of the law, which lower courts are then expected to follow. This can overcome problems where precedent is unclear, or no longer "good law" but only capable of being departed from by a higher court.

Conversely, reference procedures can prolong litigation that would otherwise be resolved definitively by lower courts. References can also place greater pressure on higher courts, which have more limited resources and capacity than their first instance counterparts.

[79] As Lord Kerr put it in January 2019, "In general, it is desirable that legal questions be determined against the background of a clear factual matrix, rather than as theoretical or academic issues of law." See Reference by the Attorney General for Northern Ireland (No 2) [2019] UKSC 1.

What reference procedures exist at the moment?

There are two notable judicial reference procedures that have shaped the law in the UK in recent decades.

The first is the CJEU's preliminary reference procedure, authorised under Article 267 TFEU. Under that provision, national courts in EU member states can refer questions of EU law to the CJEU for a direct determination. This notably happened in relation to a dispute in Scotland about whether minimum unit alcohol pricing was compatible with the EU law on free movement of goods.[80] This reference procedure still exists, in UK law, but in a more limited form, for certain disputes arising under the Withdrawal Agreement.[81]

The second notable example is the devolution reference procedure contained in the Scotland Act 1998 the Northern Ireland Act 1998, and the Government of Wales Act 2006.

Devolution references enable certain matters to be heard directly by the UK Supreme Court. This avoids having the same point of law relitigated in appeal courts. An important advantage of a devolution reference is that the UK Supreme Court can issue binding judgments on all three legal systems of the UK. This ensures that similar or identical provisions in the three devolution settlements are interpreted and applied consistently with one another.

How would this Bill's new reference procedure work?

Domestic courts and tribunals would have the power, under **clause 7** of this Bill, to refer upwards a point of law arising on binding retained case law. The reference would be made to a higher court that was legally capable of overturning the relevant retained case law.

That higher court's decision about whether to overturn the case law would then be binding on the lower courts. The original dispute could then be resolved in light of that new decision.

This change would enable retained case law to be departed from without it first having to be litigated in courts or tribunals that have no discretion about whether to follow it.

Under **new section 6A of EUWA**, a reference would be made by the relevant lower court, either on its own initiative or at the request of one or more of the parties to a dispute. A point of law is only referrable if (a) the lower court is bound to follow the relevant case law and (b) it is on a point of general public importance.

The higher court must refuse the reference if they consider the points raised either not to be relevant to the proceedings or of general public importance.

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80 *Case C333/14 Scotch Whisky Association v Lord Advocate* [2016] 1 WLR 2283.

81 Most notably in relation to the citizens' rights provisions and the Northern Ireland Protocol, both of which incorporate (by reference) specific parts of EU law.

Procedural decisions by a court about seeking, accepting or rejecting a reference would be unappealable. This is broadly consistent with the way that "permission to appeal" decisions are taken under other statutes.

Role of the law officers

Clause 7 would also allow law officers (senior legal advisors to the UK Government and devolved authorities) to make a similar type of reference, in a slightly different context. **New subsection 6B of EUWA** would allow law officer references to be made within six months of lower court proceedings coming fully to a conclusion. If a law officer believes that a relevant point of retained case law should have been referred, they can refer it in a distinct set of proceedings.

The outcome of such a reference would not impact the original decision, but would be binding on the point of law for future cases. The higher court has no discretion about whether to accept a law officers' reference.

New subsection 6C of EUWA would allow law officers to intervene in live cases concerned with whether retained case law should be departed from. This statutory power to intervene is similar to those found in the devolution statutes.

6.3 Clause 8 – selectively reinstating supremacy

Clause 4 of the Bill provides that domestic enactments, whenever passed or made, take priority over retained direct EU legislation (RDEUL). This inverts EUWA's modified supremacy rule, whereby:

- all RDEUL takes priority over incompatible pre-2021 domestic legislation; and
- pre-2021 domestic legislation is interpreted, so far as possible, compatibly with RDEUL.

Clause 8 would allow a relevant national authority (ie UK Ministers or devolved authorities), effectively to reinstate the original supremacy rule, to govern the interaction of specific pieces of legislation. The Delegated Powers Memorandum describes it as a power "to set legislative hierarchies" and to "mitigate unintended consequences associated with the end of [EU] supremacy".[82]

This power would normally be exercised by making a statutory instrument under the negative resolution procedure.[83] Any **clause 8** regulations must be

[82] Delegated Powers Memorandum (PDF), page 19.

[83] If the regulations are used to amend primary legislation, the draft affirmative procedure must be used. This would be necessary, for example, to give an instrument of retained direct EU legislation

made no later than 23 June 2026. The regulations must specify the relevant instruments for which the supremacy rule would (in effect) be reinstated.

It is not known how extensively this power would actually be used by the UK Government and/or devolved authorities. Therefore it is impossible to assess to what extent the effects of supremacy would be retained despite its formal revocation under **clause 4**.

6.4 Clause 9 – incompatibility orders

If a piece of RDEUL cannot be read compatibly with a domestic enactment (under **clause 4**) or vice versa (under **clause 8**) a court must, when faced with that conflict, make an "incompatibility order" under **clause 9**.

An incompatibility order, in a similar vein to a declaration of incompatibility under section 4 of the Human Rights Act 1998, acknowledges that two sources of law are irreconcilable: that they demand things that are unavoidably inconsistent with one another.

Although **clauses 4 and 8** stipulate which instrument should take priority in those circumstances, the immediate effects of this can be tempered by an incompatibility order. An incompatibility declarator can explain, delay, constrain or remove, the legal consequences that would otherwise arise as a result of one instrument being read "subject to" the other.

These provisions share some similarities with the prospective-only and suspended quashing orders, recently conferred on courts and tribunals by the Judicial Review and Courts Act 2022.[84]

continuing precedence over an Act of Parliament, or an Act of a devolved legislature. See **Part 3 of Schedule 3**.

84 See Commons Library, The Government's judicial review reforms and the Judicial Review and Courts Bill, CBP 9527, 20 April 2022.

7 The scrutiny provisions

7.1 Overview

Primary legislation can modify or revoke any type of retained EU law (REUL). However, not all delegated powers can be used to modify or revoke all types of REUL.

The current rules in EUWA protect certain types of REUL against modification or revocation more strongly than others. Whether or not a delegated power is a "Henry VIII power" (ie can amend or repeal primary legislation) is used as a proxy for whether it can modify or revoke certain types of REUL.

The current Bill would change this. **Clause 10** would effectively "downgrade" most of the "more protected" REUL. That law would become easier to modify or revoke via ordinary (non-Henry VIII) delegated powers.

During the passage of the EU (Withdrawal) Bill in 2018, additional scrutiny protections were also added in the House of Lords (via Government amendments). These gave Parliament a greater role if UK ministers proposed to modify or revoke regulations made under section 2(2) of the European Communities Act (ECA). Additional scrutiny can include mandatory explanatory statements, mandatory periods of prior parliamentary scrutiny, and the mandatory use of the draft affirmative procedure instead of the negative resolution procedure.

Clause 11 would repeal those additional scrutiny requirements, making ECA regulations as easy to modify or revoke as any other delegated legislation.

7.2 Clause 10 – modifying and revoking REUL

Clause 10 would make it easier to amend or revoke retained direct principal EU legislation (some of the law retained under section 3 of EUWA) and retained directly effective EU law (retained under section 4 of EUWA), using delegated powers. It would also reduce the existing level of Parliamentary oversight when the Government proposes to make changes of that kind.

The current position

Section 7 and Schedule 8 of EUWA impose a complex range of restrictions on the amendability and revocability of retained direct EU legislation and other retained direct EU law. Those provisions determine whether pre-existing

delegated powers can be used, and if so, subject to what forms of scrutiny in Parliament or the devolved legislatures.

When can delegated powers be used to modify or revoke RDEUL?

Among other things, section 7 of EUWA draws a distinction between retained direct **principal** and retained direct **minor** EU legislation. Schedule 8 then sets out the types of power that can be used to amend those respective types of RDEUL.

- A pre-existing delegated power can (normally) only modify or revoke retained direct **principal** EU legislation, or EU law retained by section 4 of EUWA, if it can also amend primary legislation.

- By contrast, any pre-existing delegated power can modify or revoke relevant retained direct **minor** EU legislation. This is true regardless of whether it can amend primary legislation.

If there is no relevant delegated power – one capable of modifying or revoking REUL in the way desired – primary legislation must be used instead.

Scrutiny of statutory instruments modifying or revoking RDEUL

Schedule 8 of EUWA also includes scrutiny arrangements for statutory instruments that would modify retained direct EU legislation. If a legacy power is being used to amend retained direct **principal** EU legislation, or law retained by section 4 of EUWA, it currently needs to undergo the same parliamentary scrutiny as if it were being used to amend primary legislation.

This will often mean that a statutory instrument must be approved in draft by Parliament (under the draft affirmative procedure) rather than being made subject to annulment (under the negative resolution procedure).

What would clause 10 and Schedule 1 change?

As the Government's Delegated Powers Memorandum puts it, **clause 10** would essentially "downgrade" the EU law that is retained by virtue of sections 3 and 4 of EUWA.[85] This notably includes downgrading retained EU regulations and retained direct effects of the EU treaties and EU directives. These sources of REUL will become as "amendable" as domestic secondary legislation is at the moment.

This would mean that a wider range of delegated powers could amend this downgraded REUL, and the level of Parliamentary scrutiny for amendments would be reduced. As the memorandum acknowledges, this would mean in the vast majority of cases that the negative resolution procedure (or devolved equivalent) would apply, rather than the draft affirmative procedure.[86]

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85 Delegated Powers Memorandum (PDF), page 7.

86 As above, page 8.

7.3 Clause 11 – procedural requirements when changing REUL

Context

According to the Government's Retained EU Law Dashboard, there are more than 700 statutory instruments (SIs), originally made under section 2(2) of the European Communities Act (ECA), still on the UK statute book.[87] Although those SIs have been preserved, the power under which they were made, and under which they would have been expected subsequently to be modified or repealed, no longer exists. This is because the EU (Withdrawal) Act 2018 (EUWA) repealed the ECA.

Members of the House of Lords raised a wide range of concerns about parliamentary oversight of the modification and repeal of EU-derived domestic legislation, when the EU (Withdrawal) Bill was progressing through Parliament. One of the concerns raised was about the potential use of existing delegated powers, in other enactments, to modify regulations made under section 2(2) of the ECA.

The (then) Government offered further safeguards at Lords Report Stage, developed further during Ping Pong, which are now contained in Schedule 8 of EUWA (paragraphs 13-15).[88] Ministers would face additional parliamentary scrutiny if they used existing delegated powers in other Acts to modify or revoke ECA SIs. Three key safeguards were put in place:

- Firstly, ministers would have to make explanatory statements, justifying the modification or revocation of an SI (paragraph 15).
- Secondly, an enhanced scrutiny procedure may apply, giving parliamentary committees a 28 day window before the SI is laid within which to comment on the proposed modification or revocation (paragraph 14).
- Thirdly, in certain circumstances, the affirmative procedure would have to be used instead of the negative resolution procedure, guaranteeing a parliamentary vote before the SI is modified or revoked (paragraph 13).

What would clause 11 change?

Clause 11 would repeal these extra safeguards. The current Government argues, in its Delegated Powers Memorandum, that "no tangible benefit" has arisen from them, and that they have put greater pressures on Parliamentary time and resources.[89]

87 These are retained under section 2 of EUWA.

88 HL Deb 18 June 2018 c1869.

89 Delegated Powers Memorandum (PDF), page 37.

8 The delegated powers provisions

8.1 Overview

Clauses 12-17 of the Bill include a suite of related delegated powers. These would give UK Government ministers and devolved authorities wide discretion on key decisions about the substance and future of retained EU law (REUL).

- **Clause 12** would confer a power, expiring at the end of 2023 to "restate" any secondary REUL.
- **Clause 13** would confer an almost identical power, thereafter, to "restate" any secondary assimilated law, as well as to "reproduce" sunsetted retained direct EU law, until 23 June 2026.
- **Clause 14** sets out the flexibilities and constraints that would apply to a relevant national authority when exercising "restating" powers.
- **Clause 15** would confer broad powers to "revoke", "replace" or make "alternative provision" for, secondary REUL.
- **Clause 16** confers a power to "update" secondary REUL or successor provision in light of technological or scientific developments.
- **Clause 17** clarifies that Legislative Reform Orders can be used to modify retained direct EU legislation.

8.2 Clauses 12-14 – the restating and reproducing powers

Clauses 12-14 would enable REUL and assimilated law to be "converted" into domestic statutory instruments, by way of "restating" regulations. Such statutory instruments could also "reproduce" interpretive principles of REUL that would otherwise have been abolished by **clauses 3-5** of this Bill.

Who can "restate" REUL or assimilated law?

A "relevant national authority" can exercise the **clauses 12-13** powers. "Relevant national authority" includes UK ministers and/or devolved

authorities. Restating regulations, by default, are made subject to annulment by either House of Parliament (and/or by the relevant devolved legislature).[90]

What law can be "restated"?

Clause 12 provides that "secondary retained EU law" can be restated (until the end of 2023), whereas **clause 13** provides that "secondary assimilated law" can be restated thereafter until 23 June 2026. This reflects the change of terminology planned under **clause 6**, as well as the other planned changes to REUL under **clauses 3-5**.

The word "secondary" is important in both provisions. Provisions in primary legislation (mostly) cannot be restated under either **clause 12 or 13**. This restriction would prevent, for example, the Equality Act 2010 being "downgraded" from an Act of Parliament to a statutory instrument. Such an Act could only be restated/recategorised via further primary legislation.

However, in some cases, provisions contained in primary legislation may still be regarded as "secondary" REUL or assimilated law for the purposes of the Bill's restatement powers. This would be the case if subordinate legislation had inserted or modified the provisions in question.

This deals with situations where, for example, a Henry VIII power was used (when making a statutory instrument). It might also include the exercise of a power in retained direct EU legislation, used to modify primary legislation.

What counts as a "restatement"?

The Bill is potentially quite permissive as to what counts as a "restatement" of REUL or assimilated law. However, it seems intended that the policy outcomes of provisions should not change when these powers are used. Several specific provisions are relevant.

Firstly, **subsection 14(2)** clarifies that the restatement can use different "words or concepts" from the original instrument(s) or law.

Secondly, **subsections 12(8) and 13(10)** indicate that restatement can potentially include "codification" of aspects of retained EU law that are not contained in legislative instruments (including direct effect, supremacy, general principles and retained case law).

Thirdly, **subsection 14(3)** allows a relevant national authority to make changes they consider "appropriate" as part of a restatement, in order to:

- resolve ambiguities;
- remove doubts or anomalies;

[90] The draft affirmative procedure applies if a statutory instrument would amend, repeal or revoke primary legislation. See **Schedule 3 para 5(1)**.

- facilitate improvement in the clarity or accessibility of the law (including by omitting anything which is legally unnecessary).

The Delegated Powers Memorandum asserts that these powers "cannot substantively change the policy effect of legislation."[91]

The barrister George Peretz KC has suggested, in a recent webinar on the Bill, that "if there has been an argument in the textbooks" about what a provision of (retained) EU law means, the restatement powers could be used to choose "whatever interpretation takes [a minister's] fancy". However he added:

> There must doubtless be some outer limit to what counts as a restatement and which will have to be policed by the courts and they may, I suspect probably will, take a restrictive view of that, if what actually seems to have happened looks like a fairly substantive change.[92]

What is the legal effect of making a "restatement"?

The effect of a restatement is that the relevant law will be contained in a new legislative instrument. Instead of something being:

- EU-derived domestic legislation (under section 2 of EUWA);
- retained direct EU legislation (under section 3 of EUWA); and/or
- saved direct EU law (under section 4 of EUWA)

the substantive law would be contained in a domestic statutory instrument. The law in question would no longer be part of REUL (if restated before the end of 2023), or assimilated law (if restated after 2023).

The exercise of the restatement powers (in **clauses 12 or 13**), and the exercise of the revocation/replacement powers (in **clause 15**) is mutually exclusive. This is because the powers to revoke and replace only apply to something that is still REUL/assimilated law. Once REUL/assimilated has been restated, it is no longer REUL/assimilated law. The restatement power also cannot be used repeatedly, for the same reason.

Henry VIII powers

Subsection 14(5) stipulates that the restatement powers in **clauses 12 and 13** are Henry VIII powers, as they can modify any enactment. The Government has explained that this flexibility exists to enable restated law to be consolidated or codified in primary legislation, where appropriate.[93]

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91 Delegated Powers Memorandum (PDF), page 21.

92 Monckton Chambers, Webinar on the Retained EU Law (Revocation and Reform) Bill, 28 September 2022.

93 Explanatory Notes (PDF), para 174.

What would "reproducing" EU principles involve?

If something ceases to be retained EU law, it is no longer to be interpreted and given effect in conformity with the direct effect, supremacy, general principles or case law of retained EU law.

However, a restatement can "recreate" the effects of these EU principles, in a more limited form. **Subsections 12(4-6) and 13(4-8)** allow for this, treating this as a type of "restatement" of REUL.

As the Delegated Powers Memorandum explains (emphasis added):

> Although the [clause 12] power can to some extent reproduce the "effects" of supremacy, it cannot reproduce supremacy itself. The power is prevented from providing that **all** enactments are subject to what is restated. The power cannot recreate EU interpretation rules, but instead must rely on traditional domestic statutory techniques and rules of interpretation to achieve the same policy outcomes.[94]

Professor Catherine Barnard recently provided an example of how the reproduction of principles might work in practice. Article 157 TFEU protects equal pay between men and women, and would expire under **clause 3** of the Bill at the end of 2023. Professor Barnard indicated that **subsection 12(5)** could be used not just to preserve the direct effect of Article 157 TFEU beyond 2023, but also, in effect if not in name, to give it supremacy over any conflicting provisions of the Equality Act 2010.[95]

Legislative scrutiny

Ministers would normally have the choice whether to make **clause 12 or 13** regulations under the draft affirmative or the negative resolution procedure.[96] The draft affirmative procedure must be used, however, if the proposed statutory instrument would amend primary legislation (see **Part 3 of Schedule 3**).

Schedule 3's sifting arrangements also apply if ministers propose to use the negative procedure. The sifting process requires the Government to justify its decision not to use the draft affirmative procedure, and gives committees of both Houses of Parliament the opportunity to register a (non-binding) objection to that decision. For more information about the sifting process, see the discussion in **Section 9.4** below.

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94 Delegated Powers Memorandum (PDF), page 21.

95 Monckton Chambers, Webinar on the Retained EU Law (Revocation and Reform) Bill, 28 September 2022.

96 Separate arrangements apply for approval of statutory instruments involving devolved authorities. See Schedule 3.

8.3 Clause 15 – the revocation and replacement powers

Whereas **clauses 12-14** are concerned (largely) with preserving secondary retained EU law and its effects after the 2023 sunset, **clause 15** is concerned with its removal or outright replacement. It also makes equivalent provision for secondary assimilated law from 2024 onwards.[97] As with **clauses 12 and 13**, the powers are exercisable by a relevant national authority.

Outright revocation

Subsection 15(1) would allow any secondary retained EU law to be revoked without replacement provision. This would enable secondary EU law to be revoked before the sunset provisions come into effect at the end of 2023.

The power to revoke, under **subsection 15(1)** of this Bill, would supplement, rather than displace, powers in other enactments capable of revoking any part of REUL.

Options for replacing secondary REUL/assimilated law

If the relevant national authority wishes to replace the REUL or assimilated law provision they are revoking, they could do so using either of two other powers in **clause 15**.

Replacement regulations

Subsection 15(2) would allow secondary REUL to be revoked, and then replaced with new domestic secondary legislation. It is for the relevant national authority to determine what "appropriate" provision should be included, but it must "achieve the same or similar objectives" as the measures being revoked.

Alternative provision

More broadly still, **subsection 15(3)** would allow a relevant national authority to make "alternative provision" having revoked a piece of secondary REUL. This means that the replacement for REUL could still be of a legislative character, but not pursuing the "same or similar objectives".

The Delegated Powers Memorandum recognises that "alternative provision" could be made where the "overarching objective of a policy" is not the same as it was before.[98]

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97 See **subsection 15(10)**.

98 Delegated Powers Memorandum (PDF), page 29.

Constraints on clause 15 regulations

There are certain things that **clause 15** regulations would not be able to do:

- create new delegated powers, criminal offences or monetary penalties;
- levy taxes;
- create a new public authority; and
- increase the overall regulatory burden

However regulations would be able to:

- recreate delegated powers, criminal offences and monetary penalties of a similar kind to those being revoked;
- confer functions and discretion on any person;
- charge fees; and
- establish voluntary schemes (which are not to be regarded as new regulatory burdens).

The power to make regulations under **clause 15** would expire on 23 June 2026.

Legislative scrutiny

If the **clause 15** power is being used to further delegate a power or to create a criminal offence, the draft affirmative procedure must be used for the proposed regulations. The same is also true if "alternative provision" is being made at the same time as revocation of the REUL/assimilated law (see **Part 3 of Schedule 3**).

Otherwise, regulations can be made either by the draft affirmative procedure or the negative resolution procedure. As with **clauses 12 and 13**, the sifting arrangements in **Schedule 3** also apply whenever ministers propose to use the negative resolution procedure (see **Section 9.4** below).

The Government insists that **clause 15** is not a Henry VIII power, because it can only amend subordinate legislation.[99] While this is technically correct, there could be knock-on effects for primary legislation. This is because regulations might revoke subordinate legislation that, itself, made textual amendments to primary legislation. There is no requirement to use the draft affirmative procedure in those cases.

[99] Delegated Powers Memorandum (PDF), page 28.

8.4 Clause 16 – the updating power

Retained EU law is not a dynamic body of law. Instead, it is a "snapshot" of EU law, as it stood, at the end of the post-Brexit transition period (after 31 December 2020). It does not automatically update to track developments in EU law.

Some of the more detailed provisions in EU law, however, change frequently (under delegated authority) and then have direct effect in member states. This allows (for example) the European Commission to keep pace with developments in technical standards, without having to use the more time-consuming ordinary legislative procedure each time. When the UK followed EU law, these changes were often also tracked using section 2(2) of the ECA.

The UK Government has identified "a number of areas" where it is desirable "to update REUL on a regular basis" to maintain its effectiveness. To this end, **clause 16** would allow a relevant national authority to "update":

- secondary retained EU law (before 2024);
- secondary assimilated law (thereafter); and
- regulations made under **clauses 12, 13 or 15** of this Bill.

These instruments can be updated to "take account of changes in technology or developments in scientific understanding".

The Delegated Powers Memorandum sets out the rationale for this new delegated power:

> The Retained EU Law substance review showed a lack of subordinate legislation making powers with the scope to make technical amendments to REUL for these purposes. This is because while the UK was an EU member, departments had previously relied upon section 2(2) European Communities Act 1972 for implementation or on the direct effect of UK law. The power conferred by section 8 of EUWA, used in some instances by the government to make these kinds of changes, is due to expire on 31 December 2022 (and was, in any case, limited to remedying specified deficiencies in REUL). In the absence of these, departments have been left without the ability to update these technical standards and regulations. This power seeks to address this.[100]

The Explanatory Notes suggest that the **clause 16** power "is not intended to make significant policy changes" and is "only intended to make relevant technical updates".[101]

The Delegated Powers Memorandum maintains that clause 16 is impliedly (by omission) limited in important respects. It cannot subdelegate, create or

[100] Delegated Powers Memorandum (PDF), page 31.
[101] Explanatory Notes (PDF), para 54.

widen criminal offences, levy or increase taxes, make retrospective provision, or amend either the devolution statutes or Human Rights Act 1998.[102]

Legislative scrutiny

As with **clause 15**, and for the same reasons, the Government maintains that **clause 16** is not a Henry VIII power (see **Section 8.2** above).

It is proposed that **clause 16** regulations would be approved under the negative resolution procedure (or devolved equivalent).

8.5 Clause 17 – Legislative Reform Orders

Context

Legislative Reform Orders (LROs) are a type of delegated legislation made under the Legislative and Regulatory Reform Act 2006. They are made for the purposes of removing or reducing regulatory "burdens" arising out of legislation.

LROs attract their own special form of legislative scrutiny, under which instruments must often be laid in draft 40 (or sometimes 60) days before they are made, and certain consultation and reporting must take place.

Sometimes a "super-affirmative" procedure applies to LROs, under which a Committee can make recommendations about a proposed order, with a view to securing changes to it before it is presented for approval.

Previously, the scrutiny for LROs was carried out by the Regulatory Reform Committee, but this was transferred to the Business, Energy and Industrial Strategy Committee in May 2021.

Relevance to this Bill

At the moment, there is what the Government describes as "uncertainty" about whether LROs can be used to modify retained direct EU legislation (RDEUL).[103] The Government proposes to amend the 2006 Act to confirm that this is permitted. It also clarifies that, if an LRO would modify RDEUL, the normal 2006 Act procedures, rather than EUWA's scrutiny procedures, apply to the instrument in question. No other changes would be made to the existing LRO process.

The LRO scheme does not extend to devolved areas in Scotland or Northern Ireland, though it can do in Wales with the consent of Welsh Ministers.

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[102] Delegated Powers Memorandum (PDF), page 32.

[103] As above, page 38.

9 Miscellaneous and final provisions

9.1 Overview

The remaining clauses of the Bill make other provision or are "standard" clauses in a Bill of this kind

- **Clause 18** would abolish the Business Impact target;
- **Clause 19** would confer on Ministers a power to make consequential provision;
- **Clause 20 and Schedules 2 and 3** govern the making of regulations under this Bill;
- **Clause 21** covers interpretation of key provisions in the Bill;
- **Clauses 22-23** cover commencement, territorial extent, and the short title.

9.2 Clause 18 – the Business Impact Target

Clause 18 would implement the Government's stated intention to remove the Business Impact Target (BIT).[104] It would repeal sections 21 to 27 of the Small Business, Enterprise and Employment Act 2015 (SBEEA) which set out requirements relating to the calculation and reporting on the BIT. This is on the basis "that the BIT is not fit for purpose, as it limits the way in which regulation can be scrutinised".[105]

It would also make minor and consequential amendments, such as by moving and updating relevant definitions. **Clause 18** would come into force two months after the Act is passed.

What are Business Impact Targets (BITs)?

BITs are a form of mandatory Government reporting on the economic impact of new regulation. They were created under the 2010-15 Coalition

[104] See HM Government, The Benefits of Brexit: How the UK is taking advantage of leaving the EU, January 2022.

[105] Explanatory Notes, para 57.

Government, with the intention that Government departments would assess and seek to minimise the cost of regulation to business.

Under SBEEA, the Government must choose and publish, within a year following a general election, a target for the cost to business of changes in regulation, over both the term of a Parliament (five years) and an interim target covering the first three years of it.[106] After setting this BIT, the Government must then publish an annual update setting out its progress.[107]

Recent changes were made to the reporting requirements for the BIT. The final report for a BIT (in the previous Parliament) now falls due no more than two months after a new Parliament has begun, whereas previously it had to be published before Parliament was dissolved.[108]

Government concerns about the BIT

The Government raised concerns about the BIT scheme when setting the target for the current Parliament (in December 2020). Business Minister Lord Callanan said at the time that the BIT framework was not suitable for pursuing the Government's aspiration of achieving "the right regulatory balance between supporting excellent business practice and protecting workers, consumers and the environment".

A "holding target" of zero was set, to allow the Government to consult with businesses about a more appropriate framework. The initial commitment was to revise the BIT in light of the findings of that consultation and a wider review of the framework itself.

In July 2021, the Department for BEIS published a consultation on "Reforming the Framework for Better Regulation".[109] This examined the scope, methodology and reporting of the BIT, and explored options for reform: to adjust, change, replace or remove the BIT.

Proposals to abolish the BIT

The Government published the responses to the consultation on 31 January 2022, alongside a policy paper (The Benefits of Brexit: How the UK is taking advantage of leaving the EU). The policy paper set out the Government's intention to:

> remove the Business Impact Target in its current form, which focuses too narrowly on net direct costs to business. To ensure a smooth transition, there will be another year of reporting under the Business Impact Target while the Government works on the replacement metrics and assessment. As part of this drive for a more rigorous approach, we will also reform the impact assessment

106 section 21(1) SBEEA.

107 section 23 SBEEA.

108 See the Schedule of the Dissolution and Calling of Parliaments Act 2022 at paras 27-31 amending SBEEA.

109 Department for BEIS, Reforming the Framework for Better Regulation, A Consultation, July 2021.

> that government departments complete to explain their rationale for regulating and ensure that they succinctly and accessibly capture key information.[110]

The Cabinet Office and the Better Regulation Executive are in the process of developing the replacement to the BIT.[111]

9.3 Clause 19 – consequential provision

Clause 19 is a boilerplate provision, granting a power to make consequential provision following the passage of an Act.[112] It would allow a Minister of the Crown to make updates to other legislation in light of Royal Assent being granted for this Bill.

Although the Government has identified consequential amendments that need to be made (to EUWA and to the Direct Payments to Farmers (Legislative Continuity) Act 2020), and has included these in **Part 2 of Schedule 1** of the Bill, it has acknowledged that others may not yet have been identified.

These regulations would be made by negative resolution unless they amend primary legislation, in which case the draft affirmative procedure would be used (see **Part 2 of Schedule 3**).

9.4 Clause 20 – provision about regulations

Although **clause 20** is concerned with the making of regulations, it mainly serves to sign-post provision elsewhere in the Bill, especially **Schedules 2 and 3**.

Subsection 20(1) clarifies that all of the other delegated powers in the Act include power to make:

- different provision for different purposes or areas; and
- supplementary, incidental, consequential, transitional, transitory or saving provision.

Subsection 20(4) clarifies that, just because a power to make regulations might lapse (for example at the end of 2023 or after 23 June 2026) does not mean that the regulations themselves, made before then, lapse.

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110 HM Government, The Benefits of Brexit: How the UK is taking advantage of leaving the EU, January 2022, page 28.

111 Impact Assessment, Retained EU Law (Revocation and Reform) Bill, para 38.

112 It is comparable with section 23 of EUWA, section 41 of EUWAA and section 39 of the European Union (Future Relationship) Act 2020.

Schedule 2 – Devolved regulations

Subsection 20(2) of the Bill gives effect to **Schedule 2**. It contains a standard set of provisions governing the powers and scrutiny arrangements for devolved authorities under the Bill.

The Schedule confirms that Scottish Ministers, Welsh Ministers and Northern Ireland departments are limited to making provision within their respective devolved competences when exercising delegated powers under the Bill.

There are also boilerplate consent, consultation and joint exercise provisions governing the making of regulations in devolved areas. Those provisions notably do not restrict the power of UK ministers to make regulations in areas of devolved competence without devolved consent (on which see **Section 10** below).

Schedule 3 – Scrutiny of statutory instruments

Subsection 20(3) of the Bill gives effect to **Schedule 3**. It governs the type of legislative scrutiny that would be given to statutory instruments made under delegated powers in the Bill.

The most notable feature of **Schedule 3** are the sifting provisions. They apply when a Minister of the Crown proposes to exercise powers under **clauses 12, 13 or 15**, and has a choice about whether to use the draft affirmative procedure or the negative resolution procedure.

If a Minister chooses to use the negative resolution procedure for an instrument, the instrument must first undergo a "sifting" process. It bears a close resemblance to those sifting processes included in EUWA and the EU (Future Relationship) Act 2020.

The Sifting Process

If a Minister proposes to use the negative resolution procedure, they must make a statement explaining why and must lay a memorandum before both Houses to that effect. The "proposed negative" instrument must also be laid in draft before both Houses.

Committees of both Houses would then be given a ten-sitting day window within which to consider the choice of procedure for the instrument.

If both House's committees endorse the Minister's choice of procedure, the Minister can proceed on that basis.

If either committee recommends that the Minister should use the draft affirmative procedure instead, the Minister then has a choice. They can either "upgrade" the instrument to a draft affirmative, or they can make a statement explaining why they have chosen to use the negative resolution procedure anyway.

Devolution and sifting

As with EUWA, parallel statutory sifting arrangements are included for the Senedd Cymru. Equivalent provision does not exist (also consistent with EUWA) for the Scottish Parliament and Northern Ireland Assembly.

9.5 Clause 21 – interpretation

An index of expressions used in the Bill is contained in **clause 21**. This includes, for example, the definition of a "relevant national authority". That phrase serves as short-hand in the Bill for a Minister of the Crown or devolved authority, or (in some cases) both acting jointly.

However, most of the important words and phrases used in the Bill are defined (at least in part):

- elsewhere in the Bill;[113]
- in the EU (Withdrawal) Act 2018;[114] or
- in the Interpretation Act 1978.[115]

Clause 22 – commencement

The penultimate clause of the Bill deals with the commencement of different provisions. The vast majority of provisions in the final Act would come into force immediately following Royal Assent.[116] The exceptions are as follows:

- **Clauses 4 and 5 and** (the abolition of supremacy and general principles of EU law) would be commenced by regulations. Presumably, this must happen no later than the end of 2023. Otherwise, the relevant minister's failure to commence the provisions could be construed as frustrating Parliament's intention.
- **Clause 7** (on the status of CJEU case law and introducing domestic reference procedures) would also be subject to commencement regulations. Unlike **clauses 4-5**, the changes in **clause 7** are not necessarily timebound, and could plausibly be commenced separately.[117]

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113 eg "EU-derived subordinate legislation" in clause 1.

114 eg "retained case law" in section 6(7) of EUWA.

115 eg "Northern Ireland legislation" in section 24(5) of the Interpretation Act 1978.

116 subsection 22(1)

117 The barrister Jack Williams has observed that these changes could plausibly be commenced before the end of 2023, and do not depend on the other changes in the Bill coming into force. See Monckton Chambers, Webinar on the Retained EU Law (Revocation and Reform) Bill, 28 September 2022.

- **Clause 9** (concerned with incompatibility orders) is closely connected to **clause 4** and the abolition of supremacy. It would similarly be brought into force by commencement regulations. Given that incompatibility orders would only become relevant when the supremacy of EU law is revoked, it seems likely that **clause 9** would be commenced concurrently with, or some point after, **clause 4**.

- **Clause 18** (concerned with the abolition of the Business Impact Target) automatically comes into force two months after Royal Assent.

Subsection 22(5) also contains the carve-out from this legislative scheme for financial services regulation. The retained EU law concerned with financial services and markets will be revoked, restated or otherwise preserved under separate arrangements in the Financial Services and Markets Bill.

Subsection 22(6) clarifies the operation of the 2023 sunset. It makes clear that direct effect, supremacy, and general principles of EU law continue to have effect, on the same basis as they do now, until the end of 2023. If legal disputes are initiated after 2023, but are brought in relation to pre-2024 situations, those key principles of retained EU law would still apply.

9.6 Clause 23 – extent and short title

The final clause of the Bill confirms that it is of UK-wide application, having effects across England and Wales, Scotland and Northern Ireland. It also confirms the Bill's intended short title once it becomes an Act: the Retained EU Law (Revocation and Reform) Act 2022.

10 Legislative consent and devolution

10.1 Overview

It is constitutional convention that the UK Parliament will not normally legislate with regard to devolved matters without the consent of the devolved legislature(s). Consent is sought where, and to the extent that, primary legislative provision:

- could have instead been made by the devolved legislature, and/or
- would materially alter the competence or functions of devolved institutions.

In the Explanatory Notes to each Government Bill before the UK Parliament, the UK Government usually indicates which provisions it believes engage the legislative consent convention.[118]

10.2 Provisions that engage the convention

Several clauses in the current Bill are acknowledged by the UK Government as engaging the consent requirement in Scotland, Wales and Northern Ireland:

- **Clauses 1 and 2**, since they govern the expiry of devolved legislation;
- **Clause 7**, since it affects retained case law in devolved policy areas;
- **Clauses 8 and 12-16**, since they confer powers on devolved authorities, and on UK ministers in devolved areas;
- **Clause 10**, since it broadens the permitted use of devolved delegated powers; and
- **Subsections 20(2-3) and related Schedules 2 and 3**, since they govern the powers of devolved authorities to make, or agree to, delegated legislation.

[118] On the legislative consent convention generally, see Commons Library, Devolution: the Sewel Convention.

10.3 Provisions that do not engage the convention

Other provisions are understood by the UK Government not to engage the legislative consent convention at all. These include:

- **Clause 6**, which changes the name of "retained EU law" to "assimilated law";
- **Clause 11**, which revokes additional UK Parliamentary scrutiny arrangements for regulations made under section 2(2) of the ECA;
- **Clause 18**, which abolishes the (reserved) Business Impact Target;
- **Clause 19**, which gives Ministers of the Crown powers to make consequential provision in relation to the Bill;
- **Subsections 20(1 and 4-5)**, which make general provision about scrutiny of regulations under the Bill;
- **Clause 21**, which concerns the interpretation of words and phrases in the Bill; and
- **Clauses 22-23** which concern the commencement and short title of the Bill.

10.4 Provisions requiring consent in Northern Ireland only

The UK Government has stated that some provisions engage the requirement for legislative consent in Northern Ireland, but not in Scotland and Wales.

The rationale for this difference of treatment is not readily apparent from the Bill's explanatory materials. The relevant provisions appear to affect all three devolution settlements in largely the same way. The relevant provisions are:

- **Clauses 3-5**, revoking direct effect, supremacy and general principles of retained EU law;
- **Clause 9**, requiring domestic courts and tribunals to make incompatibility orders in certain circumstances); and
- **Schedule 1**, making consequential provision about UK Parliamentary scrutiny of delegated powers.

10.5 Provisions requiring consent in Wales only

Clause 17 concerns the use of Legislative Reform Orders (LROs) to modify or revoke retained direct EU legislation. This clause engages the consent convention in Wales, but not in Scotland or Northern Ireland.

The reason for this difference is that LROs can extend to devolved matters in Wales, with the consent of Welsh Ministers. The same is not true in Scotland or Northern Ireland, where LROs can only modify legislation in devolved areas incidentally or consequentially.

10.6 Legislative consent memorandums

Scotland

The Scottish Government has yet to publish a legislative consent memorandum for the Scottish Parliament. However, Angus Robertson MSP (the Cabinet Secretary for the Constitution, External Affairs and Culture) wrote to Jacob Rees-Mogg (the Secretary of State for Business, Energy and Industrial Strategy) on 22 September 2022.[119]

He expressed "deep concern" about the Bill, the powers it would give to UK Ministers in devolved areas. He also complained about a lack of "advance sight" of the "most controversial clauses of the bill".

Robertson indicated that the sunset provisions would significantly disrupt the Scottish Parliament's legislative agenda, as efforts were made to preserve REUL that would otherwise fall away.

Wales

The Welsh Government has yet to publish a legislative consent memorandum for the Senedd Cymru. However, Mick Antoniw, the Counsel General for Wales, has written to the Secretary of State and. He raised concerns about:

- the proposed powers for UK ministers to exercise functions in devolved areas;
- the potential deregulatory impact of the Bill on employment, health and environmental regulation; and
- the levels of pre-legislative engagement with the Welsh Government.[120]

[119] Scottish Government, Retained EU Law Bill: letter to the UK Government, 22 September 2022.

[120] Welsh Government, Press Release: Power grab fears over new UK government legislation, 23 September 2022.

Northern Ireland

At the moment, there is no functioning Northern Ireland Executive, and the Northern Ireland Assembly is not fully functioning. This prevents the preparation of legislative consent memoranda (by the Executive) or the debating of legislative consent motions (by the Assembly).

The UK Government has, in the past, proceeded to legislate without devolved consent in Northern Ireland in circumstances such as these. This most notably happened with the EU (Withdrawal) Act 2018. It also legislated against the wishes of the Northern Ireland Assembly in relation to the EU (Withdrawal Agreement) Bill and the EU (Future Relationship) Bill in 2020.

The UK's EU Withdrawal Agreement puts in place different arrangements for Northern Ireland than the rest of the UK (most notably the Protocol on Ireland/Northern Ireland). This means that aspects of EU law continue to apply directly to Northern Ireland, but not to Scotland, Wales or England. As with other directly effective parts of the Withdrawal Agreement, the Protocol displaces REUL to the extent that the two are inconsistent. However, EU-derived domestic legislation, including regulations originally made under section 2(2) of the ECA, still supports the implementation of the Protocol, in areas which are not fully addressed by direct effect.[121]

The Northern Ireland Protocol Bill (currently being considered by Parliament) would disapply key provisions of the Protocol, and expressly authorise UK ministers to make contradictory provision.[122]

[121] section 7A-C of the EU (Withdrawal) Act 2018.

[122] See Commons Library, Northern Ireland Protocol Bill 2022-23.

11 Reaction to and comment on the Bill

The Bill has been publicly welcomed by several Government backbench MPs. For example, David Jones MP said, following its introduction:

> Pleased to see the introduction of the Retained EU Law (Revocation and Reform) Bill in the Commons today. It will start the process of weeding out undemocratically-imposed EU legislation and clear the way for laws more suited to the UK's requirements.[123]

11.1 The manifesto commitment

The Conservative Manifesto in 2019 said (emphasis original):

> Once we get Brexit done, Britain will take back control of its laws. As we end the supremacy of European law, we will be free to craft **legislation and regulations that maintain high standards but which work best for the UK**. We want a balance of rights, rules and entitlements that benefits all the people and all the parts of our United Kingdom.[124]

Some observers, including Crossbencher Lord (David) Anderson KC, have suggested that this Bill (in part) therefore pursues a manifesto commitment. However, Lord Anderson still expected the House of Lords would seek major changes to this Bill, should it be approved by the Commons. In a Hansard Society webinar on 12 October, he said:

> I would expect many of [the Lords'] concerns about this Bill to focus not so much on the principle of removing supremacy, the general principles and so on, as on practicalities: how all this could possibly be done in 14 months?
>
> The constitutional concern, which I can confidently predict, will dwarf all others, is going to be clause 15 and the powers to revoke and replace laws arrived at by the democratic processes of the EU… with statutory instruments issued by government. That will hit a very painful nerve indeed.[125]

123 David Jones MP, Twitter, 22 September 2022.

124 Conservative Party Manifesto, Get Brexit Done: Unleash Britain's Potential (PDF), November 2019, page 48.

125 Hansard Society, Webinar: Unpicking the Retained EU Law Bill: What does it mean for Parliament?, 12 October 2022.

11.2 Concerns about clarity and legal certainty

Several commentators have expressed concerns about the Bill's implications for legal certainty. The general nature of the Bill's provisions, combined with the sunset clauses, leaves the substantive fate of key policy areas unresolved.

What policy areas will see significant changes?

The primary concern expressed has been about **what** retained EU law the Government intends to:

- protect against revocation under **subsection 1(2)**;
- restate in a domestic statutory instrument under **clauses 12 or 13**;
- revoke without replacing under **subsection 15(1)**;
- replace with similar provision under **subsection 15(2)**; or
- replace with "alternative provision" under **subsection 15(3)**.

As Sir Jonathan Jones KC put it in a webinar for the Hansard Society:

> The Explanatory Notes... give no indications of any particular legal or policy areas which the Government thinks should either be retained or changed. So at the time of passing this Bill... neither Parliament nor businesses nor anyone else can know what the substantive law will be by the end of 2023...

This could, he said, lead to gaps in the law appearing in domestic law by accident, given the Government's scoping exercise has not been exhaustive:

> The default position... is that if no conscious decision is made to keep a particular piece of retained EU law, with or without amendments, or if indeed a piece of retained EU law is missed by accident, it will automatically expire on the sunset date with no further involvement by Parliament at all. At the moment we simply don't know what will happen to any particular law.[126]

Dr Ruth Fox of the Hansard Society similarly has said:

> The only thing we've really got a steer on is that the financial services aspects of retained EU law have already been carved out into the Financial Services and Markets Bill, but everything else is pretty much up for review.
>
> The only clue we've got as to Government thinking is, well, "tune into the Today Programme on a morning and hear what ministers are saying, but also, clause 15 which indicates that the direction of travel in terms of the Government's thinking is essentially one-way in favour of deregulation.[127]

[126] As above.
[127] As above.

At the Hansard Society seminar, Dr Fox also alluded to the uncertainty presented by the sunset extension. No indication has been given as to whether, or to what extent, the **clause 2** extension power is likely to be used.

Jack Williams, a barrister at Monckton Chambers and the editor of the EU Relations Law legal education blog, has described the Bill as the "Hokey-Cokey" Bill, because of the range of exceptions and caveats that potentially apply to the sunset clause.[128]

Uncertainty about supremacy and interpretation

Related concerns have been raised about the uncertainty surrounding the interpretation of the law that is preserved, restated or replaced. As Sir Jonathan Jones KC has said:

> Those provisions [abolishing supremacy and the retained general principles of EU law] may be partly symbolic in that they "distance" or "detach" domestic law from the previous trappings of EU law. But they are also undoubtedly intended to change the way the law is actually interpreted and applied; otherwise why would we be doing it?
>
> The trouble again is that no examples are given of any particular areas of the law or factual situations or real-world situations, where it is intended that the law should change. So, for example, what are the particular provisions of retained EU law which currently prevail over inconsistent domestic law… where supremacy currently applies but where the Government thinks that is a problem and would like to reverse that position?
>
> Again, we don't know. It would be left to parties to litigate, potentially, and the courts would decide. That I think is, again, a problem for legal certainty.[129]

The Public Law Project has argued that the new framework would make areas of settled law and contested, giving rise to an increase in litigation and reduced legal certainty for individuals and businesses.[130]

11.3 The role of Parliament

Specific concerns have been raised about the effect of the sunset clause on the ability of Parliament to scrutinise and challenge changes to retained EU law. George Peretz KC has said:

> A result of the sunset clause is that Government departments might be tempted to turn up to Parliament in November to December 2023 with whole rafts of replacement revocation legislation… Parliament would otherwise have been in a position of being able to prevent that because changes [would

[128] Monckton Chambers, Webinar on the Retained EU Law (Revocation and Reform) Bill, 28 September 2022.

[129] Hansard Society, Webinar: Unpicking the Retained EU Law Bill, 12 October 2022.

[130] Public Law Project, Retained EU Law Bill: four way it's flawed, 23 September 2022.

> sometimes] require a positive vote in both Houses of Parliament to get it through.
>
> But when Parliament has essentially got a gun to its head, it's faced with a whole pile of legislation about which there may be pretty substantial objections. But the message is unless you get it through, I'm afraid the rules will simply fall away. That makes Parliament's position extremely difficult.
>
> Now perhaps one would be unduly cynical to suggest that that was being planned, but it's certainly a possibility if by accident if not intention that that would happen.[131]

The Public Law Project has argued that it would be better for Parliament to reform areas of retained EU-law on a policy-by-policy or sectoral basis:

> This 'cliff edge' seems unnecessary as Parliament can change retained EU laws as and when it sees a policy need to do so. This has already been done in a number of areas, such as the Agriculture Act 2020 & the Environment Act 2021. A blanket sunset and wide ministerial powers look unnecessary, constitutionally unsound, and dangerous for rights and certainty.[132]

11.4 The delegated powers

Specific concerns have been raised about the Bill's delegated powers.

Breadth of clause 15 powers

George Peretz KC has argued that the new powers to replace existing REUL provision are very broad. He gave an illustrative, though hypothetical, example of how **subsection 15(2)** could potentially be used in relation to the current ban on the sale of cosmetic products tested on animals.

Alternative policies, such as a warning label scheme, Peretz said, could be implemented under those powers with very limited Parliamentary oversight. He was not suggesting that this was Government policy; simply that it would be permissible under the new powers.

Such regulations, he said, could be made under the negative resolution procedure (without a prior vote in Parliament) on the grounds that they were considered by a minister to be "appropriate" and in pursuit of "the same or similar objective" as the current ban (the promotion of animal welfare).[133]

Dr Ruth Fox of the Hansard Society has similarly described **clause 15** as a "do anything we want power" because of the breadth of policy discretion it confers on ministers and devolved authorities.[134]

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131 Monckton Chambers, Webinar on the Retained EU Law (etc.) Bill, 28 September 2022.
132 Public Law Project, Retained EU Law Bill: four way it's flawed, 23 September 2022.
133 Monckton Chambers, Webinar on the Retained EU Law (etc.) Bill, 28 September 2022.
134 Hansard Society, Webinar: Unpicking the Retained EU Law Bill, 12 October 2022.

11.5 Specific policy areas

Retained EU law spans a wide range of domestic policy areas, which could potentially be impacted by provisions in this Bill, including, including:

- employment law;
- environmental protection;
- consumer protection;
- agriculture and fisheries;
- transport;
- financial services and markets regulation;
- tax (especially VAT); and
- data protection.

Employment law

Several organisations have raised specific concerns about the Bill's potential implications for employment law. Most of the UK's labour law protections are contained in regulations originally made under section 2(2) of the ECA, rather than in primary legislation. This notably includes (but is not limited to):

- the Working Time Regulations;
- the Transfer of Undertakings (Protection of Employment Regulations;
- the Agency Workers Regulations;
- the Part-time Workers (Prevention of Less Favourable Treatment) Regulations;
- the Information and Consultation of Employees Regulations;
- the Maternity and Parental Leave Regulations; and
- the Paternity and Adoption Leave Regulations.

Additionally, there is relevant case law supporting the view that Article 157 TFEU (on equal pay) forms part of retained EU law by virtue of section 4 of

EUWA. It provides stronger protection, in certain contexts, than the Equality Act 2010.[135] All of this law, by default, would expire at the end of 2023.

Other parts of employment law are contained in primary legislation, and so would not be revoked under this Bill (notably the Equality Act 2010, the Employment Rights Act 1996 and the Trade Union and Labour Relations (Consolidation) Act 1992).

The Institute for Public Policy Research (IPPR) has raised four concerns about the Bill's potential impact on the employment policy space:

- that there would be a "direct threat to core rights and protections";
- that changes could cause "renewed tensions with the EU" (because of the UK's "level playing-field" commitments under the Trade and Co-operation Agreement);
- that the sunset clause would "create extraordinary uncertainty for businesses and workers" and "the prospect of legal chaos"; and
- that future changes to labour law would lack democratic scrutiny and accountability.[136]

The Public Law Project has similarly said that the Bill:

> threatens a host of rights, including workers' rights like holiday pay, agency worker rights, data protection rights, and protections from downgrading terms and conditions when businesses are transferred. [137]

The trade union UNISON has described the potential implications of the Bill as "an attack on working women".[138]

Environmental law

The Government department with the most retained EU laws identified on the Retained EU law dashboard is the Department for the Environment, Food and Rural Affairs (Defra). Several environmental organisations have raised concerns about the Bill.[139] For example, the RSPB has described the potential revocation of environmental laws in the Defra policy space as "an attack on nature", expressing particular concern about the regulation of air and water quality and prevention of pollution.[140]

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135 See for example *Case C-624-19 K and others v Tesco Stores Ltd* (preliminary reference on request of the Watford Employment Tribunal).

136 Institute for Public Policy Research, The retained EU law bill: What does it mean for workers' rights?, 30 September 2022.

137 Public Law Project, Retained EU Law Bill: four way it's flawed, 23 September 2022.

138 UNISON, The Retained EU Law Bill: An attack on working women, 12 October 2022.

139 The Guardian, UK environment laws under threat in 'deregulatory free-for-all, 23 September 2022.

140 RSPB, Attack on nature: the story so far, September 2022

11.6 Links to Bill commentary

- Financial Times, Fears raised over UK plans to review 'retained' EU law, 22 September 2022
- The Telegraph, All remaining EU laws to be scrapped or replaced by end of next year, 23 September 2022
- Public Law Project, Retained EU Law Bill: four way it's flawed, 23 September 2022
- Senedd Research, "Unfettered authority"? The Retained EU Law (Revocation and Reform) Bill in Wales, 27 September 2022
- Monckton Chambers, Webinar on the Retained EU Law (Revocation and Reform) Bill, 28 September 2022
- Institute for Public Policy Research, The retained EU law bill: What does it mean for workers' rights?, 30 September 2022
- Kate Ollerenshaw, More Haste, Less Speed: Sunset Clauses in the Retained EU Law (Revocation and Reform) Bill, UK Constitutional Law Association, 10 October 2022
- Hansard Society, Webinar: Unpicking the Retained EU Law Bill: What does it mean for Parliament?, 12 October 2022
- UNISON, The Retained EU Law Bill: An attack on working women, 12 October 2022
- The Guardian, Truss promises to slash EU red tape – what's the truth behind the rhetoric?, 12 October 2022

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