HOUSE OF LORDS Library Briefing

Retained EU Law (Revocation and Reform) Bill HL Bill 89 of 2022–23

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The House of Lords is scheduled to debate the Retained EU Law (Revocation and Reform) Bill at second reading on 6 February 2023.

The bill would make major changes to the body of retained EU law in UK domestic law. 'Retained EU law' is a concept created by the European Union (Withdrawal) Act 2018). This act took a 'snapshot' of EU law as it applied to the UK at the end of the Brexit transition period on 31 December 2020 and provided for it to continue to apply in domestic law. The bill would automatically revoke, or 'sunset', most retained EU law at the end of 2023. This would not apply to retained EU law that was domestic primary legislation. Ministers and devolved authorities could exempt most (but not all) retained EU law from the sunset, and UK ministers (but not devolved authorities) could delay the sunset until 23 June 2026 at the latest for specific descriptions of retained EU law. Any retained EU law that still applied after the end of 2023 would be renamed as assimilated law. The bill would give ministers and devolved authorities powers to restate, reproduce, revoke, replace or update retained EU law and assimilated law by statutory instrument.

The bill would repeal the principle of supremacy of retained EU law from UK law at the end of 2023, although its effects could be reproduced by statutory instrument in relation to specific pieces of retained EU law. The bill would also make changes to the way that courts could depart from retained EU case law.

The bill would change the way that some types of retained EU law can be modified. It would 'downgrade' retained direct EU legislation so that this could be amended by secondary legislation. It would also remove additional parliamentary scrutiny requirements that currently apply when modifying some types of EU-derived domestic secondary legislation.

The government has published a 'dashboard' of retained EU law, although it acknowledges this is not a comprehensive catalogue of all retained EU law that may be in scope of the bill. The dashboard is due to be updated regularly.

Concerns have been raised about the amount of retained EU law to be reviewed before the sunset deadline and whether some may end up being revoked inadvertently. MPs and others have also expressed concerns about the impact of large-scale and rapid changes to the statute book as a consequence of the bill and have highlighted a lack of clarity about what retained EU law the government intends to keep, particularly in the areas of employment, environmental and consumer protections. They have also been critical of a lack of parliamentary scrutiny of and input into the process of reforming retained EU law. However, the only amendments made to the bill in the House of Commons were government amendments to clarify the bill's drafting.

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1. Introduction

The Retained EU Law (Revocation and Reform) Bill had its first reading in the House of Lords on 19 January 2023. Second reading is due to take place in the House of Lords on 6 February 2023. The bill was originally introduced in the House of Commons on 22 September 2022 and completed its passage through the Commons on 18 January 2023. The only amendments made in the Commons were government amendments to clarify drafting. The government has published explanatory notes, an impact assessment and a delegated powers memorandum to accompany the bill.

The government has said that the bill would:[1]

- repeal or assimilate retained EU law, within a defined scope, by the end of 2023
- repeal the principle of supremacy of retained EU law from UK law by the end of 2023
- facilitate domestic courts departing from retained case law
- provide a mechanism for the UK government and devolved administration law officers to intervene in cases regarding retained case law, or refer them to an appeal court, where relevant
- repeal directly effective EU law rights and obligations in UK law by the end of 2023
- abolish general principles of EU law in UK law by the end of 2023
- establish a new priority rule requiring retained direct EU legislation (RDEUL) to be interpreted and applied consistently with domestic legislation
- downgrade the status of RDEUL for the purpose of amending it more easily
- create a suite of powers that allow retained EU law to be revoked or replaced, restated or updated and removed or amended to reduce burdens
- repeal the business impact target contained in the Small Business, Enterprise and Employment Act 2015

2. Background

2.1 What is retained EU law?

'Retained EU law' is a concept created by the European Union (Withdrawal) Act 2018 (EUWA). The act (later amended by the European Union (Withdrawal Agreement) Act 2020 to take account of the Brexit transition

[1] Explanatory notes, p 3.

period) took a 'snapshot' of EU law as it applied to the UK at the end of the Brexit transition period on 31 December 2020. It provided for this body of retained EU law to continue to apply in domestic law.

EUWA sets out three categories of retained EU law:

- Section 2 preserves **EU-derived domestic legislation**: domestic primary or secondary legislation that transposed EU obligations, including EU directives, into domestic law.
- Section 3 preserves **direct EU legislation**: EU regulations, EU decisions and EU tertiary legislation that was directly applicable in the UK when it was an EU member state.
- Section 4 preserves **other directly effective provisions of EU law**: rights, powers, liabilities, obligations etc that were directly effective in UK law when the UK was an EU member state.

EUWA also sets out how retained EU law can be modified (whether primary or secondary legislation is required depends on the type of retained EU law) and how the courts should interpret it.[2] Section 5 of EUWA preserves the supremacy of (retained) EU law over domestic law for laws enacted before the end of the Brexit transition period, but not for laws enacted after that. The principle of supremacy means that where EU law and domestic law are incompatible with each other, EU law takes precedence.

EUWA was passed under Theresa May's government. Its position was that if the UK had removed all EU and EU-derived law at the point the UK was no longer bound by EU obligations, the UK's statute book "would contain significant gaps".[3] It therefore pursued a two-stage approach of retaining EU law on exit with the ability to amend it later:

> 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 have left the EU.[4]

The body of retained EU law in UK law has already been amended in multiple ways. The government has used primary legislation to implement

[2] For further information about retained EU law, see: House of Commons European Scrutiny Committee, 'Retained EU law: Where next?', 21 July 2022, HC 122 of session 2022–3; and House of Commons Library, 'The status of "retained EU law"', 30 July 2019 (note the latter was written before the Brexit transition period was agreed).
[3] Department for Exiting the European Union, 'Legislating for the United Kingdom's withdrawal from the European Union', March 2017, Cm 9446, p 10.
[4] As above.

significant post-Brexit policy changes. For example, the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 ended EU free movement rights in the UK and repealed the main provisions of retained EU law relating to free movement. Section 8 of EUWA gave ministers the power to make regulations to correct 'deficiencies' in retained EU law. The government has made hundreds of regulations using this power. Some of these are small changes, such as removing references to "other member states" from domestic law. Others have been more significant, such as removing EU state aid rules from domestic law.[5] Although this power expired at the end of 2022, ministers may continue to modify some types of retained EU law using secondary legislation under other powers depending on the status they were given under EUWA.

2.2 Government plans to reform retained EU law

Although the ability to amend retained EU law exists, recent Conservative governments have argued that further, more systematic changes are needed.

Review of retained EU law

In September 2021, Lord Frost, who was then the minister with responsibility for Brexit, launched reviews into the status and substance of retained EU law.[6] He argued that if the status of retained EU law was not "normalised", there was a risk of giving "undue precedence to laws derived from EU legislation over laws made properly by this Parliament". The purpose of reviewing the substance of retained EU law was to fulfil the government's intention "eventually to amend, repeal or replace all retained EU law that is not right for the UK". He said the government was looking at developing a "tailored mechanism for accelerating the repeal or amendment of this retained EU law". Lord Frost said the review of the content of retained EU law followed on from the work of the taskforce on innovation, growth and regulatory reform (TIGRR), chaired by Sir Iain Duncan Smith (Conservative MP for Chingford and Woodford Green).[7]

Lord Frost gave an update on the progress of the reviews in December 2021.[8] On the substance review, he said he had directed government departments to establish the contents of retained EU law in their areas of responsibility. He said this would deliver the first authoritative assessment of which departments and which sectors of the economy were most affected by retained EU law. On the status review, he said there were seven areas

[5] State Aid (Revocations and Amendments) (EU Exit) Regulations 2020. EU state provisions still apply in respect of the Northern Ireland Protocol.
[6] HL Hansard, 16 September 2021, cols 1532–4.
[7] Prime Minister's Office, 'Taskforce on Innovation, Growth and Regulatory Reform independent report', June 2021.
[8] House of Lords, 'Written statement: Brexit opportunities: Review of retained EU law', 9 December 2021, HLWS445.

where EU law concepts retained by EUWA continued to affect the UK. In summary these were:

- The incorporation of directly effective EU rights replicated some rights that were already part of UK law, separately from the UK's membership of the EU.
- UK courts were still required to interpret retained EU law in accordance with retained general principles of EU law, such as proportionality, so far as the principles were still relevant.
- Retained EU law had a "special and unusual status" in UK law.
- The EU concept of the supremacy of EU law is preserved by EUWA in relation to domestic law passed or made before the end of the transition period.
- UK courts remained bound by EU case law in interpreting retained EU law.
- A mechanism was needed to swiftly remove retained EU law if the original EU law measure has been declared invalid in EU law.
- Consequential actions may be necessary, such as updated guidance for the courts.

'Brexit Freedoms Bill' and 'The benefits of Brexit' policy paper

On 31 January 2022, on the second anniversary of the UK's departure from the EU, the then prime minister, Boris Johnson, announced he was planning to introduce a 'Brexit Freedoms Bill'.[9] Mr Johnson said the bill would "end the special status of EU law in our legal framework and ensure that we can more easily amend or remove outdated EU law in future". At the same time, the government announced that a cross-government drive to reform, repeal or replace "outdated" retained EU law would cut £1bn of red tape for UK businesses.

The government published a policy paper on 'The benefits of Brexit' on the same day.[10] The government said its intention was to "amend, replace or repeal all the retained EU law that is not right for the UK". It identified two key strands: reviewing the substance of retained EU law to meet the UK's new regulatory priorities and reviewing the status of retained EU law to allow changes to be made more easily.

The policy paper said the new legislation would "clarify the status and operation of retained EU law", "simplify the complex status provisions" in EUWA and ensure retained EU law could be amended "in a proportionate

[9] Prime Minister's Office, 'Prime minister pledges Brexit Freedoms Bill to cut EU red tape', 31 January 2022.
[10] HM Government, 'The benefits of Brexit', 31 January 2022.

and sensible way". It said the Cabinet Office was reviewing questions including:

- Revising the status of certain types of retained EU law for the purposes of amendment, to "normalise" their status in domestic law and make them easier to repeal or replace.
- Creating a "targeted" power to enable the amendment of retained EU law for certain purposes without requiring primary legislation. The government argued it was "not a good use of finite parliamentary time" to require primary legislation to amend retained EU laws that currently have a status equivalent to primary legislation when it comes to making amendments to them.
- Removing the continued effect of the supremacy of EU law over domestic law that was made before the end of the transition period.

The government also set out in the policy paper how it believed reviewing retained EU law would give "the best platforms to capitalise on our regulatory freedoms for the long term". It argued that although EUWA was needed to ensure continuity and certainty immediately after Brexit, it was never the intention for all retained EU law to remain on the statute book without review. It said it would "prioritise areas where reform of retained EU law can deliver the greatest economic gain". The policy paper suggested that the government wanted to use the ability to diverge from the EU regulatory approach to build on the UK's international competitiveness in sectors such as financial services and fintech, automotive, digital, green energy and the creative industries.

A 'Brexit Freedoms Bill' was included in the Queen's Speech in May 2022.[11]

Retained EU law dashboard

In June 2022, the government published a retained EU law 'dashboard', which it said was the result of Lord Frost's review into the substance of retained EU law.[12] The government described it as a tool to explore thousands of pieces of retained EU law and view which government departments and sectors of the economy they relate to.[13]

The dashboard catalogues over 2,400 pieces of retained EU law. Table 1 in this briefing shows the figures given in the dashboard (as at 24 January 2023) for the numbers of pieces of retained EU law in total and broken down by

[11] Cabinet Office, 'The Queen's Speech 2022', 10 May 2022.
[12] Cabinet Office, 'Retained EU law dashboard', 22 June 2022.
[13] Cabinet Office, 'Retained EU law—public dashboard', accessed 24 January 2023.

type (according to definitions in EUWA). It also shows how many of these have been amended, repealed or replaced and how many are unchanged.

Table 1. Retained EU law (REUL) as catalogued in the government dashboard[14]

	All retained EU law	REUL type		
		EU-derived domestic legislation retained under section 2 of EUWA	EU direct legislation retained under section 3 of EUWA	Directly effective rights retained under section 4 of EUWA
Unchanged	2,006	797	746	24
Amended	182	84	25	3
Repealed	196	9	38	1
Replaced	33	5	28	-
Total	2,417	895	882	28

However, the government has acknowledged that the dashboard is not complete. It has said that the dashboard "presents an authoritative, not comprehensive" catalogue of retained EU law.[15] For instance, the guidance accompanying the dashboard notes that not all data is available for the Department for Environment, Food and Rural Affairs (Defra), and that the dashboard "is not intended to provide an authoritative account of REUL that sits within the competence of the devolved administrations".[16]

The Financial Times reported in November 2022 that the National Archives had discovered another 1,400 pieces of retained EU law, although they had not yet been verified by government departments.[17]

The government clarified recently (at the bill's House of Commons report stage in January 2023) that it has now identified and verified 3,200 items of

[14] The cumulative total for the three different types of retained EU law does not add up to the numbers given in the 'All retained EU law' column. This may be explained in part by the fact the dashboard includes 570 pieces of retained EU law for the Department for Environment, Food and Rural Affairs, but does not hold information on whether they are EU-derived domestic legislation, EU direct legislation or section 4 EUWA rights/obligations.
[15] House of Commons, 'Written question: EU law', 24 October 2022, 66986.
[16] Cabinet Office, 'Retained EU law—public dashboard', accessed 24 January 2023.
[17] George Parker, 'UK plan to scrap all EU laws suffers new setback', Financial Times (£), 8 November 2022.

retained EU law and expects the final total to be updated.[18] It has said the dashboard will be updated in January 2023.[19] This is expected to be followed by further updates on a quarterly basis throughout 2023.[20] The government is planning to add new functionality to the dashboard to highlight which entries are new or have been updated since it was first published in June 2022.

At the time of writing of this briefing, the dashboard had not been updated.

3. Bill provisions

The bill comprises 23 clauses and four schedules.

3.1 Sunsets of retained EU law

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

Clause 1 would revoke, or 'sunset', two categories of REUL at the end of 2023, namely EU-derived subordinate legislation and retained direct EU legislation. However, ministers could exempt specific pieces of legislation or specific provisions from the sunset.

EU-derived subordinate legislation is defined in clause 1(4). It means domestic subordinate legislation that was made under:

- Section 2(2) of the European Communities Act 1972 (ECA). This was the power by which subordinate legislation could be used to implement EU law or to make provisions related to the UK's obligations when it was a member of the EU.[21]
- A power other than section 2(2) of the ECA but which was made for a purpose mentioned in section 2(2)(a) of the ECA, or which operated immediately before the end of the Brexit transition period (31 December 2020) for a purpose mentioned in section 2(2)(a). Those purposes were implementing the UK's

[18] HC Hansard, 18 January 2023, col 462.
[19] As above, col 467.
[20] House of Commons, 'Written question: EU law: Internet', 12 January 2023, 119047.
[21] Clause 1(4)(a) also refers to domestic subordinate legislation made under paragraph 1A of schedule 2 to the ECA. This paragraph expressly allowed subordinate legislation made under section 2(2) of the ECA to include 'ambulatory' references to EU legislation. In other words, a piece of domestic subordinate legislation made using the power in section 2(2) could expressly provide that any references to EU legislation should be construed to refer to the EU legislation as amended if any amendments were made to that EU legislation in future (Cabinet Office, 'Explanatory notes to the Legislative and Regulatory Reform Act 2006'—see explanation of section 28 which inserted paragraph 1A into schedule 2 to the ECA).

> obligations as an EU member state, or enabling them to be implemented, and enabling the UK's rights under the EU treaties to be exercised.

Domestic subordinate legislation that falls into either of these categories would still be classed as EU-derived subordinate legislation if it had subsequently been modified by another enactment.

EU-derived subordinate legislation was saved as part of the domestic statute book by section 2 of the European Union (Withdrawal) Act 2018 (EUWA) at the end of the Brexit transition period. Without this saving provision, subordinate legislation made under section 2(2) of the ECA would have lapsed when the ECA was repealed.

When it was an EU member state, the UK implemented some of its EU obligations in domestic law through primary legislation, rather than through secondary legislation. Such primary legislation is also captured by the definition of 'EU-derived domestic legislation' used in section 2 of EUWA.

However, this primary legislation would not be revoked by the sunset in clause 1 of the bill. The bill defines primary legislation as acts of the UK Parliament, acts of the Scottish Parliament, acts and measures of the Senedd Cymru, and Northern Ireland legislation (clause 21).[22]

As noted above, the sunset would apply to EU-derived domestic subordinate legislation made under parent acts other than the ECA. This would mean that the parent act would not be revoked, but subordinate legislation that had been made under it to implement EU obligations would be, unless the government acted to prevent this.

At the bill's second reading in the House of Commons, Jacob Rees-Mogg, who had recently resigned as secretary of state for business, energy and industrial strategy, explained why the government had decided not to apply the sunset to primary legislation:

> […] we are not using this procedure to repeal acts of Parliament. Even though these measures have the effect of introducing EU law, an act of Parliament has had full scrutiny in the House, and to be repealed it deserves full scrutiny to be taken away. That is the correct constitutional procedure.[23]

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[22] 'Northern Ireland legislation' is defined in the Interpretation Act 1978. As well as acts of the Northern Ireland Assembly, it includes orders in Council made during direct rule and acts and measures of previous legislatures in Northern Ireland.

[23] HC Hansard, 25 October 2022, col 197. Mr Rees-Mogg was the minister who originally introduced the bill in the House of Commons. However, he resigned as secretary of state

Retained direct EU legislation consists of EU regulations, decisions and tertiary law that were retained as part of the domestic statute book at the end of the transition period by section 3 of EUWA. While the UK was a member of the EU, these categories of EU legislation were directly applicable and binding on the UK, so they were not individually transposed into domestic law by pieces of domestic legislation, unlike EU directives.

EUWA draws a distinction between:

- retained direct **principal** EU legislation: generally, this is REUL that originated as an EU regulation
- retained direct **minor** EU legislation: this is REUL that originated as an EU decision or EU tertiary legislation

These two categories of retained direct EU legislation are given different legal statuses from each other under EUWA. Retained direct principal EU legislation can be modified (which means amended, repealed or revoked) by:[24]

- an act of Parliament, or other primary legislation such as acts of the devolved legislatures
- pre-existing Henry VIII powers[25]
- subordinate legislation made under parent acts passed after EUWA that expressly authorise such modification

In contrast, there are fewer restrictions on the use of subordinate legislation to modify retained direct minor EU legislation.

EUWA also provides that for the purposes of the Human Rights Act 1998 (HRA), retained direct principal EU legislation is to be treated as primary legislation and retained direct minor EU legislation is to be treated as secondary legislation. Under the HRA, if a court finds secondary legislation to be incompatible with the European Convention on Human Rights, it can deprive it of legal effect to the extent that it is incompatible. It cannot do this to primary legislation but can only issue a declaration of incompatibility.

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on 25 October 2022, just before the bill had its second reading in the House of Commons, following the change in prime minister.

[24] House of Commons Library, 'The status of "retained EU law"', 30 July 2019, p 26. Additionally, powers to amend retained direct **minor** EU legislation can be used to make supplementary, incidental or consequential amendments to retained direct **principal** EU legislation.

[25] Henry VIII powers enable ministers to amend or repeal provisions in primary legislation using secondary legislation which is subject to varying degrees of parliamentary scrutiny.

When it comes to sunsetting, the bill does not make a distinction between principal and minor retained EU direct legislation. Both categories would be revoked by the sunset in clause 1.

There are some limitations on what would be revoked by the sunset in clause 1. First, a 'relevant national authority' could make regulations to exempt an instrument, or a provision of an instrument, from being revoked (clause 1(2)). A relevant national authority means a minister of the crown (UK minister), a devolved authority (Scottish ministers, Welsh ministers or Northern Ireland departments), or a minister of the crown and one or more devolved authorities acting jointly. This definition is set out in clause 21, and it applies throughout the bill where powers are given to a 'relevant national authority'. However, schedule 2 sets restrictions on how devolved authorities could use these powers (for instance, only using them in areas of devolved competence).

Regulations to exempt instruments or provisions from the sunset would be subject to the negative procedure.[26]

Instruments or provisions that were exempted from the sunset by such regulations would become part of 'assimilated law' after the end of 2023 (clause 6).

The government has said that the ability to exempt instruments or provisions from the sunset would enable it to "keep specific pieces of legislation where the legislation meets the desired policy effect without having to fully restate or otherwise amend the legislation".[27]

Second, the revocation of an instrument (or a provision within an instrument) would not affect any amendments that instrument (or provision) had made to any other enactment (clause 1(3)). For instance, if a piece of subordinate legislation made under section 2(2) of the ECA made amendments to a piece of primary legislation, those amendments would not be affected by clause 1 automatically sunsetting the subordinate legislation.[28]

Third, the sunset would not apply to the financial services legislation specified in clause 22(5). The government is proposing to legislate separately in the Financial Services and Markets Bill to revoke retained EU law relating to financial services.

[26] Schedule 4, paragraph 7.
[27] Cabinet Office, 'Delegated powers memorandum: Retained EU Law (Revocation and Reform) Bill', 19 January 2023, p 17.
[28] Explanatory notes, p 10.

Clause 2: Extension of sunset in clause 1

Clause 2 would give UK ministers the power to delay the sunset in clause 1. They could make regulations to extend the sunset beyond the end of 2023 to a date no later than the end of 23 June 2026 for a specified instrument or legislation that met a specified description. The date of 23 June 2026 would mark 10 years since the Brexit referendum. The regulations would be subject to the negative procedure.[29]

The government argues that this extension mechanism would ensure "the efficiency of the REUL revocation process should a lack of parliamentary time, or external factors, hinder progress towards reform of retained EU law prior to the 2023 sunset date".[30]

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

Clause 3 would revoke section 4 of EUWA at the end of 2023, which would 'sunset' another category of retained EU law.

Section 4 of EUWA ensured that EU rights and obligations not covered by sections 2 and 3 of EUWA were retained in domestic law after the end of the Brexit transition period. The government explained at the time EUWA was passed that this included directly effective rights contained within EU treaties, which it defined as "those provisions of EU treaties which are sufficiently clear, precise and unconditional as to confer rights directly on individuals, and which can be relied on in national law without the need for implementing measures".[31] Other rights preserved by section 4 of EUWA include directly effective rights from EU agreements with third countries and directly effective rights in EU directives, subject to qualifications.[32]

The government has stated in the bill's explanatory notes that it was developments in EU case law that had originally led to these rights being regarded as directly effective in member states' domestic law and that this effect was preserved in section 4 of EUWA to provide legal continuity.[33] It states that by repealing these rights, the bill would ensure "that it is no longer possible for EU case law to override domestic legislation".

It has been noted that there is a particular challenge in cataloguing exactly what EU law was retained by section 4 of EUWA because it is not found in a

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[29] Schedule 4, part 2.
[30] Explanatory notes, p 5.
[31] Department for Exiting the European Union, 'Explanatory notes to the European Union (Withdrawal) Act 2018', June 2018, p 23.
[32] House of Commons European Scrutiny Committee, 'Retained EU law: Where next?', 21 July 2022, HC 122 of session 2022–23, p 7.
[33] Explanatory notes, p 5.

defined legislative text.[34] The government's retained EU law dashboard lists 28 directly effective rights retained under section 4, of which one has been repealed.[35] The government said this represented "government departments' best understanding of their catalogue of REUL at the time of publication".[36]

Clause 3 provides that anything which had been preserved in REUL by section 4 of EUWA will not be "recognised or available in domestic law" after the end of 2023 "and, accordingly, is not to be enforced, allowed or followed".

As explained above, a relevant national authority could exempt instruments or provisions from being revoked by the sunset in clause 1, and UK ministers could extend the deadline for that sunset until 23 June 2026. There are no similar provisions for the sunset in clause 3. However, the explanatory notes point out that the bill would provide powers to legislate to codify these rights and obligations (see section 3.5 of this briefing).

3.2 Assimilation of retained EU law

Clause 4: Abolition of supremacy of EU law

Clause 4 would remove the supremacy of EU law over domestic law. This principle has continued to apply in a limited form after the end of the Brexit transition period through provisions contained in EUWA.

It is a general principle of EU law that EU law has supremacy over national law and that member states may not apply a national rule that contradicts EU law.[37] The principle was developed in European case law, going back to before the UK joined the European Communities.

After the end of the transition period, the UK was no longer bound by any obligation to the EU to maintain the supremacy of EU law over domestic law. The government said when EUWA was passed in 2018 that the repeal of the ECA reflected the end of the supremacy of EU law in domestic law.[38]

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[34] House of Commons European Scrutiny Committee, 'Retained EU law: Where next?', 21 July 2022, HC 122 of session 2022–23, p 43.
[35] Cabinet Office, 'Retained EU law—public dashboard', accessed 14 January 2023.
[36] House of Commons European Scrutiny Committee, 'Retained EU Law: Where next?—Government response', 15 November 2022, HC 885 of session 2022–23, p 7.
[37] EUR-Lex, 'Precedence of European law', 22 October 2021.
[38] Department for Exiting the European Union, 'Explanatory notes to the European Union (Withdrawal) Act 2018', June 2018, p 20.

However, section 5 of EUWA preserves the supremacy of EU law in relation to domestic law that was made before the end of the Brexit transition period. This means that:[39]

- legislation enacted prior to 31 December 2020 continues to be interpreted in a manner that complies with REUL
- secondary legislation enacted prior to 31 December 2020 that contradicts REUL can be quashed
- primary legislation enacted prior to 31 December 2020 which contradicts REUL can be disapplied

This does not apply to domestic law made after the end of the Brexit transition period.

The government has stated that section 5 of EUWA ensured that "domestic legislation related to EU obligations that remained in force after the UK left the EU continued to produce the same legal effects as before the UK's departure".[40] The government argued in 'The benefits of Brexit' policy paper that removing the continued supremacy of EU law over pre-Brexit domestic law would "allow Parliament to more clearly define the relationship between retained EU law and UK law".[41] It said that an appropriate relationship would need to be defined "in light of the need to promote legal certainty".

Clause 4 of the bill would amend section 5 of EUWA. It would remove subsections (1) to (3) that currently provide for the supremacy of EU law over enactments passed before the end of the Brexit transition period. It would replace them with new provisions stating that the principle of the supremacy of EU law would not be part of domestic law after the end of 2023. This would mean that after 2023, no domestic legislation would be subject to the supremacy of EU law, regardless of whether the domestic legislation was made before or after 31 December 2020.

Clause 4 would also insert a new subsection A2 into section 5 of EUWA setting out that domestic enactments would take precedence over retained direct EU legislation. Retained direct EU legislation would have to be read and given effect in a way that was compatible with all domestic enactments. If there was a conflict, domestic enactments would take precedence over retained direct EU legislation.

[39] Professor Alison Young, 'Written evidence: Retained EU law where next?', REU0018, published 28 April 2022.
[40] Explanatory notes, p 5.
[41] HM Government, 'The benefits of Brexit', January 2022, p 32.

This would be subject to:

- Provisions in the Data Protection Act 2018 (DPA) about the order of precedence of data protection provisions contained in domestic legislation and retained direct EU legislation. Some of these provisions have not yet been enacted but would be inserted in the DPA by the Data Protection and Digital Information Bill that is awaiting committee stage in the House of Commons.
- Regulations made under clause 8(1) of the Retained EU Law (Revocation and Reform) Bill. This power would allow ministers to make regulations to enable retained direct EU legislation to take precedence over domestic legislation in specified instances.

The changes brought in by clause 4 would not apply to anything that occurred before the end of 2023 (clause 22(6)). The government states this means the changes would not affect legal proceedings after 2023 that related to acts or events before the end of 2023.[42]

Clause 5: Abolition of general principles of EU law

Clause 5 of the bill would remove from domestic law the general principles of EU law that were retained by EUWA for the interpretation of retained EU law.

The general principles of EU law are unwritten sources of law developed by the case law of the Court of Justice of the European Union (CJEU), which it uses to bridge the gaps left by EU primary law (the EU's founding treaties) and EU secondary law (such as regulations, directives and decisions).[43] At the time of the passage of EUWA, the government described the general principles of EU law as follows:

> The general principles are the fundamental legal principles governing the way in which the EU operates. They are part of the EU law with which the EU institutions and member states are bound to comply. The general principles are applied by the CJEU and domestic courts when determining the lawfulness of legislative and administrative measures within the scope of EU law, and they are also an aid to interpretation of EU law. Examples of the general principles include proportionality, non-retroactivity (ie that the retroactive effect of EU law is, in principle, prohibited), fundamental rights and equivalence and effectiveness.

[42] Explanatory notes, p 13.
[43] EUR-Lex, 'The non-written sources of European law: Supplementary law', 12 March 2018.

> UK laws that are within the scope of EU law and EU legislation (such as directives) that do not comply with the general principles can be challenged and disapplied. Administrative actions taken under EU law must also comply with the general principles.[44]

Section 6(3)(a) of EUWA requires retained EU law that is unmodified on or after the end of the transition period to be interpreted in accordance with any retained general principles of EU law. Only general principles of EU law that had been recognised by the CJEU in a case decided before the end of the transition period remain part of domestic law.[45]

Clause 5 would insert a provision into section 5 of EUWA stating that "no general principle of EU law is part of domestic law after the end of 2023". It would also make other consequential amendments to EUWA.

The changes brought in by clause 5 would not apply to anything that occurred before the end of 2023 (clause 22(6)). The government states this means the changes would not affect legal proceedings after 2023 that related to acts or events before the end of 2023.[46]

Clause 6: Renaming retained EU law as 'assimilated law'

Clause 6 would rename retained EU law as 'assimilated law' at all times after the end of 2023. It would rename particular categories of retained EU law as shown in the table below:

At or before the end of 2023	After the end of 2023
Retained EU law	Assimilated law
Retained case law	Assimilated case law
Retained direct EU legislation	Assimilated direct legislation
Retained direct minor EU legislation	Assimilated direct minor legislation
Retained direct principal EU legislation	Assimilated direct principal legislation
Retained domestic case law	Assimilated domestic case law
Retained EU case law	Assimilated EU case law
Retained EU obligation	Assimilated obligation

[44] Department for Exiting the European Union, 'Explanatory notes to the European Union (Withdrawal) Act 2018', June 2018, p 16.
[45] Paragraph 2 of schedule 1 of the European Union (Withdrawal) Act 2018.
[46] Explanatory notes, p 13.

The name change would not apply before the end of 2023. References in other enactments to the old names would be read as references to the new names after the end of 2023, although this would not apply to references in the titles of any enactments.

Schedule 1 would make consequential amendments to EUWA and to the bill to reflect the renaming of these categories of law. These changes would not apply before the end of 2023 (clause 22(7)).

Clause 6(6) specifies that further consequential amendments could be made by regulations using the power in clause 19. Clause 19 contains a general power for a minister of the crown to make consequential provision. Clause 6(6) specifies this could be used in particular to:

- add entries to the table of name changes in clause 6(1) for things that are related to the existing entries
- amend an enactment in consequence of the name of a thing being changed by clause 6(1) or by regulations made under clause 19

The government has said that the renaming exercise is to reflect that the interpretive effects of EU law will no longer apply to the body of retained EU law once the section 4 EUWA rights, the supremacy of EU law and the general principles of EU law have been removed.[47]

Clause 6 and schedule 1 were added to the bill by government amendments at report stage in the House of Commons. The wording of clause 6 in earlier versions of the bill specified only that retained EU law would be known as assimilated law after the end of 2023, without detailing name changes for the various sub-categories of retained EU law.

3.3 Interpretation and effect of retained EU law

Clause 7: Role of courts

Clause 7 would make changes to the way that UK courts could depart from retained case law. It would also allow lower courts to refer questions to higher courts on whether retained case law must be followed. It would also enable the UK law officers (and in relevant cases the holders of similar officers in the devolved administrations) to intervene in certain proceedings where there was a question about departing from retained case law. They could also make references after the conclusion of legal proceedings on points of law arising from retained case law.

[47] Explanatory notes, p 6.

Current rules for the way the courts interpret retained case law are set out in section 6 of EUWA. It provides that UK courts are not bound by decisions made by the Court of Justice of the European Union (CJEU) after the end of the Brexit transition period (31 December 2020). They may, however, continue to "have regard" to such decisions so far as they are relevant to any matter before the UK courts.

The situation is different for CJEU decisions made before the end of the Brexit transition period. Section 6 of EUWA provides that the general position is that UK courts must decide any questions about the validity, meaning or effect of unmodified retained EU law "in accordance with" retained case law and retained general principles of EU law. 'Retained case law' consists of:

- retained EU case law: principles laid down by and decisions made by the CJEU before the end of the transition period so far as they relate to retained EU law
- retained domestic case law: domestic case law concerned with what was then EU law or EU-related domestic law)

However, section 6 of EUWA allows some courts to depart from retained EU case law. It specifies that the UK Supreme Court, and Scotland's High Court of Justiciary when sitting as a criminal appeal court, are not bound by retained EU case law. Section 6 of EUWA contained powers to allow ministers to make regulations enabling other courts to depart from retained EU case law. Ministers exercised this power in 2020, so that the Court of Appeal of England and Wales and equivalent courts across the UK[48] can also depart from retained EU case law, although they remain bound in the normal way by a decision of another court which would normally bind them on whether or not to depart from retained EU case law.[49] This means that, for instance the Court of Appeal can depart from retained EU case law, but if the UK Supreme Court has made a decision since the end of the transition period about whether or not to depart from retained EU case law, the Court of Appeal is bound by that decision.

The test that the courts must currently apply when deciding whether to depart from retained EU case law is the same test the UK Supreme Court must apply when deciding whether to depart from its own case law. This test is not set out in statute but is essentially whether it appears right to the court to do so.[50]

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[48] The other courts are: Court Martial Appeal Court; Court of Appeal of Northern Ireland; High Court of Justiciary in Scotland when sitting as a court of appeal in relation to a compatibility or devolution issue; Inner House of the Court of Session in Scotland; Land Valuation Appeal Court in Scotland; Registration Appeal Court in Scotland.
[49] Ministry of Justice, 'Explanatory memorandum to the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020', December 2020.
[50] See: UK Supreme Court, 'Practice direction 3', para 3.1.3.

Clause 7 would amend section 6 of EUWA to put on the face of the act the list of relevant appeal courts that could depart from retained EU case law (currently the list is set out in regulations). It would also set out matters that the relevant appeal courts, the UK Supreme Court and the High Court of Justiciary (collectively referred to as the higher courts) should have regard to when deciding whether to depart from retained EU case law, namely:

- the fact that decisions of a foreign court are not (unless otherwise provided) binding
- any changes of circumstances which are relevant to the retained EU case law
- the extent to which the retained EU case law restricts the proper development of domestic law

Clause 7 would also amend section 6 of EUWA to specify that a higher court could depart from its own retained domestic case law "if it considers it right to do so having regard (among other things) to" the following:

- 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
- any changes of circumstances which are relevant to the retained domestic case law
- the extent to which the retained domestic case law restricts the proper development of domestic law

Clause 7 would also add a new section 6A into EUWA to allow a lower court that is still bound by retained case law to refer a point of law to a higher court not bound by retained case law for the higher court to make a decision. The lower court could make such a reference if it considered that the point(s) of law was of "general public importance". A party to the proceedings could apply to the lower court to make a reference. Any references concerning retained case law of the UK Supreme Court would be made to that court. Other references would be made to the appropriate appeal court.

The higher court would have to agree that the matter was of general public importance to accept the reference. Once it accepted a reference, the higher court would have to decide the point(s) of law concerned, and the lower court that made the reference would have to apply the higher court's decision to the proceedings before it, so far as relevant.

There would be no appeal from a decision to make or not make or accept or refuse a reference. However, an appeal court's decision on the point(s) of law could be appealed to the UK Supreme Court, with permission.

Clause 7 would also insert a new section 6B into EUWA, which would allow the law officers of the UK and devolved governments to refer a point of law arising from retained case law to a higher court. They could make a reference if proceedings before a lower court had concluded, no reference had already been made, and there was no outstanding appeal before a lower court. The law officers of the devolved governments (the Lord Advocate, the Counsel General for Wales and the Attorney General for Northern Ireland) could make a reference only on a point of law relating to the meaning or effect of relevant Scotland, Wales or Northern Ireland legislation respectively.

The court to which the reference was made would have to accept the reference and decide the point(s) of law. However, any such decision would not affect the outcome of the proceedings which had concluded before the lower court.

Clause 7 would also insert a new section 6C into EUWA, which would allow the law officers to intervene in proceedings before a higher court. The law officers of the devolved governments could intervene only where the argument related to the meaning or effect of relevant Scotland, Wales or Northern Ireland legislation respectively.

The government has said the reference and intervention powers would enable law officers to act "on behalf of their respective governments in cases where other ministers have a particular view as to the meaning and effect of a relevant piece of REUL".[51] It has acknowledged that in practice, references and interventions may not always lead to courts departing from retained case law. However, it says that the provisions in clause 7 would "ensure that courts give full consideration to the appropriate influence of retained case law in the continuing development of domestic case law".[52]

Clause 8: Compatibility

Clause 8 would enable a relevant national authority to make regulations to enable retained direct EU legislation to take precedence over domestic legislation in specified instances.

The default position under clause 4 would be that retained direct EU legislation would have to be read and given effect in a way that was compatible with all domestic enactments. If there was a conflict, domestic enactments would take precedence over retained direct EU legislation.

UK ministers or devolved authorities could use the power in clause 8 to reverse this for specific domestic legislation and specific provisions of

[51] Explanatory notes, pp 16 and 18.
[52] As above, p 6.

retained direct EU legislation. This regulation-making power would only be available until 23 June 2026. This means that it could be used after the end of 2023 but not after 23 June 2026 to change the legislative hierarchy between assimilated direct legislation and 'standard' domestic legislation.

If the regulations modified primary legislation, they would be subject to the draft affirmative procedure meaning they would have to be actively approved by both Houses of Parliament. They would otherwise be subject to the negative procedure, meaning ministers could sign them into law and they would remain in force unless rejected by either House with a set time period.[53]

The government has said exercising this power would allow it to give priority to certain individual pieces of retained direct EU law which it had explicitly decided to preserve.[54] It has said that this would allow it to "mitigate the unintended consequences associated with the end of supremacy" and "ensure that, where it is desirable to do so, the UK policy environment remains constant".[55] However, the government has not indicated which pieces of retained EU law it may want to prioritise in this way.

Clause 9: Incompatibility orders

Clause 9 would require a court to make an 'incompatibility order' if it decided during the course of any proceedings that either:

- a provision of retained direct EU legislation was incompatible with any domestic enactment
- a domestic enactment was incompatible with a provision of retained direct EU legislation where regulations made under clause 8(1) specified that the provision should take precedence over the domestic enactment

The incompatibility order could:

- set out the effect of the incompatible provision in its operation in relation to that particular case
- delay the coming into force of the order
- remove or limit the effect of the operation of the relevant provision before the coming into force of the order

[53] Schedule 4, part 3.
[54] Explanatory notes, p 6.
[55] Cabinet Office, 'Delegated powers memorandum: Retained EU Law (Revocation and Reform) Bill', 19 January 2023, p 19.

3.4 Modification of retained EU law

Clause 10: Scope of powers

Clause 10 would amend EUWA to change how retained EU law could be modified in future.

At present, EUWA restricts the extent to which subordinate legislation can be used to modify (that is, amend, repeal or revoke) certain categories of retained EU law. Subordinate legislation made before EUWA was passed can modify retained direct principal EU legislation only if that subordinate legislation would also be capable of modifying primary legislation.[56] The same restriction applies to using subordinate legislation to modify rights preserved by section 4 of EUWA. Subordinate legislation made under primary legislation passed after EUWA can be used to modify direct principal EU legislation or rights preserved by section 4 of EUWA if the parent act permits such a modification.

This effectively means that retained direct principal EU legislation and rights preserved under section 4 of EUWA have a status similar to domestic primary legislation when it comes to being modified.

Clause 10 would amend EUWA so that retained direct principal EU legislation and rights preserved by section 4 of EUWA would be treated in the same way as domestic secondary legislation for the purposes of modification. The government has explained that the effect of clause 10 would be to remove the following:

- the restriction that some existing powers may only be used to amend retained direct principal EU legislation or section 4 EUWA rights if they are also capable of being exercised to amend domestic primary legislation
- the restriction that, where an existing power is exercised in order to amend retained direct principal EU legislation or section 4 EUWA rights, the parliamentary scrutiny procedure applying to exercises of the power amending domestic primary legislation must be applied
- the restriction [that] existing powers not capable of amending primary legislation may only be used to amend retained direct EU legislation in ways that are consistent with retained direct principal EU legislation or section 4 EUWA rights[57]

[56] European Union (Withdrawal) Act 2018, schedule 8, paragraph 3. Retained direct principal EU legislation is generally legislation that originated as EU regulations.
[57] Cabinet Office, 'Delegated powers memorandum: Retained EU Law (Revocation and Reform) Bill', 19 January 2023, p 36.

Clause 10 also introduces schedule 2. The schedule amends several pieces of legislation to remove a requirement for the affirmative procedure to apply to regulations that modify retained direct principal EU legislation or section 4 EUWA rights. Schedule 2 also makes consequential amendments to EUWA and the Direct Payments to Farmers (Legislative Continuity) Act 2020.

The government has described the effect of clause 10 as a "downgrading" of retained direct principal EU legislation, but only for the purposes of amendment.[58] It notes that by treating retained direct principal EU legislation and section 4 EUWA rights as equivalent to domestic secondary legislation, generally the negative procedure will apply to modifying them.[59] This means that rather than requiring the approval of both Houses of Parliament before making the modification (the affirmative procedure), the government could make modifications unless either House objected.

The government has argued that clause 10 would confer "a more proportionate status" for retained direct EU legislation since "when it was made it was not subject to the same degree of UK parliamentary scrutiny as an act of Parliament or even domestic secondary legislation".[60] It said it would be able to amend or repeal a greater amount of retained direct EU legislation using secondary legislation, which would "enhance the ability for amending RDEUL more quickly without the need for primary legislation".

Clause 11: Procedural requirements

Clause 11 would change the parliamentary procedure that applies to secondary legislation being used to modify EU-derived domestic legislation originally made under section 2(2) of the ECA.

While the UK was a member of the EU, section 2(2) of the ECA was used to transpose many EU directives into domestic law. Currently, EUWA sets out additional procedural requirements that apply when the government is proposing to use delegated powers conferred before the start of the 2017–19 parliamentary session to modify EU-derived subordinate legislation made under section 2(2) of the ECA:[61]

- The affirmative procedure must be used if a procedure with a lesser degree of parliamentary scrutiny would otherwise be required. This means that instruments must be laid in draft and

[58] Cabinet Office, 'Delegated powers memorandum: Retained EU Law (Revocation and Reform) Bill', 19 January 2023, p 36.
[59] As above, p 8.
[60] As above, p 37.
[61] These requirements do not apply to instruments that are subject to a procedure in another legislature, for example the Scottish Parliament.

approved by both Houses before coming into force (although the made affirmative procedure could be used in urgent cases).[62]

- Under an enhanced scrutiny procedure, the instrument must be published in draft at least 28 days before it is intended to be laid in Parliament. Before the instrument is laid, a minister must publish a scrutiny statement setting out the government's response to any recommendations made by a parliamentary committee and to other representations made to the government about the draft instrument.[63]
- A minister must make an explanatory statement setting out the "good reasons" for amending or revoking the EU-derived subordinate legislation, the relevant law, and the effect it will have on retained EU law.[64]

Clause 11 would remove these procedural requirements (although the requirements would not be removed for instruments where the procedures had already been started before the bill was passed).

The government argues there has been "no tangible benefit" from this additional parliamentary scrutiny. It says the requirements "add a layer of complexity" and "take up valuable parliamentary time".[65] It argues that "it is unnecessary for extra protections to be given to subordinate legislation made under section 2(2) of the ECA" beyond the procedural requirements already attached to the use of the powers being used to make the modifications.

3.5 Powers relating to retained EU law and assimilated law

Clauses 12 to 17 create a series of delegated powers to allow retained EU law to be restated or reproduced, revoked, replaced, updated, or amended to remove or reduce 'burdens'. The government has said this will allow it to "ensure that only those regulations that are appropriate for the UK will remain on the statute book".[66] It argues that laws which originated in the EU "evolved in order to meet the various needs of 28 countries, with differing economies and legal requirements" and may no longer "accurately meet the needs of the UK moving forward as an independent sovereign nation".

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[62] European Union (Withdrawal) Act 2018, schedule 8, paragraph 13.
[63] European Union (Withdrawal) Act 2018, schedule 8, paragraph 14.
[64] European Union (Withdrawal) Act 2018, schedule 8, paragraph 15. This requirement applies to modifications to instruments made under section 2(2) of the ECA using powers conferred at any time (not just those conferred before the start of the 2017–19 session). However, it does not apply to powers under EUWA itself.
[65] Cabinet Office, 'Delegated powers memorandum: Retained EU Law (Revocation and Reform) Bill', 19 January 2023, p 37.
[66] Explanatory notes, p 7.

Clauses 12 to 14: Powers to restate or reproduce

Clause 12 would enable a relevant national authority to make regulations to "restate" secondary retained EU law. The government has said that this power will enable ministers and devolved authorities to "clarify, consolidate and restate any secondary REUL to preserve the effect of the current law while removing it from the category of REUL".[67]

Clause 12(2) defines "secondary retained EU law" as:

- any retained EU law that is not primary legislation
- any retained EU law that is primary legislation where the text was inserted by subordinate legislation

This would mean that where EU obligations had been transposed into domestic law using primary legislation, that primary legislation could not be "restated" in secondary legislation made under this power. In other words, the power could not be used to downgrade primary legislation to secondary legislation. However, that would not apply to provisions inserted in primary legislation by secondary legislation.

Clause 12(3) specifies that a restatement is not retained EU law. The government has stated that one effect of this is that section 6 of EUWA, which specifies that retained EU law should be interpreted in line with retained case law, would not apply to restated law.[68] The regulations making the restatement would be a 'standard' piece of domestic secondary legislation.

Clause 12(4) and (5) mean that the principle of the supremacy of EU law, retained general principles of EU law, retained section 4 EUWA rights and retained case law do not apply for the purposes of interpreting restatement provisions. However, the restatement regulations could be used to produce an equivalent effect if the minister or devolved authority making the regulations considered it appropriate (clause 12(6)). The government says that this would "enable the same policy outcome to be achieved as was produced by the REUL being restated".[69]

Clause 12(8) specifies that for section 4 EUWA rights and retained case law, restatement could include codification.

The power to make regulations under clause 12 would end at the end of 2023 (clause 12(7)).

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[67] Explanatory notes, p 7.
[68] As above, p 21.
[69] As above.

Clause 13 contains a similar power to clause 12 but for the restatement of assimilated law rather than retained EU law. The government has said that clause 13 is intended to have the same scope as clause 12 and to be used to restate or reproduce the same things, but to operate after 2023 when clauses 3 to 6 of the bill have taken effect.[70]

The power in clause 13 would apply to restating 'secondary assimilated law', which is defined as:

- any assimilated law that is not primary legislation
- any assimilated law that is primary legislation where the text was inserted by subordinate legislation

A restatement would not itself be part of assimilated law (clause 13(3)). The regulations making the restatement would be a 'standard' piece of domestic secondary legislation.

The regulation-making power in clause 13 would end on 23 June 2026 (clause 13(9)).

Clause 14 sets out some general provisions about the powers to restate contained in clauses 12 and 13. It provides that a restatement may:

- use words or concepts that are different from those used in the law being restated
- make any change which the relevant national authority making the restatement considers "appropriate" to:
  - resolve ambiguities
  - remove doubts or anomalies
  - facilitate "improvement in the clarity or accessibility of the law (including by omitting anything which is legally unnecessary)"

A restatement made under clause 12 or 13 could make provision about the relationship between what is restated and a relevant enactment that is specified in the regulations. However, it could not make provision about the relationship between what is restated and other enactments that are not specified in the restatement regulations.

The government added subsections (5) and (6) to clause 14 at committee stage. These subsections would prevent regulations under section 12 or 13 from codifying or reproducing wholesale the principle of the supremacy of EU law or a retained general principle of EU law. However, they could codify

[70] Explanatory notes, p 22.

or reproduce an equivalent **effect** in relation to a specific enactment or something retained by section 4 of EUWA that was being restated.

Clause 14(7) specifies that the powers in clauses 12 and 13 could be used to modify any enactment. Although they could not be used to restate primary legislation (unless they were restating provisions of primary legislation inserted by secondary legislation), they could make a restatement by modifying primary legislation. The government has explained this would enable "the codification or reproduction of case law or general principles to sit alongside related primary legislation, or for the consolidation of any REUL/assimilated law to be placed in primary legislation if appropriate".[71]

Regulations made under clauses 12 or 13 would be subject to the draft affirmative procedure if they amended primary legislation.[72] Other regulations using this power could be made using the draft affirmative or the negative procedure. At Westminster, if a minister proposed to make an instrument using the negative procedure, it would be subject to a sifting process.[73] The government has explained this would work as follows:

> Under this procedure, instruments which are proposed to be subject to the negative procedure must be laid in draft alongside a memorandum from the relevant minister stating that in their view the negative procedure is the appropriate procedure and giving the reason for that opinion. A minister will then not be able to make the instrument until both the relevant committees of the Lords and the Commons make recommendations on the appropriate procedure or when the time limit for the committees making recommendations has expired. Where either committee recommends that the instrument should follow the draft affirmative procedure, the minister must either follow that recommendation or publish a written statement as to why they don't agree with the committee's recommendations. If 10 sitting days pass after the instrument has been laid and no recommendations are received from the committees, then the minister may proceed to make the instrument via the chosen procedure.[74]

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[71] Explanatory notes, p 24.
[72] Schedule 4, part 3.
[73] The bill makes provision for a comparable sifting procedure for Welsh ministers in the Senedd Cymru. The Scottish government has said it is content not to include a sifting procedure for the Scottish Parliament. There is currently no Northern Ireland executive, but the UK government has said that if a future executive wanted a sifting requirement, one could be included at a later stage of the bill's passage (Cabinet Office, 'Delegated powers memorandum: Retained EU Law (Revocation and Reform) Bill', 19 January 2023, p 10).
[74] Cabinet Office, 'Delegated powers memorandum: Retained EU Law (Revocation and Reform) Bill', 19 January 2023, pp 9–10. The details of the sifting procedure are set out in the bill in schedule 4, part 3.

The government said that this procedure largely corresponds with the one established under EUWA.[75] It said it "recognises the significant role Parliament has played in scrutinising instruments subject to these sifting procedures and is committed to ensuring the appropriate scrutiny of any secondary legislation made under these delegated powers in this bill".[76]

Clause 15: Powers to revoke or replace

Clause 15 would give a relevant national authority the power to make regulations to revoke any secondary retained EU law. The regulations could revoke the secondary retained EU law and either:

- not replace it (clause 15(1))
- replace it with such provision as the minister or devolved authority making the regulations considered "to be appropriate and to achieve the same or similar objectives" (clause 15(2))
- replace it with alternative provision that the minister or devolved authority considered "appropriate" (clause 15(3))

The bill does not define "alternative provision". However, the government has said that "alternative provision" would have to "cover similar ground to the REUL or assimilated law being replaced (though may seek to achieve different objectives)".[77] It argues this means the power "cannot be used to create new regulations in wholly unrelated policy areas".

Regulations making replacement or alternative provision could:

- confer delegated powers
- create a criminal offence
- impose a monetary penalty

However, they could do so only if the delegated powers, criminal offence or monetary penalty were similar to or corresponded to existing ones in the secondary retained EU law that was being revoked. They could confer functions on any person, but this would be subject to the proviso about conferring delegated powers.

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[75] Cabinet Office, 'Delegated powers memorandum: Retained EU Law (Revocation and Reform) Bill', 19 January 2023, p 9. For further information about the EUWA sifting process see: House of Lords Secondary Legislation Scrutiny Committee, 'Sifting of proposed negative instruments under the EU Withdrawal Act', 25 February 2020.
[76] Cabinet Office, 'Delegated powers memorandum: Retained EU Law (Revocation and Reform) Bill', 19 January 2023, p 9.
[77] As above, p 28.

Regulations making replacement or alternative provision could not:

- confer new delegated powers
- create a new criminal offence
- impose new monetary penalties
- charge fees
- impose taxation
- establish a public authority
- increase the regulatory burden (but voluntary schemes would explicitly not be regarded as increasing the regulatory burden)

Any regulations made using this power would not themselves be part of retained EU law. The government has stated this means the power cannot be used repeatedly on the same provisions; once the power has been used to replace retained law or assimilated law with domestic provisions, the power cannot then be used on the domestic legislation.[78]

Clause 15 would come into force on royal assent, meaning that this power could be used to revoke secondary retained EU law before the sunset provisions are due to take effect at the end of 2023. They could also be used after the sunset to revoke secondary assimilated law. However, the power would expire on 23 June 2026 (clause 15(9)).

Regulations made under clause 15 would be subject to the draft affirmative procedure if they:[79]

- conferred a power to make subordinate legislation
- created a criminal offence
- made alternative provision in place of revoked secondary retained EU law

Other regulations under clause 15 could be made using the draft affirmative or the negative procedure. If the government proposed to use the negative procedure, the regulations would be subject to the same sifting process as would apply to the powers in clauses 12 and 13.

The government has argued that it would be inappropriate to have to rely on primary legislation to replace technical pieces of retained EU law:

> […] matters similar to these are dealt with via secondary legislation in non-REUL scenarios. The power is required as there are

[78] Cabinet Office, 'Delegated powers memorandum: Retained EU Law (Revocation and Reform) Bill', 19 January 2023, p 27.
[79] Schedule 4, part 3.

approximately 3,200 pieces of retained EU law, including RDEUL, that the government may wish to replace with legislation more suited to the UK's needs. Doing so purely through sector-specific primary legislation would take a significant amount of parliamentary time.[80]

Clause 16: Power to update

Clause 16 would give a relevant national authority the power to modify secondary retained EU law as they considered appropriate to take account of:

- changes in technology
- developments in scientific understanding

This power to make such updates would also apply to:

- any provision made by virtue of clauses 12 or 13 (in other words, where retained EU law or assimilated law had been restated or its effects reproduced)
- any provision made by virtue of clause 15 (in other words, where retained EU law had been revoked and replaced with replacement or alternative provision)
- secondary assimilated law after the end of 2023

No expiry date is set for the use of this power. Regulations would be subject to the negative procedure.[81]

The government has stated that this power "is not intended to make significant policy changes but is only intended to make relevant technical updates to REUL for these specific purposes".[82] The government explained the power could "continue to be used on the same piece of legislation as multiple advances in science and technology take place over time".[83]

Clause 17: Power to remove or reduce burdens

Clause 17 would amend the Legislative and Regulatory Reform Act 2006 to allow legislative reform orders (LROs) to be used to amend retained direct EU legislation.

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[80] Cabinet Office, 'Delegated powers memorandum: Retained EU Law (Revocation and Reform) Bill', 19 January 2023, p 26.
[81] Schedule 4, paragraph 7(4)(c).
[82] Explanatory notes, p 8.
[83] As above.

LROs are a specific type of delegated legislation that the government can use to remove or reduce burdens that result directly or indirectly from legislation.[84] The act defines a "burden" as any of the following:[85]

- a financial cost
- an administrative inconvenience
- an obstacle to efficiency, productivity or profitability
- a sanction, criminal or otherwise, which affects the carrying on of any lawful activity

The act specifies that a financial cost or administrative inconvenience may result from the form of any legislation, for example where the legislation is hard to understand.

Clause 17 would add retained direct EU legislation to the list of types of legislation that can be amended by an LRO. It would also result in all LROs amending retained direct EU legislation being subject to the standard LRO parliamentary procedure. It would do this by disapplying a requirement in EUWA for subordinate legislation (including LROs) that amend retained direct principal EU legislation to be subject to the same parliamentary procedure that would apply to amending primary legislation.[86]

The standard LRO procedure requires ministers to consult on their proposals.[87] They must then lay a draft order before both Houses of Parliament, with a recommendation as to which scrutiny procedure should apply (negative, affirmative, super-affirmative).[88] That recommendation is subject to a decision of either House to upgrade the procedure. Either House may propose amendments to the draft order, and either House may veto the instrument. There is an enhanced role for the designated scrutiny committees in each House (the House of Commons Business, Energy and Industrial Strategy Committee and the House of Lords Delegated Powers and Regulatory Reform Committee). Either committee can make a recommendation to stop an LRO proceeding, although this can be overturned if the relevant House resolves to reject the committee's recommendation.

[84] UK Parliament, 'Legislative reform orders', accessed 16 January 2023.
[85] Legislative and Regulatory Reform Act 2006, section 1(3).
[86] European Union (Withdrawal) Act 2018, schedule 8, paragraph 4.
[87] House of Lords, 'Companion to the standing orders and guide to the proceedings of the House of Lords', 28 October 2022, paras 10.26–10.27.
[88] Paragraph 10.29 of the 'Companion to the standing orders and guide to the proceedings of the House of Lords' sets out in detail how these procedures operate.

3.6 Business impact target

Clause 18 would abolish the business impact target contained in the Small Business, Enterprise and Employment Act 2015.

That act created a statutory framework for managing and reporting on the economic impacts of new regulation on business and voluntary or community bodies.[89] It imposes a duty on the secretary of state to publish a business impact target for each parliament.[90] The target relates to the economic impact on business of qualifying regulatory provisions (QRPs) that come into force or cease to be in force during a parliament, including amendments to existing regulations. Relevant regulators are required to publish a list of their QRPs and an assessment of their economic impact on business.

The government said in 'The benefits of Brexit' policy paper that it would abolish the business impact target in its current form because it focused "too narrowly on net direct costs to businesses".[91] It said it would develop a more rigorous and holistic approach to assessing the impacts of regulation and judging whether a regulatory intervention had been successful. This followed a consultation which had explored options for reforming the business impact target.[92]

3.7 Final provisions

Clause 20 and schedules 3 and 4

Clause 20 would make some general provisions about regulations made using powers in the bill, including that:

- the powers could be used to make different provision for different purposes
- the powers could be used to make supplementary, incidental, consequential, transitional, transitory or saving provision
- where a regulation-making power ends on a given date, this does not affect the validity of regulations made before that date

Clause 20 also introduces schedule 3, which would place some restrictions on devolved authorities' use of the delegated powers within the bill. Where

[89] Department for Business, Innovation and Skills, 'Explanatory notes to the Small Business, Enterprise and Employment Act 2015', March 2015, para 48.
[90] Department for Business, Energy and Industrial Strategy, 'Business impact target statutory guidance', January 2019, p 4.
[91] HM Government, 'The benefits of Brexit', January 2022, p 28.
[92] Department for Business, Energy and Industrial Strategy, 'Reforming the framework for better regulation', last updated 31 January 2022.

the bill gives powers to a 'relevant national authority', a devolved authority could use these powers acting alone only in areas where it had devolved competence. This would apply to the delegated powers in the following clauses:

- clause 1 (power to preserve EU-derived subordinate legislation and retained direct EU legislation)
- clause 8 (compatibility: power to enable retained direct EU legislation to take precedence over domestic legislation in specified instances)
- clauses 12 and 13 (powers to restate)
- clause 15 (powers to revoke or replace)
- clause 16 (power to update)

Schedule 3 also sets out the circumstances in which the devolved authorities would have to have consent from UK ministers, exercise the powers jointly with UK ministers, or consult UK ministers before using the powers.

Clause 20 also introduces schedule 4, which would set out what parliamentary scrutiny would apply to regulations made using different powers in the bill.

Clauses 19 and 21 to 23: Other final provisions

Clause 19 would create a power for a minister of the crown to make consequential provisions. These would be subject to the draft affirmative procedure if they modified primary legislation.[93] Otherwise, the negative procedure would apply.

Clause 21 sets out definitions for some of the terms used in the bill.

Clause 22 contains commencement, transitional and savings provisions. Most of the bill's clauses would come into force on the day the bill was passed. The exceptions to this would be:

- clause 18 (removing the business impact target) which would come into force two months after the bill was passed
- clauses 4 and 5 (abolishing the supremacy of EU law and the general principles of EU law), clause 6(3) (which introduces schedule 1), clause 7 (on the role of the courts) and clause 9 (introducing incompatibility orders) which would be commenced by regulations

[93] Schedule 4, paragraph 5(1).

Clause 22(4) would allow a minister to make transitional, transitory or savings provisions in connection with the coming into force of any provision of the bill or with anything sunsetted by clause 1 or clause 3.

Clause 22(5) would exempt certain financial services legislation from the sunset in clause 1. The government is proposing to legislate separately in the Financial Services and Markets Bill to revoke retained EU law relating to financial services.

Clause 22(6) provides that clauses 3, 4 and 5 would not apply in relation to anything occurring before the end of 2023. The government states that this means the principle of supremacy, retained EU general principles and references to "retained EU law" and so on will continue to apply to things that occur before the end of 2023 and to any later legal proceedings which relate to things that happened before that date.[94]

Clause 23 sets out the bill's short title and confirms that the bill extends to England and Wales, Scotland and Northern Ireland.

4. Legislative consent and devolution

The Scottish and Welsh governments have both recommended that their respective parliaments do not grant legislative consent to the bill.

The Sewel convention states that the UK Parliament will not normally legislate on matters within devolved competence without the consent of the devolved legislatures.[95] The UK Supreme Court has concluded that the Sewel convention does not give rise to a legally enforceable obligation.[96] The UK Parliament has previously legislated in the absence of legislative consent—one or more of the devolved legislatures withheld consent from the European Union (Withdrawal) Act 2018, the European Union (Withdrawal Agreement) Act 2020, the United Kingdom Internal Market Act 2020 and the European Union (Future Relationship) Act 2020.[97]

There is disagreement between the UK government and the Scottish and Welsh governments about which clauses engage the legislative consent motion process. The UK government's clause-by-clause analysis of which provisions it considers engage legislative consent is set out in annex A of the explanatory notes.[98] The Scottish and Welsh governments both consider

[94] Explanatory notes, p 28.
[95] UK Parliament, 'Sewel convention', accessed 9 September 2022.
[96] UK Supreme Court, 'Press summary—R (On the Application of Miller and Another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)', 24 January 2017.
[97] See Institute for Government, 'Sewel convention' (9 February 2022) for further details.
[98] Explanatory notes, pp 43–5.

that the legislative consent motion process should apply to more of the bill's provisions than the UK government has set out.[99]

The Scottish government published a legislative consent memorandum on 8 November 2022. Its recommendation was that the Scottish Parliament should not give consent to the bill for three reasons:

> Firstly, the bill's deregulatory agenda poses risks to important protections and high standards. Secondly, it significantly undermines devolution. And thirdly, the Scottish government believes that the sunsetting approach brings significant risk to the coherence of the statute book, and that the proposed 2023 date for sunsetting is impractical and unachievable, imposing unrealistic burdens on both government and parliamentary resources to complete the necessary work to preserve REUL in the available time.[100]

The Scottish Parliament has not yet considered a formal legislative consent motion, but in November 2022 it voted in favour of a motion that the UK government should scrap the bill because it "threatens vital environmental and health standards and protections built up over 47 years of EU membership, creates enormous uncertainty for workers and businesses and undermines devolution".[101]

The Welsh government published a legislative consent memorandum on 3 November 2022, recommending that legislative consent be withheld. It set out its "significant concerns" about the bill, including:[102]

- the possibility a UK minister could use powers to assimilate, restate, revoke or update retained EU law in devolved areas without the consent of Welsh ministers
- the "arbitrary sunsetting deadline" could "force all governments across the UK to revisit this large body of law in a very compressed timescale that will likely lead to errors and inoperability issues"
- lack of scrutiny for the devolved legislatures where retained EU law is to sunset automatically

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[99] Scottish Government, 'Legislative consent memorandum: The Retained EU Law (Revocation and Reform) Bill', 8 November 2022, pp 7–8; and Welsh Government, 'Legislative consent memorandum: The Retained EU Law (Revocation and Reform) Bill', 3 November 2022, p 12.
[100] Scottish Government, 'Legislative consent memorandum: The Retained EU Law (Revocation and Reform) Bill', 8 November 2022.
[101] Scottish Parliament, 'Motion ref S6M-06984: EU retained law', accessed 23 January 2023.
[102] Welsh Government, 'Legislative consent memorandum: The Retained EU Law (Revocation and Reform) Bill', 3 November 2022, pp 12–14.

- inability of devolved authorities to extend the sunset deadline for specific pieces or categories of retained EU law, whereas UK ministers would be given this power
- potential for the exercise of powers within the bill to result in regulatory divergence within the UK internal market
- more limited powers for devolved law officers to refer or intervene in cases than for the UK law officers

Concerns have been raised about whether all retained EU law within devolved competence has been identified and what impact the bill may have on the operation of common frameworks.[103] Common frameworks developed between the UK and devolved governments are intended to ensure that a common approach is taken where powers have returned from the EU post-Brexit that intersect with policy areas of devolved competence.[104] The government told the House of Lords Common Frameworks Scrutiny Committee in November 2022 that it was "committed to working with devolved governments to reach a shared understanding on the devolution status of REUL".[105]

At the bill's report stage in the House of Commons, Hywel Williams (Plaid Cymru MP for Arfon) asked the government to ensure the retained EU law dashboard was updated to identify which legislation was reserved and which was devolved.[106] Nusrat Ghani, minister of state at the Department for Business, Energy and Industrial Strategy, said that this would be done.[107]

There is currently no functioning Northern Ireland executive or Northern Ireland Assembly to carry out a legislative consent motion process in Northern Ireland. An additional consideration in Northern Ireland is the bill's interaction with the Northern Ireland Protocol.

[103] See for instance: House of Lords Common Frameworks Scrutiny Committee, 'Letter from Baroness Andrews to Michael Gove MP on the government's response to the Common Frameworks Scrutiny Committee report', 2 November 2022; and 'Letter from Baroness Andrews to Felicity Buchan MP on the common frameworks programme', 14 December 2022.
[104] Cabinet Office, 'UK Common frameworks', last updated 19 December 2022.
[105] House of Lords Common Frameworks Scrutiny Committee, 'Letter from Felicity Buchan MP to Baroness Andrews on the UK government response to the Common Frameworks Committee report 'Common frameworks: An unfulfilled opportunity?'', 29 November 2022.
[106] HC Hansard, 18 January 2023, col 401.
[107] As above, col 401.

5. Interaction with international obligations

5.1 Northern Ireland Protocol

Some EU law continues to apply to Northern Ireland because of the Northern Ireland Protocol, but this is a different category from retained EU law.

Under the Northern Ireland Protocol, Northern Ireland is subject to the EU's customs code, VAT rules and single market rules for goods. EU rules on state aid apply to the UK in respect of measures which affect trade between Northern Ireland and the EU covered by the protocol. Article 2 of the protocol also requires the UK to ensure there is no diminution of the rights, safeguards, and equality of opportunity set out in the Belfast/Good Friday Agreement, as a result of Brexit. This includes protections against discrimination enshrined in certain provisions of EU law. EU law measures that continue to apply to Northern Ireland are listed in annexes to the protocol. This covers over 300 pieces of EU legislation. If the EU amends or replaces any of these measures, the changes apply to Northern Ireland automatically. This is known as 'dynamic alignment'.

This body of law has been termed "protocol-applicable law" by academics Lisa Claire Whitten and David Phinnemore from Queen's University Belfast.[108] It has direct effect in UK law through section 7A of EUWA read together with the provisions of the Withdrawal Agreement (in particular article 4) and the protocol itself. It is explicitly excluded from the definition in EUWA of retained EU law.[109]

This does not mean there is no retained EU law in Northern Ireland. As Lisa Claire Whitten and David Phinnemore have explained, "in Northern Ireland, all EU law that applied on exit day and **was not protocol-applicable EU law** became 'retained EU law'", in the same way as in other parts of the UK.[110]

At the bill's second reading in the House of Commons, Dean Russell, then parliamentary under secretary of state at the Department for Business, Energy and Industrial Strategy, said the government recognised that some retained EU law within the scope of the sunset would be required to continue to fulfil the UK's international obligations, including the Northern

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[108] Lisa Claire Whitten and David Phinnemore, 'On the legislative complexity to come: Reflections on what the Northern Ireland Protocol Bill and the Retained EU Law Bill could mean for Northern Ireland', November 2022.
[109] As above.
[110] Lisa Claire Whitten and David Phinnemore, 'Retained EU law: Where next?—Evidence submitted to the House of Commons European Scrutiny Committee', 28 April 2022. Emphasis in original.

Ireland Protocol.[111] He gave a commitment that the government would "as a matter of priority, take the necessary action to safeguard the substance of any retained EU law and legal effects required to operate international obligations within domestic law". He said the government would set out in the dashboard where retained EU law was required to operate international obligations, so that the public could scrutinise it. Nusrat Ghani, minister of state at the Department for Business, Energy and Industrial Strategy, repeated the commitment at report stage, and said the government would set out where retained EU law was required "in the near future".[112]

A further complexity is the Northern Ireland Protocol Bill. The government is seeking to legislate in that bill to make some provisions of the Northern Ireland Protocol 'excluded provision'. This would mean they would no longer apply in domestic law and much of the EU legislation listed in the annexes to the protocol would no longer automatically apply to Northern Ireland.[113] It would also give ministers delegated powers to make new law in connection with the protocol, such as on the movement and regulation of goods, replacing the EU law that applies under the protocol.

Lisa Claire Whitten and David Phinnemore have argued that the two bills would "individually and more so together add considerable complexity and uncertainty to the legislation that applies in and to Northern Ireland".[114] They conclude that "systematic consideration of what the bills would entail in terms of legal clarity and certainty in and for Northern Ireland would seem wise". Dr Whitten and other academics have identified a number of "known unknowns" about the bill's impacts in Northern Ireland, such as:[115]

- how would the bill's disapplication of supremacy and general EU law principles affect the application of supremacy and general EU law principles under the Withdrawal Agreement and the protocol?
- would instruments that are part protocol-applicable law and part retained EU law be subject to sunsetting?
- what would the bill's impact be on North-South cooperation on the island of Ireland, which "relies to a significant extent" on retained EU law?

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[111] HC Hansard, 25 October 2022, col 189.
[112] HC Hansard, 18 January 2023, col 402.
[113] For more information about the Northern Ireland Protocol Bill, including disagreement over the government's legal justifications for the non-performance of some of the UK's international obligations, see: House of Lords Library, 'Northern Ireland Protocol Bill', 5 October 2022. The Northern Ireland Protocol Bill is currently awaiting report stage in the House of Lords.
[114] Lisa Claire Whitten and David Phinnemore, 'On the legislative complexity to come: Reflections on what the Northern Ireland Protocol Bill and the Retained EU Law Bill could mean for Northern Ireland', November 2022.
[115] Jane Clarke et al, 'Ten questions for the REUL Bill in Northern Ireland', Brexit and Environment, 17 October 2022.

- what would the bill's impact be on Northern Ireland's place in the UK internal market if the bill leads to deregulation in Great Britain that Northern Ireland cannot follow because of the protocol?
- how will the bill be scrutinised and retained EU law be reviewed in Northern Ireland in the absence of a functioning executive and assembly?

The Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland have recommended several changes to the bill to deal with provisions they believe create a risk of breaching the UK's human rights obligations in Northern Ireland under article 2 of the Northern Ireland Protocol.[116]

5.2 Withdrawal Agreement and Trade and Cooperation Agreement

The government has said it recognises that some retained EU law within the scope of the sunset is also needed to operate the UK's international obligations under the Withdrawal Agreement (the 'divorce' deal with the EU) and the Trade and Cooperation Agreement (the future relationship agreement with the EU).[117] When ministers made commitments during the bill's Commons stages to "take the action required to ensure that the necessary legislation is in place to uphold the UK's international obligations" and to update the dashboard accordingly, they said these commitments applied to the UK's obligations under the Withdrawal Agreement and the Trade and Cooperation Agreement.[118]

The Trade and Cooperation Agreement contains obligations intended to create a level playing field so that one party's businesses do not gain an advantage over the other's owing to a less stringent regulatory environment. For instance, there are non-regression provisions to ensure that neither side can reduce its labour and social protection or its environment and climate protection if doing so would affect trade and investment between the UK and the EU. For further information about the level playing field, see the House of Commons Library briefing on 'The UK-EU Trade and Cooperation Agreement: Level playing field' (20 May 2021).

[116] Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, 'NIHRC/ECNI briefing on the Retained EU Law (Revocation and Reform) Bill', 16 January 2023.
[117] HC Hansard, 25 October 2022, col 189.
[118] As above and HC Hansard, 18 January 2023, col 402.

6. Responses to the bill

6.1 Regulatory Policy Committee

The independent Regulatory Policy Committee (RPC) has criticised the government's impact assessment for the bill and rated it as not fit for purpose.[119] The RPC is an independent body, sponsored by the Department for Business, Energy and Industrial Strategy.[120] Its role includes scrutinising government impact assessments for proposals that regulate or deregulate business or civil society organisations and providing an opinion to ministers on the quality of evidence or analysis presented.

The government prepared an impact assessment for the bill that was made public in November 2022.[121] The RPC gave it a 'red' rating, meaning it considered it not to be fit for purpose. The impact assessment was judged to be 'weak' in setting out the rationale and options and wider impacts of the legislation, and 'very weak' in its cost-benefit analysis and monitoring and evaluation plan.

The RPC found that the impact assessment did not provide an assessment of the impact of the sunset provisions, nor commit sufficiently to providing an impact assessment as future decisions were taken to change or sunset pieces of retained EU law. The RPC judged that without such an assessment, the cost to business might "never be calculated or understood".[122] It concluded that the department had "not made a sufficient case to support regulatory intervention in the form of sunsetting REUL". It also said the impact assessment needed to "provide a stronger argument for why the sunsetting of REUL is necessary, as opposed to merely setting a deadline to complete the review and change of REUL, including appropriate and robust evidence to support this position".

In response, Grant Shapps, secretary of state for business, energy and industrial strategy, said the RPC red rating reflected "the limited information available at this time to quantify potential impacts around how the enabling powers in the bill will be used".[123] He said that "proper and proportionate analysis" would be undertaken by government departments in relation to specific amendments to retained EU law. In addition, he said that "efforts are

[119] Regulatory Policy Committee, 'Retained EU Law (Revocation and Reform) Bill', 18 November 2022.
[120] Regulatory Policy Committee, 'About us', accessed 23 January 2023.
[121] Cabinet Office and Department for Business, Energy and Industrial Strategy, 'Retained EU Law (Revocation and Reform) Bill 2022: Impact assessment', dated 26 September 2022, published 22 November 2022.
[122] Regulatory Policy Committee, 'Retained EU Law (Revocation and Reform) Bill', 18 November 2022, p 2.
[123] House of Commons Business, Energy and Industrial Strategy Committee, 'Letter from the secretary of state relating to the Retained EU Law Bill', dated 21 December 2022, published 10 January 2023.

also underway to understand the potential impacts of sunsetting". He explained that efforts to monitor and evaluate the bill post-implementation would tie in with the retained EU law substance review to identify each individual piece of retained EU law for which each department was responsible. He said the Brexit Opportunities Unit would be overseeing departments' ongoing efforts to measure progress towards reaching the target of removing £1bn worth of the costs of retained EU law to business, as set out in 'The benefits of Brexit' policy paper.

6.2 Process

Some commentators have raised concerns about the processes that the bill would introduce for reforming and revoking retained EU law.

The Hansard Society has identified what it has described as five problems with the bill. It said:

- acceptance of the automatic expiry (sunset) of REUL will be an abdication of Parliament's scrutiny and oversight role
- it will introduce unnecessary uncertainty—legal, economic and political—into the REUL review process
- the broad, ambiguous wording of powers will confer excessive discretion on ministers
- parliamentary scrutiny of the exercise of the powers will be limited
- there are potentially serious implications for devolution and the future of the union[124]

Catherine Barnard and Joelle Grogan from the UK in a Changing Europe think tank made similar points.[125] They argued the bill would introduce "uncertainty and disorder to the UK statute book" and was "not the best way to realise genuine potential benefits from Brexit". They highlighted "a serious risk of mistakes" whereby retained EU law that had not been identified for the dashboard would be subject to the sunset provisions. They also believed that "wide areas of law could be significantly altered without adequate parliamentary scrutiny", with no process identified for how ministers would decide whether to 'save' particular pieces of retained EU law. In addition, they identified a lack of capacity, particularly in the devolved administrations, to give sufficient scrutiny to every piece of legislation within scope of the bill.

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[124] Hansard Society, 'Five problems with the Retained EU Law (Revocation and Reform) Bill', 24 October 2022.
[125] Catherine Barnard and Joelle Grogan, 'Retained EU Law (Revocation and Reform) Bill: Written evidence for HC Public Bills Committee', UK in a Changing Europe, November 2022.

Oliver Garner and Julian Ghosh from the Bingham Centre for the Rule of Law echoed these points. They said that "failure to preserve the REUL necessary for sectors of the legal system to function would create a vacuum" that could "potentially hamper the functioning of the UK statute book" and "create legal instability".[126] They suggested the government would be under "enormous pressure" to complete the process of identifying REUL and using the bill's powers to retain provisions before the sunset at the end of 2023. They also expressed concerns that the government would be able to "side-line Parliament in creating new law to modify or replace secondary REUL". They argued that making such "major substantive policy changes using delegated legislation undermines the rule of law benchmark of the supremacy of the legislature".

6.3 Sectoral impacts

Groups representing business, trade unions, environmentalists and consumers have expressed concerns about the impact of large-scale and rapid changes to the statute book as a consequence of the bill.

The Institute of Directors, the Trades Union Congress, Greener UK (a coalition of environmental organisations), the Chartered Institute of Personnel and Development, the Civil Society Alliance and other organisations wrote a joint letter to Grant Shapps, secretary of state for business, energy and industrial strategy, in November 2022 calling on the government to withdraw the bill.[127] They feared the bill could "cause significant confusion and disruption for businesses, working people and those seeking to protect the environment" by "sweep[ing] away thousands of pieces of legislation and established legal principles". They also said there was a risk of the bill putting the UK in breach of the Trade and Cooperation Agreement, "bringing with it the prospect of additional tariffs, hurting UK exporters and those who work for them".

The letter also expressed concerns about the lack of time for the UK's governments and parliaments to deal with the "vast amount of legislation" before the end of 2023. The organisations said this created a "huge risk of poor or potentially detrimental law entering the statute book".

The British Chambers of Commerce (BCC) said that a survey of its members had highlighted a low level of priority for deregulation.[128] William Bain, head of trade policy at the BCC, said removing barriers to growth for

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[126] Oliver Garner and Julian Ghosh, 'Joint written evidence submission to the House of Commons Public Bill Committee on the Retained EU Law (Revocation and Reform) Bill 2022', 16 November 2022.
[127] Institute of Directors, 'Letter to the business secretary: Withdrawal of the Retained EU Law (Revocation and Reform) Bill', 24 November 2022.
[128] British Chambers of Commerce, 'Large-scale deregulation not a priority for UK businesses', 29 November 2022.

small and medium enterprises would be welcome, but businesses did not want to see divergence from EU regulations which would make it more difficult or costly for them to export. He suggested the deadline for the sunset should be delayed to 2026 to give time for consultation and careful examination.

In his recent annual speech, Tony Danker, director general of the Confederation of British Industry, questioned whether the UK should be "subjecting the public—and industry—to another round of mass confusion and disruption, just when we're trying to exit recession".[129] He suggested it would be better to review retained EU law "smartly". As an example of this, he pointed to the government's appointment of Sir Patrick Vallance, chief scientific adviser, to review regulation in emerging technology areas.[130]

The TUC has expressed concerns that a "host of rights that workers have long fought for" could be lost if ministers did not restate or replace certain pieces of retained EU law.[131] It pointed to employment rights such as:

- holiday pay
- agency worker rights
- data protection rights
- protections of terms and conditions for workers whose employment is transferred to another employer (known as TUPE)
- collective consultation with worker representatives when redundancies are proposed
- protection of pregnant workers, and rights to maternity and parental leave
- protection of part-time and fixed-term workers
- rights relating to working time, including rights to daily and weekly rest, maximum weekly working time, paid annual leave and measures to protect night workers
- protection of workers' rights on the insolvency of their employer
- rights to a written statement of terms and conditions

The Work Foundation think tank has suggested that part-time workers (most of whom are women), workers on fixed-term contracts and agency workers would be "most at risk" of losing existing rights and protections

[129] Confederation of British Industry, 'Is the UK stuck in a rut on growth?—Speech by CBI director general at University College London', 23 January 2023.
[130] HM Treasury, 'Pro-innovation regulation of technologies project: Terms of reference', 18 December 2022.
[131] Trades Union Congress, 'Countdown starts on vital rights', 19 December 2022.

under the default sunset. This is because their terms and conditions are "substantially governed by regulations deriving from EU law".[132]

Similarly, the Chartered Trading Standards Institute (CTSI) has said that a significant amount of trading standards work is underpinned by retained EU law, including:[133]

- the Consumer Protection from Unfair Trading Regulations 2008, which protect consumers from misleading claims, scams and rogue traders
- food legislation, including allergen labelling requirements and restrictions on the use of decontaminants on meat, such as chlorine washes on chicken
- weights and measures regulations
- animal health
- product safety
- intellectual property
- business protection from misleading marketing

The CTSI urged the government to "ensure that vital consumer protections are not lost inadvertently". It called for the sunset deadline to be extended to 2026 and for Parliament, not just ministers, to have input into decisions about whether to amend, repeal or replace retained EU law.

Greener UK has highlighted the potential for retained EU law governing environmental protections to be sunsetted, for instance controls on the use of chemicals and pesticides, and safeguards for wildlife and air quality.[134] It called for the bill to be withdrawn, and suggested that a "sensible, consultative process that examines, updates and improves environmental laws" should be taken instead.[135]

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[132] Melanie Wilkes et al, 'A year of uncertainty? The Retained EU Law Bill 2022 and UK workers' rights', Work Foundation at Lancaster University, 10 January 2023; and Heather Taylor et al, 'A year of uncertainty? The Retained EU Law Bill 2022 and UK workers' rights', Work Foundation, January 2023, p 9.
[133] Chartered Trading Standards Institute, 'CTSI voices concerns over hurried timetable for EU law reforms', 1 November 2022.
[134] Greener UK, 'Cross-sector letter on REUL calling on the government to withdraw the bill', 17 January 2023.
[135] Greener UK, 'Retained EU Law (Revocation and Reform) Bill: Briefing for report stage', January 2023.

7. House of Commons stages

7.1 Second reading

Second reading took place on 25 October 2022. Opening the debate, Dean Russell, then parliamentary under secretary of state for business, energy and industrial strategy, said the bill was the "culmination of the government's work to untangle the United Kingdom from nearly 50 years of EU membership".[136] He said that by enabling "outdated and often undemocratic retained EU law to be amended, repealed and replaced more easily", the bill would "create a more agile and sustainable legislative framework to boost economic growth".

Mr Russell said that before the end of 2023, the government would determine which instruments should be preserved, which should be reformed and which should be revoked.[137] He said this would pave the way for "future frameworks better suited to the needs of the UK, including on energy, emissions trading, services and consumer law".[138] However, he also assured MPs that the bill would "not weaken environmental protections" and the government would use the bill's powers to "ensure that our environmental law is functioning and able to drive improved environmental outcomes".[139]

Mr Russell also highlighted that the bill would end the supremacy of EU law. He said it was "constitutionally outrageous and absurd" that "in certain situations foreign law takes precedence over UK statute passed before we left the EU".[140] He said that the will of past Parliaments as expressed through primary and secondary legislation passed before the end of the transition period would "no longer be secondary to the will of Brussels" and Parliament could "again legislate in support of the UK's interests rather than those of Brussels".[141]

Jonathan Reynolds, shadow secretary of state for business and industrial strategy, moved a reasoned amendment to the bill's second reading motion. The amendment would have meant the House of Commons declining to give the bill a second reading for the following reasons:

> […] notwithstanding the need to address the future status and suitability of retained EU law following departure from the European Union, the bill creates substantial uncertainty for businesses and workers risking business investment into the UK, is a significant threat

[136] HC Hansard, 25 October 2022, col 183.
[137] As above, col 187.
[138] As above, col 188.
[139] As above, cols 185 and 186.
[140] As above, col 189.
[141] As above, col 190.

> to core British rights and protections for working people, consumers and the environment as signalled by the wide body of organisations opposed to the bill, could jeopardise the UK's need to maintain a level playing field with the single market under the terms of the Trade and Cooperation Agreement, and contains powers which continue a dangerous trend of growing executive power, undermining democratic scrutiny and accountability.[142]

Mr Reynolds said it was important to recognise that the bill was "not about whether people think Brexit was a positive or negative thing" but rather "whether we wish to give the government the power to sweep away key areas of law […] with no scrutiny, no say and no certainty over their replacements".[143] He viewed the sunset clauses as "a huge source of uncertainty for businesses and workers" at a time when business was "crying out for stability, for long-term political commitment and for consistent policy".[144]

Mr Reynolds expressed a fear that what the government wanted to do was "reduce key regulations entirely" and he therefore believed the bill posed "a threat to core British rights and protections".[145] He said this was "particularly alarming" in relation to employment law, where many protections were contained in regulations originally made under section 2 of the European Communities Act 1972 (which would put them in scope of the sunset).

Mr Reynolds also asserted that "far from taking back control, the bill risks diminishing democratic scrutiny and accountability in key areas of British law".[146] He suggested the use of the sunset clause "effectively puts a gun to Parliament's head".[147] He said it would be "taking a gamble" for Parliament to scrutinise or object to future legislation replacing retained EU law, because if the legislation was not passed before the sunset date, then "the current law in its entirety will just fall away". He said the processes in the bill were "not conducive to good law being made".

Labour's amendment was defeated by 277 votes to 223, a majority of 54.[148] The bill received its second reading by 280 votes to 225, a majority of 55.[149]

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[142] HC Hansard, 25 October 2022, col 190.
[143] As above, col 191.
[144] As above, cols 191–2.
[145] As above, col 193.
[146] As above, col 191.
[147] As above, col 194.
[148] As above, cols 255–8.
[149] As above, cols 259–62.

7.2 Committee stage

Committee stage took place over four days, between 8 and 29 November 2022, including one day of oral evidence.[150]

A series of government amendments were made to the bill without division. These were largely to resolve drafting issues or to clarify certain points, as follows:

- clarifying that individual provisions, rather than the whole instrument, could be sunsetted by the power in clause 1 if an instrument contains some provisions that are retained EU law and some that are not
- clarifying that where an instrument is exempted by regulations from the sunset in clause 1, it would be the version of the instrument as it stands immediately before the sunset that would become assimilated law
- clarifying the statutory language in clause 7 in relation to the law officers operating in the devolution settlements
- clarifying that the powers to restate or reproduce in clauses 12 and 13 could apply to things other than legislation (such as section 4 EUWA rights or retained EU case law)
- clarifying in clause 14 that restatement regulations could reproduce the effects of principles such as supremacy and retained general principles of EU law, but they could not reproduce the principles themselves
- amending schedule 3 (schedule 4 in the Lords version of the bill) to enable regulations made under the bill subject to the draft affirmative procedure to be combined into a single instrument with regulations that are not subject to that procedure
- clarifying in clause 22 that transitional, transitory and saving provision could be made in relation to the revocation of retained EU law or assimilated law

No other amendments were made to the bill at committee stage. For a summary of issues debated at committee stage, see the House of Commons Library briefing, 'Progress of the Retained EU Law (Revocation and Reform) Bill 2022–23: Bill progress' (12 January 2023).

7.3 Report stage

Report stage took place on 18 January 2023.[151] Several technical drafting amendments tabled by the government were made without division.

[150] House of Commons Public Bill Committee, 'Retained EU Law Revocation and Reform Bill', 8, 22, 24 and 29 November 2022.

Non-government amendments on the following subjects were all defeated on division:

- delaying the sunset in clause 1 from the end of 2023 to the end of 2026
- excluding legislation within the legislative competence of the Scottish government from the sunset
- excluding certain employment protection regulations from the sunset
- parliamentary oversight of the list of retained EU law measures to be sunsetted by clause 1

MPs also raised concerns about whether the bill would impact on existing environmental and consumer protection legislation, although no amendments on these subjects were put to a vote.

Government amendments

Several government amendments were made without division at report stage. Nusrat Ghani, minister of state at the Department for Business, Energy and Industrial Strategy, described them as "technical drafting measures".[152] The changes these made were:

- Rewording clause 6 to include specific name changes for different types of retained law (eg 'retained direct EU legislation' would become 'assimilated direct legislation'). The previous version of clause 6 specified only that retained EU law would be known as assimilated law after the end of 2023. This group of amendments also added a schedule 1 to the bill; this schedule makes changes in other legislation consequential on the reworded clause 6.
- Redrafting clause 7 to bring together provisions relating to the High Court of Justiciary and to enable a reference to be made to the High Court of Justiciary in all relevant cases. Ms Ghani said there had been engagement with the Scottish government on these amendments.[153]
- Clarifying that the use of the extension power in clause 2 would also apply to amendments to retained EU law made between the extension regulations and the sunset.
- Clarifying the application of clause 14 to codification as well as restatement.

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[151] HC Hansard, 18 January 2023, cols 383–489.
[152] As above, col 392.
[153] As above.

Non-government amendments defeated on division

Delaying the sunset until 2026

Labour moved amendment 18, which would have delayed the sunset date in clause 1 from the end of 2023 to the end of 2026.

Justin Madders, shadow minister for business and industrial strategy, said he had not heard any "rational justification" for the sunset deadline of 31 December 2023.[154] He suggested it had been "plucked out of thin air, seemingly at random".[155] He said Labour agreed with the Regulatory Policy Committee's assessment that a stronger argument was needed for choosing that date.[156] Mr Madders expressed concerns that there was not enough capacity in the civil service for a "genuinely effective appraisal" within that deadline of all the regulations the bill would sunset. He highlighted the potential for things to be missed and for provisions to be sunsetted by accident.

Mr Madders contended that the "cliff edge becomes all the more absurd when we consider that the government do not know what rules will be covered by this bill".[157] He said the dashboard had not been updated since it was first published, despite reports that an additional 1,400 pieces of retained EU law had since been discovered. He described the dashboard as "not comprehensive or authoritative" and "undoubtedly not a sound basis on which to be legislating".

Speaking for the government, Nusrat Ghani, minister of state at the Department for Business, Energy and Industrial Strategy, said she could "not stress enough the importance of achieving the 2023 deadline".[158] She argued that retained EU law was "never intended to sit on the statute book indefinitely". She believed it was "constitutionally undesirable" for some domestic law, including primary legislation, to remain subordinate to some retained EU law.

Ms Ghani maintained the sunset clause was "the quickest and most effective way to pursue retained EU law reform", for several reasons.[159] First, it would ensure the government was "proactively choosing to preserve EU laws only when they are in the best interests of the UK". Second, it would ensure "outdated and unneeded laws are quickly and easily repealed". Third, it would give the government "a clear timeline in which to finish the most important tasks".

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[154] HC Hansard, 18 January 2023, col 404.
[155] As above, col 405.
[156] As above, col 406.
[157] As above, col 409.
[158] As above, col 392.
[159] As above, col 397.

Ms Ghani said the date of 31 December 2023 had been chosen "to incentivise and accelerate a programme of reform that is well underway".[160] She also pointed out the bill already allowed the sunset to be extended to mid-2026 if departments needed more time to consult and take decisions on the EU laws that they wished to amend or repeal. She said the government would ensure that that work was appropriately resourced.

She gave assurances the dashboard would be updated regularly to reflect the government's progress on reforming retained EU law.[161] She said it would be updated again that month (January 2023).

The amendment was defeated by 297 votes to 239, a majority of 58.[162]

Excluding employment protections from the sunset

Labour also moved amendment 19, which would have excluded a list of regulations to do with workers' rights from the sunset in clause 1.

Justin Madders described employment rights as "an essential ingredient of a civilised society".[163] He said they were not a "burden on businesses" but would contribute to future economic growth and productivity. He questioned the government's record on protecting employment rights and said that amendment 19 would close off "another line of attack on working people".[164] He suggested that if the government had no plans to remove existing employment protection legislation, it should have no difficulty in supporting Labour amendments to take them out of the scope of the bill.[165]

Stella Creasy (Labour MP for Walthamstow) suggested that when she had asked ministers about their plans for specific employment protection regulations, they had been unable to confirm whether they would retain, replace or revoke them.[166] Justin Madders agreed with her concerns on this issue. He said it was a problem that the bill would enable ministers to remove these regulations with no opportunity for Parliament to challenge that outcome.[167]

Nusrat Ghani dismissed the idea that the bill amounted to "a bonfire of workers' rights".[168] She said the government was proud of the UK's excellent record on labour standards, arguing that the UK's "high standards

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[160] HC Hansard, 18 January 2023, col 464.
[161] As above, col 398.
[162] As above, cols 469–72.
[163] As above, col 415.
[164] As above, cols 407 and 416.
[165] As above, col 413.
[166] As above, col 407.
[167] As above.
[168] As above, col 401.

were never dependent on our membership of the EU". She described amendments seeking a 'carve-out' for workers' rights as "a bit absurd" as they were "not under threat".[169] She stated that the government would not "abandon [its] strong record on workers' rights".

The amendment was defeated by 301 votes to 238, a majority of 63.[170]

Excluding legislation within devolved competence from the sunset

The SNP moved amendment 28, which would have prevented the automatic sunset in clause 1 from applying to legislation within the legislative competence of the Scottish Parliament.

Alyn Smith, the SNP spokesperson on Europe, said he accepted there was a need to "tidy up" the EU elements of the domestic statute book, but he argued the bill was not the way to do it.[171] He said the government already had powers to amend or repeal "legacy" pieces of EU legislation that were not fit for purpose through the normal legislative process.[172] He said the bill was "not the normal legislative process", but a "huge blank cheque" for ministers. He believed it was an "utterly flawed premise" that some pieces of legislation should lapse "because of their origin, rather than their content". He argued that amendment 28 would make explicit Scotland's powers over its devolved competence.[173]

Alliance, the SDLP and Plaid Cymru tabled similar amendments relating to Northern Ireland and Wales respectively, although these were not put to a vote. Stephen Farry (Alliance MP for North Down) noted that the 'end of 2023' sunset deadline posed particular challenges for Northern Ireland given the lack of a functioning assembly.[174] He suggested that measures could drop off the statute book but there was "no one in political charge" in Northern Ireland to use the devolved powers in the bill.

Some members drew attention to the fact that the Scottish and Welsh governments had recommended withholding legislative consent from the bill. Ian Blackford (SNP MP for Ross, Skye and Lochaber), a former SNP Westminster leader, argued Scotland should have the right to veto the bill as it "tramples over devolution and our laws in a way that we do not consent to".[175] Hywel Williams, Plaid Cymru spokesperson, made a similar point in relation to Wales, arguing that the government had "rendered the Sewel

[169] HC Hansard, 18 January 2023, col 462.
[170] As above, cols 478–80.
[171] As above, col 425.
[172] As above.
[173] As above, col 425.
[174] As above, col 425.
[175] As above, col 395.

convention almost valueless" by legislating without devolved consent.[176] He argued amendment 28 and the others like it were "vital" to protect the rights of people in the devolved nations and to prevent the devolved governments from being "lumbered with the consequences of this impractical, dangerous, costly and wholly ideological legislation".

Nusrat Ghani said the bill "must and should apply to all nations of the UK".[177] She argued that providing a 'carve-out' for legislation within devolved competence would "severely impact the coherence of the UK statute book and legal certainty for our public and businesses". However, she also emphasised that the bill was providing the devolved governments powers to reform retained EU law that was within their own devolved competence.[178] She said this would give them "greater flexibility to decide how they should regulate those areas" and to decide "which retained EU law they wish to preserve and assimilate, and which they wish to sunset within their devolved competences". She also said the government remained fully committed to the Sewel convention. [179]

The SNP amendment was defeated by 300 votes to 239, a majority of 61.[180]

Parliamentary oversight of legislation to be revoked

Stella Creasy (Labour MP for Walthamstow) moved amendment 36, which sought to give the House of Commons the final say on which legislation would be revoked by the sunset in clause 1. It would have required the government to publish a list of all legislation subject to the sunset at least three months before the sunset was due to take effect. Any legislation not included on the list would not be sunsetted. The amendment would have given both Houses of Parliament the power to add or remove legislation from the revocation list, although the House of Commons would have been able to veto any changes made by the House of Lords.

Ms Creasy emphasised the importance of understanding the scope of the legislation that would be covered by the sunset.[181] She suggested there were issues with the government's dashboard, including pieces of retained EU law that were missing from it, pieces of retained EU law included on it that had already been repealed, and discrepancies between retained EU law listed to be repealed by the Financial Services and Markets Bill and what was included on the dashboard. Although the minister had promised the dashboard would be updated, Ms Creasy pointed out this was not due to happen until after MPs were being asked to approve the bill. She argued it was not "an

[176] HC Hansard, 18 January 2023, col 452.
[177] As above, col 402.
[178] As above.
[179] As above, col 395.
[180] As above, cols 473–6.
[181] As above, col 431.

unreasonable proposition" to ask the government for "a clear number and a clear list of what is in scope".[182] She said MPs should be concerned "about the precedent set by legislation that allows the government to give themselves an enabling power without defining its limitations".

Ms Creasy expressed her concerns about how ministers would use the powers in the bill. She said the government had described her as "scaremongering" when she suggested that the powers could be used to get rid of employment, environmental or consumer protections, but she had been unable to get assurances from ministers that they would keep particular pieces of regulation. For instance, she said the government had told her it would keep regulations on bird flu but would not confirm what its plans were for regulations on maternity and parental leave.[183] She said the bill was asking MPs to "hand over oversight of an unknown number of laws" and amendment 36 was intended in response to "stand up for parliamentary sovereignty".[184]

David Davis (Conservative MP for Haltemprice and Howden), a former secretary of state for exiting the European Union, was a co-signatory of amendment 36. He said he came at the bill as "a convinced and campaigning Brexiteer" who had resigned from the cabinet "to preserve the right to diverge from the EU".[185] He said the bill would give control to Whitehall rather than to Westminster, which was not what he had campaigned for. He said the bill was "a blank cheque—one might almost say a pig in a poke—because we do not even know how many pieces of legislation are going through on the back of this bill".

Mr Davis believed many of the areas where legislation could be repealed or amended by ministers using powers in the bill were "substantive issues", where changes should be debated on the floor of the House, not in a statutory instruments committee. He argued that if ministers did not have to justify their decisions at the dispatch box, "the quality of the decision goes down, and that is dangerous when we are talking about measures as important as these".[186] He argued that a better approach would be to pass primary legislation to rewrite EU rules in the areas "that really matter", as was being done for data protection, financial services and procurement.

In response, Jacob Rees-Mogg (Conservative MP for North East Somerset), who had introduced the bill when he was secretary of state for business,

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[182] HC Hansard, 18 January 2023, col 432.
[183] Ms Creasy referred to written parliamentary questions she had asked on these subjects. See: House of Commons, 'Written question: Avian Influenza and Influenza of Avian Origin in Mammals (England) (No. 2) Order 2006', 7 December 2022, 99824 and 'Written question: Maternity and Parental Leave etc. Regulations 1999', 13 December 2022, 102912.
[184] HC Hansard, 18 January 2023, col 432.
[185] As above, cols 439–40.
[186] As above, col 441.

energy and industrial strategy, argued that the bill was "proportional" because it was sunsetting or providing powers only over secondary measures.[187] He said any retained EU law introduced by primary legislation would still have to be considered on the floor of the House.

Mr Davis said that Parliament's lack of powers over EU law transposed into domestic law by secondary legislation was one of the reasons he had become a Brexiteer.[188] He argued that using secondary legislation to revoke or amend EU rules would not "right" the "wrong" of their having been "de facto imposed" on the UK through secondary legislation in the first place. He maintained that many of the issues involved were "important enough to justify discussion on the floor of the House".

Stella Creasy pushed Ms Ghani several times during the debate to give an exact number of laws covered by the bill. She argued this was necessary so that MPs could "at least have some sense of the task that they are voting for".[189] At the end of the report stage, Ms Ghani clarified that the government had identified and verified 3,200 items of retained EU law and expected the total to be 4,000.[190] She said the dashboard would be updated.

Stella Creasy pointed out that the dashboard listed 2,400 pieces of EU law at present.[191] She asked if that meant the government was asking the House of Commons to vote for ministers "to have power over 1,600 undefined, un-public pieces of regulation". She called on Ms Ghani to be "open […] about what is at stake with this legislation". Ms Ghani repeated that the dashboard would be updated. She said the government had already verified "a substantial amount" but the total could be up to 4,000 laws.[192] She said the bill would give each government department time to assess, amend, assimilate or revoke retained EU law in its area.

On the subject of parliamentary scrutiny, Ms Ghani said that EU law being amended or repealed by regulations made under the bill would "go through the usual channels" and would be scrutinised by the House of Commons European Statutory Instruments Committee and the House of Lords Delegated Powers and Regulatory Reform Committee.[193] With this scrutiny and the dashboard, she maintained that "nothing could be more transparent".

Amendment 36 was defeated by 295 votes to 242, a majority of 53.[194]

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[187] HC Hansard, 18 January 2023, col 440.
[188] As above, cols 440–1.
[189] As above, col 396.
[190] As above, col 462.
[191] As above, col 464.
[192] As above.
[193] As above, cols 466–7.
[194] As above, cols 482–5.

Other concerns raised by MPs

Environmental protection

Several members raised the issue of the bill's impact on existing environmental and consumer protections, citing concerns similar to those expressed about employment protections. However, no amendments on environmental and consumer protection law were put to a division.

For instance, Caroline Lucas (Green MP for Brighton, Pavilion) expressed concerns that the bill contained no requirement for existing environmental standards to be maintained.[195] She also feared that the requirement for replacement or alternative provisions not to increase the regulatory burden amounted to a requirement "not to go on and make the legislation stronger".[196] She questioned how the minister could talk about the bill providing any certainty on environmental protection "when businesses have no idea which laws will be in or out and when she does not know how many laws are on her dashboard".

Similarly, Justin Madders expressed concerns that the environment could become a "casualty" in the government's "deregulatory war" and that the government saw environmental protections as "red tape that holds back growth".[197] Labour tabled amendments intended to protect specific pieces of environmental legislation from being sunsetted or from being revoked without being replaced. Sarah Olney, the Liberal Democrat spokesperson for business, energy and environmental strategy, said her party was also "extremely concerned about the potential for environmental deregulation" through the bill.[198]

Nusrat Ghani said there had been a lot of "misinformation" on the subject of the environment.[199] She emphasised that Defra had committed to enhance or maintain standards in this policy area. She said Defra had already taken "decisive action" to reform areas of retained EU law and had overseen new legislation such as the Environment Act 2021, the Fisheries Act 2020 and the Agriculture Act 2020.[200] She maintained it was "simply incorrect to suggest that the government will be weakening any of those protections".

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[195] HC Hansard, 18 January 2023, col 398.
[196] As above, col 399.
[197] As above, col 417.
[198] As above, col 442.
[199] As above, col 395.
[200] As above, col 396.

Consumer protection

Justin Madders and others raised similar concerns about consumer protection legislation and whether it could be removed by provisions in the bill.[201] Nusrat Ghani said the government was committed to protecting consumers from unsafe products now and in the future.[202] She said the government was finalising a consultation setting out the next steps in delivering the government's ambitions for a new product safety framework, which would include "changes to save time and money for business". She also pointed out that "core consumer rights" set out in the Consumer Rights Act 2015 and the Consumer Protection Act 2017 would continue to apply and would be unaffected by the bill.[203]

7.4 Third reading

Third reading took place immediately after report stage on 18 January 2023.[204]

Nusrat Ghani spoke of the "paramount importance" of the bill in "ending the supremacy of EU law and restoring acts of Parliament as the highest law in the land".[205]

Jonathan Reynolds, shadow secretary of state for business and industrial strategy, described the bill as "a charter for uncertainty, confusion and the regression of essential British rights".[206] He said the bill was not about Brexit, but about "how the law should be changed, and the certainty and clarity the government need to give when they do that".[207] He described it as "frankly absurd" to discover that an additional 1,600 laws on top of those in the dashboard would be affected, without the government being able to tell MPs what they were. He also said the government had failed to provide a "compelling answer" about why the government could not address the body of retained EU law by putting forward their replacement proposals through sector-by-sector legislation.

Jacob Rees-Mogg described the bill as "a reclamation of our democracy, of parliamentary sovereignty and of our proper law".[208] He suggested the House of Lords should note that the only amendments made to it by the House of Commons were technical amendments from the government, with no fundamental amendments. In contrast, Patrick Grady (SNP MP for

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[201] HC Hansard, 18 January 2023, col 416.
[202] As above, col 462.
[203] As above, col 467.
[204] As above, cols 490–7.
[205] As above, col 490.
[206] As above, col 491.
[207] As above, col 490.
[208] As above, col 491.

Glasgow North) suggested the House of Lords should look again at the amendments the government had rejected at report stage.[209] He said that rather than exerting parliamentary sovereignty, the bill "hands it over to the executive to pass thousands of laws, or get rid of thousands of laws, by executive diktat".

The bill received its third reading by 297 votes to 238, a majority of 59.[210]

[209] HC Hansard, 18 January 2023, col 492.
[210] As above, cols 494–7.

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