

European &
International
Analysts Group



The Future of Retained EU Law

The Future of Retained EU Law

Introduction

During the UK's 47 years as a member of the European Union, EU law was given effect in our domestic law partly through recognition that certain rules, notably those contained in a number of EU Treaty provisions and in EU regulations, were required to apply directly in all Member States and partly by the incorporation of the rules into UK legislation. Sometimes such legislation took the form of statute law (that is, the passing of an Act of Parliament). But more frequently under a procedure in the European Communities Act 1972, new EU-related laws, particularly those implementing EU directives, were brought in by way of delegated legislation (that is, a law proposed by a minister that Parliament can reject but not amend). This procedure reflected the fact that EU law went through multiple levels of scrutiny nationally as well as in the Council of Ministers and the European Parliament, before it came to national parliaments for their adoption.

The May and Johnson governments recognised, when agreement was reached on the terms of the UK's withdrawal and of the future Trade & Co-operation Agreement (TCA), that there could be no question of completing the replacement of this large body of EU law by the time the UK left the EU on 31 January 2020. They therefore legislated to incorporate all these EU laws into the UK's national statute book on an interim basis through the European Union (Withdrawal) Act 2018.

Known as "retained EU law" (REUL), there has been a debate as to what should be done about it. As the UK is no longer part of the EU it could in theory repeal, replace or reform this body of law as it so chooses but in practice there are significant constraints. These include the fact that major areas of policy are governed by it, the potential impact on the UK's trading and other relationships with the EU, the consequences for individuals and businesses of dropping such a large body of law and the technical complexity and resourcing issues involved with scrapping or changing of almost 4,000 pieces of law.

REUL covers a wide area of regulation that is included in the EU's Single Market and related policy areas including employment law, food safety, civil aviation, product safety (including toy safety), consumer rights and the environment. In many cases UK policy is entirely set within a framework of REUL. Two sectors particularly dependent on REUL are outlined in the Annex to this paper.

The future of REUL has been brought to the centre of political attention by the Truss Government's Retained European Union Law (Revocation and Reform) Bill, which is currently being considered by Parliament. This paper explains the background to this Bill, its detailed provisions and the considerable implications of what is a radical proposal.

Background

The Government's Bill

The Government has brought forward a Bill to revoke, reform or revise all of the remaining law in the UK that was previously derived from our membership of the EU. The Bill would revoke all of this law at the end of 2023 unless ministers expressly decided to reinstate the law in new regulations, to revise the law or to retain it until (at the latest) 23 June 2026 (*i.e.* ten years after the referendum).

The Government's case for the Bill is that REUL is no longer needed as the UK has left the EU and over time it will become less relevant. It also does not make sense for EU law principles to be applied in the UK after Brexit. In the opinion of ministers, if REUL were left on the statute book it would become increasingly obscure and its origins complex. As a former Parliamentary Counsel put it: "Retained EU law is imprecise because it has been removed from the context needed to make sense of it" with the UK's departure from the EU.¹

The origins of retained EU law

The European Union (Withdrawal) Act 2018 retained EU-derived law as law of the UK but made provision for it to be repealed or amended where necessary.² The Act also retained the basic principles of EU law as still applying in the UK even after Brexit. In addition, that Act made specific provision for Northern Ireland as the Protocol requires that certain parts of EU law remain in force there (*e.g.* relating to trade in goods, VAT etc.) but that is not affected by the new Bill and is not discussed in this briefing.

Retained EU law (REUL) is made up of five categories:

- EU-derived domestic legislation – that is, legislation passed by parliament, the devolved legislatures or under delegated legislation in order to implement the UK's EU obligations mostly pursuant to EU Council directives (*e.g.* the Working Time Regulations 1998 and the Consumer Rights Act 2015);
- retained direct EU legislation – mostly EU regulations and relevant EU legal decisions that applied directly in the UK (*e.g.* passenger rights or competition rulings);
- retained directly effective provisions of EU law – that is, provisions that confer rights on individuals or entities that can then be enforced in national courts, these rights may have been conferred by EU treaties (*e.g.* equal pay between men and women) or, exceptionally, directives where these have not been properly implemented;³
- retained EU and domestic case law – the decisions of the Court of Justice of the EU (CJEU) and UK domestic courts when they adjudicated on the meaning or effect of EU law, including EU-derived domestic law;

¹ Sir Stephen Laws KCB, KC, former First Parliamentary Counsel: see Retained EU Law (Revocation and Reform) Bill Deb 8 November 2022, col 5

² See Sections 2-7 of the Act

³ From the landmark 1963 Court of Justice case, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, C-26/62, [1963] ECR 1. These rights only applied in the UK until Brexit day, *i.e.* 31 January 2020.

- retained general principles of EU law – these establish the hierarchy and interpretation of EU law and its relationship with domestic law (e.g. the principle of proportionality), as well as certain fundamental rights.⁴

The Government made 140,000 amendments, most of them brief and technical, which came into force on 31 December 2020, to enable the UK to leave the EU with legal certainty. But this left several thousand EU laws on the statute book.

Proposals to reform and revoke REUL

The Conservative manifesto 2019 promised to remove the supremacy of EU law and to “craft legislation and regulations that maintain high standards but which work best for the UK” whilst promising a “balance of rights, rules and entitlements that benefits all the people and all the parts of our United Kingdom”.⁵

Subsequently, the Brexit Opportunities Unit was established in the Cabinet Office in 2021 and the then Minister, Lord Frost, announced first, a departmental review of existing REUL to see which parts should be repealed or reformed and second, the Government’s intention to amend the REUL arrangements in the 2018 Act with new primary legislation.

The Government published the Retained EU Law (Revocation and Reform) Bill on 22 September 2022 and it was debated in the House of Commons on 25 October.

Under the Bill, almost all retained EU law will expire at the end of 2023 - the “sunset clause”. An estimated 3,800 laws will lapse entirely unless ministers explicitly decide to retain them or temporarily extend the life of an existing REUL beyond 2023 but such an extension can only last until 23 June 2026. The Bill grants Ministers extensive powers to retain, reform or revoke REUL before the deadline.

The Bill is highly controversial because of the wide areas of public policy that it covers, the principle of all REUL lapsing unless ministers intervene and the way in which Ministers propose to change things, using procedure that limits the role of Parliament and enables them to act without consultation.

The Bill’s main provisions

Sunset clause

Clause 1 of the Bill revokes REUL in domestic delegated legislation and direct EU law from 31 December 2023. It excludes Acts of Parliament, Acts or measures of the devolved legislatures in Scotland and Wales, Northern Ireland legislation and financial services legislation.

Clause 1 also gives ministers power to preserve REUL by regulation. Under this Clause, all REUL (other than the exceptions listed in the preceding paragraph) that is not otherwise preserved by using the powers in the Clause, will lapse after 31 December 2023.

⁴ This summary is based on Sections 2-7 of the 2018 Act and Graeme Cowie, *Retained EU Law (Revocation and Reform) Bill 2022-23*, House of Commons Library, CBP-9638, 17 October 2022

⁵ Conservative and Unionist Party, *Get Brexit Done: Manifesto 2019*, p. 48

Clause 2 enables extension of the sunset date from 31 December 2023 to 23 June 2026 by Ministers of the Crown but *not* by devolved legislatures. Ministers have said that this is a “fail safe” and will not be widely used. The text of the Bill 2(1) refers to “a specified instrument or a specified description of legislation” as being able to be extended until 23 June 2026, implying that whole policy areas of REUL could be extended until this later date (but not beyond it without further primary legislation being passed).

Clause 3 repeals section 4 of the Withdrawal Act which had retained the direct effect of EU law in the UK after Brexit. Put simply, section 4 meant that any remaining rights and obligations not covered by other aspects of the 2018 Act continued to have effect in UK law after Brexit. Clause 3 would remove any rights, powers or liabilities under EU law effective in UK from 31 December 2023; clauses 12 and 13 of the Bill (see below) could be used to put some of these rights and obligations back into UK law through delegated legislation. The implications of this Clause are not wholly clear because there is no database available of REUL with direct effect in the UK.

Supremacy other general principles of EU law and assimilated law

During the UK’s membership of the EU it was a principle of law that EU law had primacy (or supremacy) over UK law when there was a conflict between the two. The 2018 Withdrawal Act had retained this concept of supremacy of EU law with respect to REUL after Brexit.

Clause 4 provides that from the sunset date, the supremacy of surviving REUL over UK law will cease. Indeed, the Clause goes further, explicitly turning primacy on its head. Any provision of retained direct EU legislation must, if possible, be read so as to be compatible with domestic enactments, and to be subject to such enactments so far as it is incompatible with them.

There is a limited exclusion from the new supremacy rule regarding aspects of data protection law (*i.e.* the GDPR). In addition, Clause 8 creates a power, exercisable by regulations, to reinstate the supremacy over specified domestic enactments of specified provisions of retained EU direct legislation but not after 23 June 2026.

The supremacy rules under Clause 4 and Clause 8 are complemented by a power given to courts under Clause 9 to issue “incompatibility orders”. Any court that finds a provision of retained direct EU legislation to be incompatible with a domestic enactment (or a domestic enactment to be incompatible with a provision of retained direct EU law covered by a regulation adopted under a Clause 8 regulation) must issue such an order, clarifying the effects of the incompatibility.

Clause 5 abolishes the use of the other general principles of EU law in domestic law after the end of 2023. These principles, which evolved over time through the case law of the Court of Justice, include the equality principle and the doctrine of proportionality. Under the Withdrawal Act, such principles were incorporated into UK law and could be relied on (with some restrictions) in the interpretation of REUL.

Clause 6 of the Bill changes the status of any remaining REUL. After the sunset date it will be known as “assimilated law” and the term “retained EU law” will no longer apply.

Interpretation provisions

Clauses 7-9 end the requirement for domestic courts to interpret REUL in accordance with case law of CJEU; courts will be able to depart from retained EU case law.

Clause 7 provides statutory tests for departing from CJEU case law and retained domestic case law. It also creates a new procedure by which the law officers (including those of the devolved administrations) may refer points of law concerning REUL to the courts.

Clauses 8 and 9 are explained above under supremacy.

Modification of retained EU law

Clauses 10 and 11 downgrade REUL saved by Sections 3 and 4 of the 2018 Act to make them more easily amendable through secondary legislation.

Clause 11 makes it easier to modify or revoke legislation adopted under Section 2(2) of the former European Communities Act by repealing safeguards adopted during the passage of the 2018 Withdrawal Act. Many of the most important parts of REUL were originally passed by Parliament under Section 2(2).

Amendment of REUL and assimilated law

The main powers to repeal or reform REUL and assimilated law are in Clauses 12-17. They apply to “a relevant national authority”, that is, a Minister or the devolved administrations. Clauses 12-17 form the second most controversial part of the Bill after the sunset clause. This is because, first, these clauses contain extensive powers to enable ministers to alter or revoke each category of REUL through delegated legislation. Second, they substantially reduce the usual Parliamentary scrutiny procedure for this type of legislation. Third, changes in the law under these clauses would not generally require the positive approval of Parliament. They could theoretically be stopped by Parliament through use of a negative resolution against them. But, if Parliament did so, the end result, in default of further steps by the relevant national authority, could be that the REUL in question simply fell away under the Bill’s sunset provisions, without Parliament having any further say.

Clause 12 enables a national authority to restate REUL, that is delegated legislation or primary legislation that has been amended by delegated legislation. If this kind of law is restated, then it is no longer REUL. This power is the main clause by which ministers would retain current EU law before the sunset; it can only be used until the end of 2023.

Clause 13 contains a similar power to enable national authorities to restate assimilated law until the later deadline of 23 June 2026.

Clause 14 sets out the scope of minister’s powers in relation to these clauses. These powers are wide as the restatement “may use words or concepts that are different” from the existing law. Any change to REUL can be made to resolve ambiguities, for removing doubts or anomalies, for clarity or accessibility of the law.

Clause 15 is the most important clause in the Bill apart from Clause 1. It enables national authorities to:

- revoke any existing REUL without replacing it;
- to revoke and replace any REUL with alternative provision that it considers appropriate and would achieve similar objectives;
- create new criminal offences, or to charge fees and levy monetary penalties, if they are similar to ones being revoked.

The limitations on these powers include a prohibition on a minister imposing taxation or establishing a public authority, nor can national authorities use these powers to do anything that would “increase the regulatory burden.”

Clause 16 enables a national authority to make such modifications as they think appropriate to REUL or after the end of 2023 to assimilated law to take account of changes in technology or scientific understanding.

Clause 17 enables a national authority to bring forward a Legislative Reform Order under the 2006 Legislative & Regulatory Reform Act to modify retained direct EU legislation. Such orders are designed to remove or reduce regulatory burdens. They are subject to a different parliamentary procedure including consideration by a committee that can make recommendations for changes. In practice they are rarely used as the procedure is regarded by Whitehall as slow and cumbersome.

Final provisions

The remaining provisions in the Bill concern procedural, technical and others matters. Clause 22 contains an exclusion so that the Bill would not apply to the policy areas covered by the Financial Services & Markets Bill 2022. This is the only restriction in the Bill on what policy areas of REUL it can apply to.

Consequences of the proposed changes

Scope

The Bill is unprecedented in its scope. The sunset clause means that without Ministers acting to prevent it, at least 3,800 UK laws would automatically lapse after the end of 2023.⁶ Such an approach to policy development or law reform has never been tried before in this country. Part of the reason there is such concern is that there is no definitive list of all the laws affected and so there is a considerable risk of the accidental repeal of an important piece of law without replacement. The proposed timescale would not leave time for proper consultation and debate on what could be major developments in policy or approach. Prolonged uncertainty for businesses in particular seems inevitable.

The approach taken by the Bill – that all EU law will lapse unless it is expressly retained – runs directly counter to what Parliament agreed during the passage of the 2018 Withdrawal Act. That Act made provision for the repeal or reform of REUL and placed

⁶ It was originally thought that 2,417 pieces of legislation were affected but a trawl by the National Archives has identified a further 1,400 pieces of legislation that are potentially EU-derived: see ‘UK plan to scrap all EU laws suffers new setback’, George Parker, *Financial Times*, 8 November 2022

safeguards to ensure that Ministers did not abuse the extensive powers the Act granted them, safeguards the current Bill seeks to overturn.⁷

It is not just the scope of the law that concerns critics but the importance and complexity of it too. REUL covers large areas relating to the operation of the economy and therefore of critical importance to businesses, employees and consumers. Policy areas that would be affected, such as food safety, consumer protection and product safety are very important to ordinary people as are, for example, the right to paid holidays, to maternity and paternity leave and to the protection of your rights if your job is outsourced (TUPE). Environmental protections laid down in REUL matter to everybody.

In addition, the Bill applies not just to delegated legislation but also to rights directly conferred by EU Treaties (for example, equal pay between men and women). As there is no database of treaty rights, the Bill's impact on this aspect of REUL cannot be quantified.

Although the Bill excludes primary legislation it does in fact include REUL made by amending primary legislation via secondary legislation. For example, the Working Time Directive was implemented in the UK through the Working Time Regulations 1998 which in turn amended the Employment Rights Act 1996. Should parts of statutes be allowed to lapse in this way?

There are major implications for the civil service and the delivery of Government policy because of the volume of work involved. Critics have pointed out that DEFRA would have to bring forward a new law every day in 2023 to meet the deadline at a time when departments are being asked to reduce their staffing. In total, to repeal, reform or extend all the 3,800 pieces of REUL would require the production of at least three times the amount of delegated legislation that would normally be considered by Parliament in any one year.⁸

It could prove particularly difficult for Ministers in the present Government to propose to extend parts of REUL because of objections from within their own party.

The Government's advisory body on deregulation, the Regulatory Policy Committee, said that the impact assessment published by Ministers was not fit for purpose. In particular, the Committee noted that Ministers had not quantified the benefits from the abolition of REUL and had not even attempted to assess the impact of each of the individual REULs subject to sun setting. Furthermore, the Bill was creating uncertainty because it was not clear which of the current REULs would be retained and which would be repealed.⁹

Parliamentary scrutiny

One of the features of the Bill is that it enables a major reduction in Parliamentary scrutiny by switching from positive to negative resolution procedure for the delegated legislation that will revoke, replace or reform REUL. An aspect of this which has attracted particular criticism is the striking absence of consultation provisions in the Bill. The powers granted

⁷ Following objections during the 2018 Act's passage through Parliament, Government amendments to require that delegated legislation amending REUL would need to be approved by a positive resolution in both Houses was accepted. See the speech of Lord Callanan, HL Deb, 23 April 2018, vol 790, col 1411

⁸ See UK Parliament, 'What is Secondary Legislation?', 28 September 2022

⁹ See Regulatory Policy Committee, *RPC Opinion: Retained EU Law (Revocation & Reform) Bill*, 21 November 2022

to Ministers are of the type known as “Henry VIII clauses” because they give Ministers wide power to change the law by regulation.

The sheer volume of law affected will in any case mean it will be impractical for Parliament to scrutinise what is being done in the time available. A problem made worse by the absence of a complete record of the law affected. The Government admits that its EU law dashboard, which shows 2417 laws as REUL, is incomplete. Indeed, a further 1,400 laws were identified by National Archives research. This means that Parliament being asked to agree to repeal laws that have not been identified. This creates legal uncertainty when the Bill is said by its supporters to ensure certainty.

Clause 15 is of particular importance as it allows not just the restatement of REUL but the modification of it in ways which amounts to policy making without consultation and by delegated legislation. Critics argue that this is more than amendment for the purposes of legal certainty and has constitutional implications.

It is legally true that Parliament can reject delegated legislation to which it objects but in practice this rarely happens. The Commons last did so in 1979 during a hung parliament; the House of Lords rejected a regulation in 2000 but has not done so since. Debates on delegated legislation usually last just 90 minutes and no amendments can be made.

Interpretation of EU law

The dropping of the supremacy of EU law and other general principles is a more understandable development as the UK has now left EU, including the transitional period. But there is a danger of legal uncertainty if REUL is subject to new tests, not least because the Government has not issued any guidance as how they think it should be interpreted in the courts in future except in very general ways.

Devolved administrations

The Bill has major implications for the devolved administrations. While they have the same powers in the Bill to repeal, restate or reform REUL as the UK Government (provided it is within their competence), it will be difficult for them to do so by the end of 2023 because of capacity issues. There also could be disputes as to competence between HMG and the devolved administrations, for example in relation to environmental law where the Scottish and Welsh Governments are likely to adopt different approaches to Westminster. Both the Welsh and Scottish administrations have made clear their unhappiness with the Bill and neither the Senedd nor the Scottish Parliament have given their consent to the Bill.

Impact on external trade

The passing of the Bill would create some uncertainty for existing and potential trade partners with the UK. This is because we do not know which parts of REUL will be revoked or reformed. Some free trade agreements have been negotiated on the basis of the existing REUL (e.g. the parts on food and product safety) and might unravel if REUL was dropped or substantially amended.

There are also questions about the Bill’s potential impact on the UK-EU Trade & Co-operation Agreement. The EU has always made it clear that if the UK moved substantially

away from Single Market law in important areas it would regard that as grounds for reducing trade and other co-operation with the UK.

Conclusions

The statement on REUL in the 2019 Conservative manifesto did not foreshadow a Bill of this scope and implication but implied a far narrower change. To the Bill's critics, its radical approach goes beyond any mandate contained within the manifesto.

The changes to employment and environment law, in particular, which would follow REUL being allowed to lapse, would be immense. Ministers have been keen to reassure that no such radical moves are intended but it is the absence of any procedure for Parliament to be able to guarantee that which concerns their opponents. There are big questions too about the principle of allowing such big changes by secondary legislation rather than by primary legislation. To critics of the Bill, this is far from the notion of "taking back control" advocated by supporters of the Leave campaign in 2016. Far from parliament being in charge, the Bill puts ministers in a position to make radical changes to the law without consultation or effective scrutiny.

The presence of a large quantity of retained EU law on the UK statute book raises important questions. There was a recognition that what to do with it was an issue that could not be ignored. But the Government's Bill has attracted unusually wide opposition because of the approach taken; criticism of it has come from a larger group than those who opposed Brexit. It was striking that the Institute of Directors should have chosen to join with the Trades Union Congress to object to the Bill, alongside environmental groups and others.¹⁰ The risk of the Government's approach putting the UK in breach of the TCA and triggering a dispute with the EU particularly worries the business community.

There are some signs that the Sunak Government is having second thoughts about the scope of the Bill, if not its methodology.¹¹ The lack of capacity to bring forward the large amount of new legislation needed has raised concern across government. The approach of HM Treasury in pursuing financial services regulatory reform through a more narrowly focused Bill, would be one way forward in other sectors, rather than using an omnibus Bill.

If the Bill remains unamended it will face major opposition in the Lords and delegated legislation issued under Clause 15 (in particular) could trigger a constitutional crisis in the future.

There is a general consensus that the Bill in its current form is deeply flawed and could cause a great deal of damage and dislocation if passed unamended. It will be hard for the Government to ignore that consensus.

January 2023

¹⁰ Joint letter from the IoD, TUC and others: see 'Brexit: Don't scrap EU rules, firms and unions say', Noor Nanji & Lora Jones, *BBC News*, 24 November 2022

¹¹ For example, in the Autumn Statement the Chancellor referred to focusing on regulatory reform of EU law in five growth areas: see HC Deb, 17 November 2022, vol 722, col 853

Annex

Civil aviation

There are approximately 80 pieces, amounting to around 7,700 pages, of aviation legislation derived from EU law. Retained EU law is the basis for nearly all key UK safety aviation law covering competence of key personnel, operations and airworthiness of aircraft, as well as aspects of security, environmental and consumer protection law as they relate to aviation. In particular, all current UK requirements (which are conditions for granting licences to operate) for pilots, air traffic controllers, air traffic managers, aerodromes and airlines are based on EU retained law. This is also the case for common safety reporting standards, standards for operating the European air traffic network, conditions for certifying airworthiness of aircraft and parts and the conditions for maintenance of aircraft.

Quite apart from the resources required to consider all these provisions most of this legislation reflects the fact that UK aviation operates in an international network. Much derives ultimately from ICAO (International Civil Aviation Organisation) of which the UK is a member. So repealing or substantially amending is not feasible either legally or operationally. And if it were done, the UK would need to convince international partners that our standards remained equivalent so that the UK remained a safe place to fly.

Environmental protection

Retained EU law is the basis for much UK environmental protection of nature. The Habitats Directive and associated Regulations give legal protection to internationally important habitats (for example Special Areas of Conservation (SAC) and Special Protection Area (SPA) designations which cover vital wildlife sites) and species (including legal protection of the otter, dolphins and rare orchids). They provide the legal basis for Environmental Impact Assessments as well as laws on air and water quality and waste.

The Bill has provoked opposition from many notable conservation organisations including the National Trust and Wildlife Trusts, as well as the statutory Office for Environmental Protection. Their main concern is that the automatic revocation of retained EU law by the Bill's sunset clauses will result in loss of protection and risk impeding the UK's ability to meet its legally binding target to halt the decline in the abundance of species in England by 2030, as set out in the UK's Environment Act (2021).



European & International Analysts Group

The European & International Analysts Group are an independent group of former British officials, both civil servants and diplomats, including former officials in the EU institutions and several former UK ambassadors to the EU.

The group publishes high-quality, evidence-based briefing materials on issues concerning the UK's new, external relationship with the EU, developments in the EU itself and on broader international issues that affect the UK and its neighbours.



eiag.org.uk



contact@eiag.org.uk



[@AnalystsGroup](https://twitter.com/AnalystsGroup)