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SPICe Briefing

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

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

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Summary

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

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

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

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

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

[Explanatory Notes, paragraph 1](#)

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

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Part one: retained EU law

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

What is retained EU law?

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

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

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

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

1. Domestic law which implemented or related to EU obligations. This is called “EU-derived domestic legislation”. This was saved by section 2 of the European Union Withdrawal Act 2018 (EUWA). The most important instances of EU-derived domestic legislation are regulations which implemented EU Directives. Examples include the [Working Time Regulations 1998](#) (a UK [Statutory Instrument](#) - a UK SI) which implemented the [EU Working Time Directive](#) in England, Scotland and Wales and the [Air Quality Standards \(Scotland\) Regulations 2010](#) (a Scottish Statutory Instrument - an SSI) which implemented the [EU Air Quality Directive](#) in Scotland. The Retained EU Law (Revocation and Reform) Bill (“the Bill”) mentions “EU-derived subordinate legislation” which is a sub-category of EU-derived domestic legislation.
2. EU legislation which was directly applicable in the UK, most importantly EU Regulations, which used to apply in the UK in and of themselves. This is now called “retained direct EU legislation”. It was converted into domestic law by section 3 of EUWA. Examples are the EU’s [General Data Protection Regulation](#) (known as the [UK GDPR](#) in retained EU law) or Regulation 261/2004 (the Flight Compensation Regulation). The same term - “retained direct EU legislation” is used in the [REUL \(Revocation and Reform\) Bill](#).
3. Other rights, powers, obligations, remedies etc. in EU law that had direct effect in the UK. These are known as “saved EU rights” – a catch-all category for EU rights and obligations which are not captured in “direct EU legislation”. These were saved by section 4 of EUWA. Examples include directly effective rights contained in EU treaties such as the right to equal pay (TFEU article 157) and certain rights under the EU’s

international treaties.

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

Why was retained EU law created?

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

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

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

EU law and its principles

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

Primary EU law is the [EU Treaties](#).

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

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

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

legislation (SIs) in the UK.

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

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

“ The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after IP Completion Day.”

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

“ the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP Completion Day”

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

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

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

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

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

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

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

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

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

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

- (a) an Act of Parliament,
- (b) any other primary legislation (so far as it has the power to make such a modification), or
- (c) any subordinate legislation so far as it is made under a power which permits such a modification by virtue of—
 - (i) paragraph 3, 5(3)(a) or (4)(a), 8(3), 10(3)(a) or (4)(a), 11(2)(a) or 12(3) of Schedule 8,
 - (ii) any other provision made by or under this Act,
 - (iii) any provision made by or under an Act of Parliament passed before, and in the same Session as, this Act, or
 - (iv) any provision made on or after the passing of this Act by or under primary legislation.

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

ⁱ Retained direct principal EU legislation is considered primary legislation for the purposes of the [Human Rights Act 1998](#).

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

- (a) an Act of Parliament,
- (b) any other primary legislation (so far as it has the power to make such a modification), or
- (c) any subordinate legislation so far as it is made under a power which permits such a modification by virtue of—
 - (i) **paragraph 3, 5(2) or (4)(a), 8(3), 10(2) or (4)(a) or 12(3) of Schedule 8,**
 - (ii) any other provision made by or under this Act,
 - (iii) any provision made by or under an Act of Parliament passed before, and in the same Session as, this Act, or
 - (iv) any provision made on or after the passing of this Act by or under primary legislation.

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

Retained EU case law

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

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

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

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

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

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

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

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

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

The UK Government’s ‘[Benefits of Brexit](#)’ paper published in January 2020 highlighted that the UK Government was considering the continued effect of supremacy of EU law over domestic law made before 31 December 2020:

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

Legislative competence of the Scottish Parliament

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

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

“ An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown.”

[Scotland Act 1998, Section 30A](#)

However, no “freezing” regulations were ever made, and the power to make them expired on 31 January 2022. In [March 2022 section 30A of the Scotland Act was repealed](#). This

ii [European Union \(Withdrawal\) Act 2018, section 6](#)

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

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

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

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

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

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

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

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

ⁱⁱⁱ [Scottish Continuity Bill Reference \[2018\] UKSC 64](#)

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

UK Government dashboard of retained EU law

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

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

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

UK Government , 2022¹

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

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

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

[Retained EU Law Dashboard](#)

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

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

Welsh Government , 2022²

Background to Retained EU Law (Revocation and Reform) Bill

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

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

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

[Lords Hansard, volume 814, Thursday 16 September 2021](#)

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

“

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

2. Even though we have left the EU, the UK courts are still required to interpret REUL in accordance with retained general principles of EU law, such as proportionality and the protection of legitimate expectations, so far as those principles are relevant. These general principles have developed in the EU over the years to apply to the laws as they exist in the EU system. But REUL is now UK law derived from EU sources - so we need to consider whether this new body of UK law should be interpreted under UK principles of interpretation, or under those that apply to the EU treaties and legislation developed for Member States.

3. Currently, under the European Union (Withdrawal) Act 2018, REUL has a special and unusual status in UK law. Whatever its original EU legislative form (for example, a regulation or treaty article), for some purposes REUL is treated as UK primary legislation, and in other cases its status depends on its original form (with a significant number automatically accorded the status of primary legislation). Accordingly, we will be revisiting the legislative framework in the European Union Withdrawal Act and the operation of such REUL, so that it is given a more appropriate status within the UK legal system for the purposes of amendment and repeal. That status should reflect the fact that Parliament had no ability to block or amend such legislation once agreed in Brussels - indeed it often had no meaningful democratic scrutiny in the UK at all. Accordingly, this aspect of the review will consider whether, and if so, how, REUL could be amended or repealed by an accelerated process, with appropriate oversight, given the unsatisfactory nature of its original incorporation.

4. The EU concept of the ‘supremacy of EU law’ - which forces all other UK legislation to be interpreted so as to give way to EU law where there is a conflict (even if EU law was overridden by subsequent non-EU sourced UK law) - has been preserved by the 2018 Act so far as relevant to the interpretation, disapplication or quashing of domestic law passed or made before the end of the transitional period. This interpretative concept is alien to the UK legislative principles, whereby later parliaments (and their laws) can override earlier parliaments. This concept never sat well with our long established democratic and parliamentary traditions, and now we have left the EU is clearly no longer appropriate. We will consider the issue and it is likely that we will propose removing the concept from the statute book.

5. Under the 2018 Act, in interpreting REUL, UK courts remain bound by EU courts and their decisions issued before the transition period ended. Only the Supreme Court or certain appellate courts have the power to depart from such case law. REUL is UK law which is derived from a (now) foreign source. In all other cases, when UK legislation draws on foreign models, its courts are not bound by foreign case law, although it may be persuasive. Accordingly, we need to consider the anomalous status of EU case law, and we will be revisiting the issue of which UK courts should be able to depart from retained EU case law, and on what basis.

6. The Court of Justice of the EU may, from time to time, declare an EU instrument invalid under EU law. In addition to the general process for addressing REUL which is no longer right for the UK, we propose to ensure that the retained

version can be swiftly removed when the original EU law measure has been declared invalid under EU law. 7. The review will also consider any consequential actions, such as updated guidance relating to the courts (for example, on the treatment of EU case law) and the place of EU law in legal education”

[Brexit Opportunities, Review of Retained EU law, Ministerial Statement, 9 December 2021](#)

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

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

[Brexit Opportunities, Review of Retained EU law, Ministerial Statement, 9 December 2021](#)

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

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

UK Government , 2022⁴

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

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

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

“ The Government’s review of retained EU law has, to date, identified over 1,400 pieces of EU-derived law that have been transferred into UK law.”

UK Government , 2022⁵

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

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

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

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

[Explanatory Notes, paragraph 1](#)

What does the Bill do?

The Bill will have four main effects:

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

Sunset of retained EU law

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

“ To ensure REUL comes to an end in the near future, a sunset of REUL by the end of 2023 has been included in the Bill.”

UK Government printed by the UK Parliament , 2022⁶ paragraph 16

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

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

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

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

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

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

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

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

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

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

Creation of new category of law: assimilated law

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

[The Explanatory Notes](#) state that:

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

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

Enhancing existing powers to modify retained direct EU law

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

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

Henry VIII powers are those which enable secondary legislation to repeal or amend primary legislation. The usual constitutional principle is that primary legislation, passed by parliament, should be repealed or amended only by other primary legislation passed by parliament, not by secondary legislation made by the executive. Key to this principle is that where the executive wants to amend or repeal primary legislation which has been put in place by Parliament, it should do so by way of a bill, which will receive full parliamentary scrutiny, and which Parliament has the opportunity to amend. Secondary legislation receives a far lower level of scrutiny and Parliament cannot amend it, only approve or reject it as a whole⁷.

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

The [Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee](#) notes that:

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

and

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

The Hansard Society has explained the effect of clause 10 as follows⁸ :

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

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

Ministerial powers to amend, retain and repeal retained EU law

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

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

“Concurrently” means that they can be used either by a UK Minister or a devolved administration independently of each other in devolved areas.

“Jointly” means a UK Minister and a devolved administration acting together.

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

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

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

The power to preserve retained EU law

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

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

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

“Relevant national authorities” are defined in the Bill as:

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

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

exempt from the sunset provision.

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

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

The power to extend the sunset

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

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

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

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

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

The power to restate retained EU law

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

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

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

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

or consultation requirement in such circumstances.

The power to restate assimilated law

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

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

Secondary assimilated law is defined as:

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

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

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

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

The UK Government's justification for the power is:

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

UK Government (published by the UK Parliament), 2022⁹

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

The power to revoke or replace

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

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

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

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

UK Government (published by the UK Parliament), 2022⁹

It also notes that

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

UK Government (published by the UK Parliament), 2022⁹

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

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

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

UK Government (published by the UK Parliament), 2022⁹

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

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

“Burden” is defined as including “amongst other things” –

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

The Hansard Society has stated that:

“ The clause thus imposes what amounts to a regulatory ceiling. This is contrary to previous claims from Ministers that in some areas REUL might be amended to enhance regulatory requirements (e.g. in the field of animal welfare).”

The Hansard Society, 2022¹⁰

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

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

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

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

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

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

The power to update

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

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

The note on delegated powers states that:

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

UK Government (published by the UK Parliament), 2022⁹

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

The Hansard Society has described the power as “*very open-ended*”⁸ , asking:

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

The Hansard Society , 2022⁸

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

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

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

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

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

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

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

The courts and retained EU case law

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

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

“ (a) The extent to which the retained domestic case law is determined or influenced by retained EU case law from which the court has departed or would depart, (b) Any changes or circumstances which are relevant to the retained domestic case law, and (c) The extent to which the retained domestic case law otherwise restricts the proper development of domestic law.”

UK Government printed by the UK Parliament , 2022⁶

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

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

Reception of the Bill

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

“ The Government’s approach to REUL in this Bill is fundamentally and irresponsibly flawed.”

The Hansard Society , 2022⁸

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

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

^{vi} Section 6 European Union (Withdrawal) Act 2018

“

1. Acceptance of the automatic expiry (sunset) of REUL will be an abdication of Parliament's scrutiny and oversight role;”
2. It will introduce unnecessary uncertainty – legal, economic and political – into the REUL review process;”
3. The broad, ambiguous wording of powers will confer excessive discretion on Ministers;”
4. Parliamentary scrutiny of the exercise of the powers will be limited; and”
5. There are potentially serious implications for devolution and the future of the Union.”

The Hansard Society , 2022⁸

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

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

The Guardian, 2022¹¹

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

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

The Guardian, 2022¹¹

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

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

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

Scottish Government view of the Bill

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

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

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

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

“

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

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

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

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

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

relation to the lack of work to identify REUL in devolved areas when the UK Government published its [dashboard of REUL](#).

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

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

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

Powers for UK Ministers to act in devolved areas

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

“ Delegated powers are powers to make secondary legislation which are delegated by a parliament/legislature to government ministers”

The Scottish Parliament , 2022¹³

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

The CEEAC Committee has said that:

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

[The Impact of Brexit on Devolution](#), paragraph 178

As the CEEAC Committee report explains:

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

The Sewel Convention and consent

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

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

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

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

The [Institute for Government](#) has stated that:

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

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

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

The CEEAC Committee agrees that:

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

The Scottish Parliament , 2022¹³

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

The Committee’s view was that^{vii}:

“ there is a need for a much wider public debate about where power lies within the devolution settlement following the UK’s departure from the EU. In particular...this needs to address the extent of regulatory autonomy within the UK internal market. Any reform of the Convention needs to flow from the outcome of this discussion which also needs to be inter-parliamentary.”

The Scottish Parliament , 2022¹³

Keeping pace with EU law

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

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

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

The Scottish Parliament , 2022¹³

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

vii The Constitution, Europe, External Affairs and Culture Committee launched an inquiry ‘[How is Devolution Changing post EU](#)’ on 6 October 2022.

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

New constitutional arrangements

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

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

The UK Internal Market Act 2020

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

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

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

Common frameworks

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

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

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

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

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

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

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

- [What common frameworks are](#)
- [Why common frameworks should be scrutinised](#)
- [How common frameworks can be scrutinised](#)

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

The Northern Ireland Protocol

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

At present, the Protocol means that:

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

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

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

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

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

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

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

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

[A SPICe joint guest blog with Professor Katy Hayward](#) considers the Northern Ireland Protocol Bill.

Trade and the EU-UK Trade and Cooperation Agreement

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

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

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

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

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

Challenges for parliamentary scrutiny

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

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

UK Parliament Hansard, 2022¹⁵

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

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