Five problems with the Retained EU Law (Revocation and Reform) Bill

24 October 2022

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Acknowledgements

This paper was produced by Ruth Fox.

The research for this paper was funded by the Legal Education Foundation as part of the Hansard Society's Delegated Legislation Review.

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The *Retained EU Law (Revocation and Reform) Bill* does not itself make any major policy changes directly. It is a framework Bill which provides extensive powers to Ministers to decide whether to amend, retain or revoke any of the at least 2,417[1] pieces of Retained EU Law (REUL). However, a sunset provision means that any piece of REUL will be revoked by default at the end of December 2023 unless Ministers actively decide to save it by that point.

The Government's approach to REUL in this Bill is fundamentally and irresponsibly flawed.

Overview: Why is this Bill flawed?

This briefing focuses on five of the problems with the Bill:

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 Bill:

- Sidelines Parliament because it proposes to let all REUL expire on the sunset deadline unless Ministers decide to save it, with no parliamentary input or oversight.
- Provides Ministers with a series of broad 'blank cheque' powers to amend or replace REUL – including to make '*alternative provision*' that they '*consider appropriate*' – across policy areas as diverse as animal welfare, consumer rights, data protection, employment, environmental protection, health and safety, and VAT, and all subject to only limited parliamentary oversight.

The Bill gives no indication of:

- What internal review process will be adopted by the Government to assess 2,417 pieces of REUL and how much resource this will require.
- The timescale for decision-making by Ministers about whether to let a piece of REUL fall away, or whether to amend or save it.
- How Ministers propose to use the powers to alter policy, other than the intention to move in a de-regulatory direction, treating REUL as a regulatory ceiling rather than a floor.

[1] See www.gov.uk/government/publications/retained-eu-law-dashboard

- How much REUL is reserved or devolved, and how Ministers will engage with the devolved administrations to determine the future of REUL in areas that are matters of devolved competence.

The Bill risks creating considerable legal and economic uncertainty:

- The powers are so broadly drawn that it is difficult to say, other than in the abstract, what the implications of the Bill will be. It depends on how, and how extensively, Ministers choose to use the powers. But, as things stand, no-one can say with certainty what the law will be at the end of 2023 in any area covered by REUL.[2]
- Ministers will be able – or obliged – to make late decisions about whether to amend or save REUL or let it fall away. This will leave little time for planning and preparation by affected bodies to ensure implementation and compliance with any resulting regulatory changes.
- The arbitrary December 2023 sunset deadline carries significant risk if errors are made – directly through the loss of a piece of REUL which creates an unintended or undesirable regulatory lacuna, or indirectly through a failure to identify linked and consequential effects in other legislation.
- The potential for dispute in areas of devolved competence risks undermining the Union. There are significant complexities involved, not least in relation to divergence and the operation of the UK internal market.

What is Retained EU Law?

Parliament assented to the creation of Retained EU Law (REUL) with effect from the end of the Brexit transition period at the end of 2020, as provided for in the *EU (Withdrawal) Act 2018* (EUWA). Sections 2-4 of EUWA 2018 established 3 categories of REUL:

- EU-derived domestic legislation: implemented in UK domestic legislation via section 2.2 of the *European Communities Act 1972* (ECA);
- Rights and obligations under section 2.1 of the ECA 1972: rights and principles in EU law that previously had direct effect in UK (eg rights in EU Treaties and Directives - limited in the latter case to rights recognised in case law prior to IP [Implementation Period] completion day on 31 December 2020).
- Direct Retained EU Legislation: EU legislation directly applicable in the UK without implementing legislation.

[2] Other than in relation to financial services (as this has been carved out into the Financial Services and Markets Bill currently before Parliament).

Problem 1: Acceptance of the automatic expiry (sunset) of REUL will be an abdication of Parliament's scrutiny and oversight role

The Government states that the main purpose of the Bill is to '*firmly re-establish our Parliament as the principal source of law in the UK*'.[3] However, under the Bill, all REUL will be repealed unless Ministers decide to exercise a power in the Bill to preserve it by 31 December 2023.

The *EU (Withdrawal) Act 2018* made provision for EU law to continue to have effect in the UK until such time as Parliament decided to change it. This Bill is not about Brexit, but about the future of law-making authority in the UK. The UK has left the EU – that is a legal, political and economic fact – and no powers in this Bill can be used to affect that reality. However, the powers in this Bill do shift the burden of future democratic oversight of any changes to REUL away from Parliament.

> ***The Bill invites parliamentarians to give Ministers a cliff-edge power without knowing what, if any, pieces of REUL may be thrown off the cliff on sunset day.***

Everything that is not actively saved by Ministers will automatically be turned off on expiry of the sunset deadline. The choice to do nothing and let REUL provisions fall away will not be subject to further parliamentary scrutiny.

If the powers in this Bill are granted, Parliament will thus have no say in whether a piece of REUL is repealed: that will be a matter solely for ministerial decision. This will entrench the dominance of the executive and sideline Parliament in this important legislative process.

An alternative approach would be to amend and update REUL by standalone pieces of primary legislation, subject to full scrutiny, amendment and approval by both Houses of Parliament. The Government has rejected this approach, arguing that it would take up too much parliamentary time. However, it has carved out review and amendment of REUL in relation to financial services, making bespoke provision for it in the Financial Services and Markets Bill.

Problem 2: It will introduce unnecessary uncertainty – legal, economic and political – into the REUL review process

Uncertainty is a business burden that the Government takes little account of in its approach to this Bill. Clarity about the timing and content of changes to REUL is needed as far as possible in advance, to ensure that implementation and compliance requirements can be met. The combination of the sunsets and the

[3] Cabinet Office, *Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee*, 20 September 2022, p.1

potential broad scope of ministerial (in)action may give rise to a high degree of uncertainty in some or all the sectors affected by REUL, with potentially detrimental effects in what are already difficult economic and trading conditions.

The Government has identified 2,417 pieces of REUL and set these out on a Dashboard that is updated quarterly. However, there must be some risk that one or more provisions have been missed and are not yet captured on the Dashboard. Given other competing pressures on the civil service and Ministers, can the Government realistically review 2,417 pieces of REUL by December 2023, particularly when the burden will fall unevenly across departments and on top of normal business? If an omission is not spotted by December 2023, the piece of REUL will automatically fall away on expiry of the sunset deadline, with all the risks that entails.

In addition to the December 2023 deadline, the Bill gives Ministers an extension power to set different sunset dates for specified bits of REUL up to 23 June 2026 – the symbolic end-point marking the 10th anniversary of the EU referendum. The result could therefore be a patchwork quilt of sunset dates across different policy areas, resulting in even greater legal complexity.

However, there is no deadline by which Ministers must make clear their intentions for each piece of REUL. These intentions may have highly divergent impacts: they may intend to buy more time to continue reviewing policy, or to let pieces of REUL fall away on sunset day, or to restate REUL or amend the legislation.

It is not clear how decisions to let REUL fall away will then be communicated given that no legislative or parliamentary action is required.

Problem 3: The broad, ambiguous wording of powers will confer excessive discretion on Ministers

We have concerns about many of the powers in the Bill, but particularly draw attention to clauses 10, 15 and 16.

Clause 10 amends Schedule 8, Paragraph 3 of the *EU (Withdrawal) Act 2018*. This provision currently allows other powers to amend certain types of REUL providing they are Henry VIII powers. Clause 10 of the current Bill removes that restriction so that in future any power – not just Henry VIII powers – can be used to amend REUL, providing it falls within the other confines of the power.

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 (for more, see the section about parliamentary scrutiny below).

Clause 15 (provision to replace or revoke secondary REUL) is concerning because it is tantamount, with just a few caveats, to a '*do anything we want*' power for Ministers.

The power permits UK Ministers (and devolved Ministers in areas of devolved competence) to replace a piece of REUL with provisions that they consider '*to achieve the same or similar objectives*', or even to '*make such alternative provisions*' as they consider appropriate.

When doing so, Ministers do not have to observe the same oversight provisions – for example, a requirement to consult – that were required with respect to the piece of REUL that is being replaced.

The clause also permits sub-delegation, creation of a criminal offence or imposition of a monetary penalty providing that any new regulations '*correspond*' or are '*similar to'* the original REUL provisions. But what terms such as 'appropriate', 'correspond' and 'similar' mean in practice is left entirely to ministerial discretion.

There is one caveat: Clause 15 cannot be used to increase regulatory burdens, impose obstacles to trade or innovation, financial costs and administrative inconveniences, and obstacles to efficiency, productivity or profitability, or sanctions that affect the carrying on of lawful activity. 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 (eg in the field of animal welfare).

Clause 16 states that Ministers may made modifications to secondary REUL that they consider '*appropriate to take account of changes in technology or developments in scientific understanding'*.

This is a very open-ended power. 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? Clause 16 can also be exercised indefinitely on REUL and any new regulations that replace it – unlike other powers in the Bill, it is not sunsetted.

The use of this power is subject only to the negative scrutiny procedure and so changes made under it will not require active parliamentary approval. For an SI made under this power to be scrutinised, MPs would have to 'pray' against it and Ministers would have to grant time for it to be debated. There is thus a clear case for the power to be upgraded to the affirmative scrutiny procedure (so that the regulations cannot be approved without debate) or at least made subject to the parliamentary scrutiny sifting mechanism (see below) in the Bill.

Problem 4: Parliamentary scrutiny of the exercise of the powers will be limited

The Bill does three things in respect of parliamentary scrutiny of REUL:

- it removes or downgrades existing forms of parliamentary scrutiny of SIs when they would modify or revoke REUL;
- in Schedule 3, it extends the 'sifting' system for SIs, as set out in *the EU (Withdrawal) Act 2018* (Schedule 7) and the *EU (Future Relationship) Act 2020* (Schedule 5), to the exercise of three powers in this Bill, namely clause 12 (the power to restate REUL), clause 13 (the power to restate assimilated law or sunsetted EU rights) and clause 15 (the power to replace or revoke secondary REUL);
- it expands the scope of Legislative Reform Orders to include all REUL.

Clause 11 of the Bill repeals the **scrutiny safeguards in Schedule 8 of EUWA** which apply when existing delegated powers are used to modify or revoke REUL SIs that came on to the statute book via section 2.2 of the *European Communities Act 1972*. These scrutiny safeguards include the provision of explanatory statements, a 28-day consultation period for parliamentary committees to comment on the proposed amendment or revocation of an SI, and the use of the affirmative rather than the negative scrutiny procedure, thus ensuring that a vote in one or both Houses must take place prior to the modification or revocation of a REUL SI.

The Government states that there has been '*no tangible benefit*' from these scrutiny safeguards and that they have added a layer of complexity to the process of determining the appropriate scrutiny procedure that should apply when amending an SI containing ECA section 2.2 provisions.[4] We can independently verify from our own daily monitoring of SIs laid before Parliament that mistakes have been made in the allocation of scrutiny procedures, resulting in the withdrawal and re-laying of some of these SIs.

It is also hard to disagree with the Government's claim that there has been no tangible benefit from these safeguards, given that Parliament – particularly the House of Commons – has taken so little interest in their application and use. The reason for this lack of interest lies in part in the wider problem of excessive Government control of the legislature. The House of Commons lacks a mechanism to keep its Standing Orders under regular review and amend them in a timely way in response to the insertion of statutory scrutiny requirements in Acts of Parliament or the emergence of other scrutiny-related obligations. After the *EU (Withdrawal) Act 2018* received Royal Assent there was thus no process in place through which MPs would decide how to scrutinise SIs subject to these safeguards. If the House had a standing committee to regularly review its rules and practices – as is common in many other legislatures – these problems might not have arisen

[4] Cabinet Office, *Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee*, 20 September 2022, p.37

and MPs might have been more aware of the scrutiny safeguards available to them.[5]

With respect to the extension of the **SI 'sifting' procedure**, if the EUWA system for sifting SIs is extended to SIs made under some of the powers in the current Bill, a decision will need to be made about which Committee will undertake the 'sifting' work in the House of Commons (we assume it will be the Secondary Legislation Scrutiny Committee in the House of Lords).

What is 'sifting' of Statutory Instruments?

This Bill proposes to replicate the 'sifting' provision in the *EU (Withdrawal) Act 2018*. When a Minister proposes to lay an SI before Parliament subject to the negative scrutiny procedure, the SI must first be laid in draft with a Memorandum from the Minister stating why the negative procedure is deemed appropriate. The proposed SI will then be scrutinised by a 'sifting' Committee in each House which has 10 sitting days to decide whether the SI should be upgraded to the affirmative scrutiny procedure. The Minister must then accept that upgrade or publish a written statement explaining their rejection of the Committee's recommendation. If the Committees fail to make a decision within 10 sitting days, the Minister can go ahead and make the Instrument under the negative procedure.

One option that has been mooted is for the 'sifting' role to be taken on by the European Scrutiny Committee (ESC). If so, this will be a matter of considerable concern, given that the long-term near-absence of Labour participation means that the ESC is not currently operating as a fully cross-party committee.[6] The ESC's role is also to sift EU documents; it has never undertaken sifting of UK Statutory Instruments.

An alternative option is for the European Statutory Instruments Committee (ESIC), which sifts EUWA SIs, to take on the role. However, sifting SIs under this REUL Bill would also mark a significant change in role and approach for ESIC. The Committee currently sifts all SIs laid before Parliament under powers in the *EU (Withdrawal) Act 2018* to correct 'deficiencies' that are subject to the negative scrutiny procedure. Thus, its sift and scrutiny function has largely been focused on what are primarily quite dry and technical matters. In contrast, changes made to REUL under this Bill will deal with much more sensitive and politically salient areas of policy interest – amending or replacing existing legislation, but in a de-regulatory direction.

If MPs want to express a view on any legislative changes to REUL that the Government proposes to make using the powers conferred in clauses 12, 13 and 15,

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[5] The Hansard Society has **previously proposed that a permanent Rules Review Committee** should be established.
[6] See Fowler, B. (2022), *When is a 'cross-party Committee' no longer cross-party? The case of the European Scrutiny Committee* (Hansard Society: London)

it is therefore imperative that they take an early interest in the identity and remit of the sifting committee mechanism.

The Government has proposed not only the inclusion of the sifting mechanism but also an extension of the Legislative Reform Order (LRO) procedure, as set out in Clause 17.

The *Legislative and Regulatory Reform Act 2006* provides powers for Ministers to remove or reduce legislative burdens through LROs. The powers in that 2006 Act are among the broadest ever to reach the UK statute book. The LRO process thus provides for the highest level of parliamentary scrutiny that can be applied to Statutory Instruments, via the super-affirmative procedure. An SI laid in the form of an LRO requires consultation, the normal scrutiny period can be extended, and the relevant scrutiny committee can propose changes to an Order and even veto it. Consequently, the LRO procedure is time-consuming. It can take 10-14 months from the start of the consultation for an LRO to reach the statute book and can absorb as much resource as a Bill. LROs are thus relatively rare: fewer than 40 have been laid since the Act was passed in 2006, significantly fewer than was originally anticipated.[7]

In our view, the LRO procedure in this REUL Bill is therefore unlikely to be much used: only if amendments to primary legislation are needed, and there are no other suitable powers available, would it make sense to do so, and even then, primary legislation might be quicker.

Problem 5: There are potentially serious implications for devolution and the future of the Union

REUL encompasses a range of policy areas which are within devolved competence, including agriculture, culture, education, environment, fisheries, health, housing, rural development, tourism and transport.

Several powers in this Bill can be used either by a UK Minister in Whitehall, or by Ministers in the relevant devolved administration in areas of devolved competence, or they can act jointly.

However, the Bill is silent on what should happen in cases where a UK Minister alone seeks to make SIs in areas of devolved competence: should the devolved governments or legislatures need to consent to such SIs – or at least be consulted on them?[8]

The power to extend the sunset deadline in clause 2.1 of the Bill is reserved for UK Ministers only. In contrast, the power to remove the sunset entirely in clause 1.2 –

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[7] See West, T. (2022), 'Brexit Freedoms' Bill: Is Jacob Rees-Mogg planning to give Parliament more control over Retained EU Law? (Hansard Society: London)
[8] This is an issue we discussed in a recent Hansard Society webinar entitled, 'Devolved but denied: Regulations and consent beyond Westminster', with representatives from the devolved nations (29 September 2022)

and thus keep pieces of REUL indefinitely – is granted to both UK and devolved Ministers.

There is thus the potential for UK Ministers and Ministers in the devolved governments to diverge on the application of sunset dates as well as on policy decisions. This will exacerbate the already challenging complexities raised by the interactions between divergence from the EU, the devolution settlements, and the operation of the *Internal Market Act 2020* and Common Frameworks.

There was clearly little consultation with the devolved administrations by UK Ministers before this Bill was published. The best that Ministers have been able to say to date is that the Bill will provide a 'framework for those conversations to be had'.[9] In the Westminster Hall debate about REUL in Scotland on 19 October, the Minister said '*if the Scottish Government want to preserve all areas within their competency, the UK Government will respect that.*'[10] However, this commitment hinges on what is within the competency of Scottish Ministers. The Government's REUL Dashboard does not identify which pieces of REUL are reserved and which are devolved, and the devolved governments may not have the resources to undertake the review of REUL to ascertain this in the timescale required by the Bill. Important questions about who is and who should be making the law in respect of particular areas of REUL in the devolved nations will therefore continue to sharpen.

[9] Dean Russell MP, Hansard, Vol 720, Column 308WH, 19 October 2022
[10] Dean Russell MP, Hansard, Vol 720, Column 309WH, 19 October 2022.