

The flame to start a bonfire of protections – the Retained EU Law (Revocation and Reform) Bill

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Introduction

On 22 September 2022, the government gave the Retained EU Law (Revocation and Reform) Bill (the “Bill”) its first reading in Parliament. It’s second reading is imminent. The Bill would, if passed, lead to the automatic revocation, at the end of 2023, of a suite of protections across a range of areas – protections that benefit both people and nature. The Bill would also give the government power to amend safeguards with almost no oversight from Parliament. This outcome threatens to undermine the rule of law in the UK – a key foundation of this country’s longstanding democracy that, worryingly, is under threat.

Whilst the problems with the Bill are legion, this briefing focusses on five fundamental flaws that mean it is likely to result in the chaotic destruction of our regulatory framework and the protections it provides. It is because of these flaws that ClientEarth takes the firm view that the Bill should be dropped in its entirety.

The Bill

The Bill was introduced by Jacob Rees-Mogg (Secretary of State for Business, Energy and Industrial Strategy) who, in his opening statement, argued that, “[t]he time is now right to bring the special status of retained EU law in the UK statute book to an end on 31st December 2023, in order to fully realise the opportunities of Brexit and to support the unique culture of innovation in the UK.”¹ The clear purpose of the Bill is to remove retained EU law (“b”) from the UK statute book, in a short time frame, in order to realise the ‘benefits of Brexit’.

REUL is a category of UK law created under the European Union (Withdrawal) Act 2018 at the end of the transition period, consisting of EU regulations and decisions, legislation passed to implement EU directives, general principles of EU law, directly effective rights and obligations developed in case law of the Court of Justice of the European Union. REUL was created to provide the UK with a functioning statute book after Brexit and avoid a regulatory cliff-edge. As the rest of this briefing makes clear, the Bill would do little more than reintroduce a cliff-edge and give the government almost no time to avoid it.

The text of the Bill itself lives up to the purpose articulated by Mr Rees-Mogg (who has now resigned from his position in the cabinet). In summary, the Bill:

- a) Provides for the automatic revocation of all REUL at the end of 2023 (the ‘sunset’), save for any items that are specifically saved by statutory instrument as determined by Ministers or devolved administrations. Ministers would have the power to extend the automatic sunset date up to 23 June 2026 (symbolically, 10 years to the day from the Brexit referendum). However, the government’s memorandum to the Delegated Power and Regulatory Reform Committee ([here](#)) makes clear that this power “*is not intended for wide usage*” and would not be used without “*collective [ministerial] agreement*”;
- b) Would give ministers and devolved administrations broad powers to change REUL before the sunset date:
 - 1) Restate REUL – Re-write REUL into UK law. The clause in question states that different language and concepts can be used for a restatement and that a restatement may resolve ambiguities or anomalies in the REUL;

¹ <https://questions-statements.parliament.uk/written-statements/detail/2022-09-22/hcws298>.

- 2) Revoke REUL – Determine that there is no benefit or purpose to keeping or replacing specified REUL. Given the automatic sunset, it appears that this power is intended to allow for the early revocation of REUL;
 - 3) Replace REUL – Decide to replace provisions with regulations that: (i) meet the same or similar objectives; or (ii) are considered “*appropriate*”;
 - 4) Update REUL – Conclude that provisions require amendment to reflect changes in scientific understanding and/or technology;
 - 5) Consequential provisions – Make any provision deemed appropriate in consequence of the Bill (once passed), by regulation.
- c) Makes clear that, importantly, the power to revoke or replace REUL will not be exercisable if to do so would increase the “*regulatory burden*” in a “*particular subject area*”. ‘Regulatory burden’ includes (amongst other things): financial cost; administrative inconvenience; obstacles to trade or innovation; and obstacles to efficiency, productivity or profitability.
- d) Would end the supremacy of EU law on 31 December 2023. Prior to the Bill, domestic legislation that preceded Brexit still had to be interpreted in the light of EU law in certain circumstances. Under the Bill, domestic legislation, whenever made, will be superior to all ‘assimilated law’ (that is, REUL which the government chooses to preserve from the sunset);
- e) Would abolish general principles of EU jurisprudence that were previously used to interpret domestic legislation (e.g., proportionality, legitimate expectations, subsidiarity and fundamental rights);
- f) Proposes to make it easier for the Courts to depart from both retained EU case law and previous domestic decisions. The Bill would also create novel mechanisms for referrals on points of law:
- 1) A court would be entitled to refer to a higher court for determination a point of law arising out of retained case law, if it is considered that it is of public importance;
 - 2) If a concluded case raises a point of law arising out of retained case law, the legal representatives of the government and devolved administrations may ask that a higher court makes a determination on that point of law. Notably, the court has to accept the request;
 - 3) If, in an extant case, a party to proceedings is making an argument that the court should depart from retained case law, the legal representatives of the government and devolved administrations are entitled to be given notice of the proceedings and joined as parties to it.

The five fundamental flaws

Problem 1 – A multitude of protections lost, through choice or neglect. The Bill turns the normal legislative order on its head by determining that an entire category of UK law will pass out of existence at the end of 2023, save for those specific provisions which are chosen for preservation. Significantly, there is no obligation on the government to save any REUL; nor is there any detail in the Bill on what processes will be applied by ministers to determine which REUL survives and which falls away. The question of which REUL forms a part of UK law going forward is a matter of choice for the executive.

And yet, many pieces of REUL may not even get the benefit of the government's attention. The number of items of REUL on the statute book is not clear and there is no authoritative index. Earlier this year, the government published a 'Retained EU Law Public Dashboard', which allows users to filter REUL according to department and type. The guidance states that the dashboard is an "*authoritative catalogue of REUL*", with 2,417 items listed. Despite the government's assertions, many significant pieces of REUL are missing – one prime environmental example being the Conservation of Habitats and Species Regulations 2017 (the "**Habitats Regulations**"). It is widely understood by those in the NGO community and admitted in private by some government departments that the dashboard is far from complete and certainly not 'authoritative'. The real number of REUL is, therefore, likely to be much higher than 2,417.

It is completely implausible to suggest that the government and civil service will, between the enactment of the Bill in November or December of this year and the end of 2023 (a period of about 12 months), be able to assess the thousands of pieces of REUL, evaluate what should be allowed to pass with the sunset and make regulations addressing those items which it is judged should be kept or amended. It is almost inevitable that, at the end of 2023, a multitude of regulations will, as a result of a lack of time and human error, inadvertently fall victim to the sunset. This is not an academic problem – REUL has been built up over decades and provides fundamental protections. Examples of the kinds of protections that could be lost include:

- a) Species and habitats. The Habitats Regulations protect hundreds of species from destruction and wildlife habitats from unsustainable development. The Town and Country Planning (Environmental Impact Assessment) Regulations 2017 require an assessment of the likely environmental impacts of a development proposal in order for decision makers to be fully informed.
- b) Air quality. The Air Quality Standards Regulations 2010 set limits on the permitted concentration of a number of harmful air pollutants in outdoor air and impose duties on the government to measure and report pollution levels and provide information to the public. They are the central pillar of air quality regulation in the UK – affording everyone the same minimum level of protection and providing the vehicle through which legal action can be brought to reduce pollution. The National Emission Ceilings Regulations 2018 set national emission reduction commitments for five harmful air pollutants, which apply from 2020 and 2030, to which the government can be held to account.
- c) Water quality. The Water Framework Directive (through its implementing regulations) sets objective and deadlines for improving water quality in rivers, by reference to both the ecology of the water and its chemical characteristics. The Drinking Water Directive (through its implementing regulations) sets safety standards for drinking water.
- d) Agriculture. The Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 (known as the 'Farming Rules for Water') set out provisions to reduce and prevent the pollution of waters from diffuse agricultural sources. Other rules safeguard water quality by requiring farmers to judge when it is best to apply fertilisers, where to store manures and how to avoid pollution from soil erosion.
- e) Chemicals. The Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Regulation provides protection for human health and the environment against chemicals and makes companies that place chemicals on the market responsible for understanding and managing the risks associated with their use.
- f) Food standards. The General Food Regulation (EU Regulation (EC) 178/2002) requires that: food must not be unsafe; food businesses must be able to trace from whom they sourced food and to whom they supplied; and unsafe food must be withdrawn from sale and/or recalled from the end

consumer. EU Regulation (EC) 396/2005 sets limits on maximum residue levels of pesticides and decontaminants in or on food or feed.

- g) Employment rights. The Working Time Regulations 1998 set limits on the number of hours employees can be expected to work. The Agency Worker Regulations 2010 work to mitigate discrimination against agency workers by providing protections with respect to pay, holiday and working time conditions. Article 157 of the Treaty on the Functioning of the European Union establishes the principles of equal pay for male and female workers.
- h) Consumer rights. The Consumer Protection from Unfair Trading Regulations 2008 are a core consumer protection law that prevent businesses from participating in unfair practices, such as false endorsements, misleading availability and pyramid schemes.
- i) Health and safety. The Management of Health and Safety at Work Regulations 1999 require employers to carry out risk assessments and make arrangements to put measures in place to minimise the risk of workplace injury. The Control of Substances Hazardous to Health Regulations 2002 impose a duty on companies to control substances that are hazardous to health and prevent workers' exposure to them.

Problem 2 – Chaos, uncertainty and red tape. As highlighted above, the Bill would usher in a period of legislative chaos. Ministers and the civil service would be required to assess vast quantities of REUL ahead of the end of 2023 deadline. Even if the total number of REUL was 2,400 (as stated on dashboard), the process would occupy almost all the available hours of the civil service, leaving them unable to focus on pressing day to day issues, at a time when the country faces a cost of living crisis and a recession.

Further stymying the process will be the major cuts to the civil service indicated by Mr Rees-Mogg and the austerity approach of the new Chancellor; 91,000 jobs are to be lost and Mr Hunt (in his first remarks as Chancellor) indicated that government departments will be expected to make 'efficiency savings'. Inevitably, things will fall through the cracks through lack of resource and changes made in haste will have unintended consequences. This will mean that, long after the end of 2023, government departments will be spending a significant volume of time drafting legislation to reintroduce regulations lost or changed by mistake. This is precisely the type of red tape that the Bill is ostensibly aimed at removing.

An additional and related factor is that the processes enabled by the Bill will create pervasive uncertainty for businesses and communities. There is currently no indication as to how and when the powers in the Bill will be exercised. Just at the moment when businesses have started properly to adapt to trading rules resulting from Brexit, the Bill threatens to tear up the rule book again. Businesses will now be aware that the framework of regulation within which they operate may change dramatically within the next 14 months – yet, they have no way of knowing how extensive the changes might be (i.e., some of the regulations they are subject to might be kept and some might not, but there is currently zero clarity on this point) or when they might take place (i.e., changes might occur before 31 December 2023, at the point of 'sunset' or up to June 2023 by virtue of the extension provision). The uncertainty that the Bill is likely to create will, in all probability, lead to a reduction in corporate investment. Furthermore, many businesses recognise that regulation is an important part of the long-term sustainability of the economy and that their customers expect standards to be maintained in the goods and services they pay for. A BEIS Business Perception survey from 2020 (see [here](#)) reported that less than two-fifths (37%) of businesses agreed that regulation is an obstacle to success. Businesses will be in the dark.

Problem 3 – Undermining of the rule of law. The Bill empowers ministers and devolved administrations to amend, revoke or replace REUL before the ‘sunset’ date, using secondary legislation. This has repercussions for our democratic process as secondary legislation, unlike an Act, affords Parliament almost no opportunity for scrutiny. Indeed, the Commons has not voted down a piece of secondary legislation since 1979 and the Lords has not done so since 2000. The effect of the Bill is that it will be possible for ministers to change or revoke legislation in important areas (examples of which are set out above) without oversight from the legislature. That represents government by decree and is a threat to the rule of law, as well as to our constitutional structure. A fundamental part of the UK’s constitution is the separation of powers, whereby laws are introduced by government but then debated and approved by Parliament, rather than the executive.

Furthermore, the Bill does not provide any information on what processes will be applied by ministers to determine what should be kept, what should be left to expire and what should be amended. In addition, there is nothing in the Bill about what consultation or public participation will be applied to the exercise of the powers granted by the Bill – there are no guarantees as to any taking place. This undermines the feature of the rule of law that legislation should be publicly promulgated and subject to scrutiny by those persons elected for the purpose.

In this respect, the Bill may also constitute a breach of the UK’s international obligations under the Aarhus Convention. Article 8 of the Convention requires that signatory parties promote effective public participation during the preparation of regulations and/or other generally applicable legally binding rules that may have a significant effect on the environment. The Bill is structured to assist with a deregulatory agenda, which is likely to have a significant effect on the environment. If public participation is not guaranteed as part of that process, it may constitute a breach of the Aarhus Convention.

Problem 4 – Courts dragged into the political sphere. As explained above, the Bill creates new powers for the courts to depart from existing case law. Significantly, the language of Clause 7 states that a higher court (e.g., the Court of Appeal or the Supreme Court) may depart from binding retained domestic case law, “*if it considers it right to do so*” having regard to a number of things, including: (i) the extent to which the case law is determined or influenced by retained EU case law; (ii) any changes in circumstance that are relevant to the retained domestic case law; and (iii) “*the extent to which the retained domestic case law restricts the proper development of domestic law*”.

This last provision is deeply opaque but suggests that judges will be asked to make decisions on whether to depart from case law on the basis of whether to do so would be good for the development of “*domestic law*” – a task that veers close to the functions properly carried out by Parliament as the legislature. As ClientEarth’s analysis makes clear, in recent years the government has not been hesitant unjustifiably to criticise the judiciary for coming to ‘politically motivated’ decisions – yet the wording of the Bill appears to enable them to do just that.

The provisions allowing for referrals on points of law and the ability of legal representatives of the government and devolved administrations to be admitted as parties to cases that involve questions of retained case law have the potential to create problems:

- a) The wording of the Bill makes clear that a referral on a point of law to a higher court is to take place during proceedings – presumably necessitating a stay in the case. This is likely to further slow down an already sluggish litigation process and swell the court backlog, especially given that the other provisions of the Bill are likely to create significant legal uncertainty that courts will look for assistance in resolving;

- b) The Bill raises the prospect of the government repeatedly referring points of law arising out of retained case law in order to try and land at an interpretation that suits its political agenda. The ability of the government to be joined to proceedings in cases where a party is arguing that the court should depart from retained case law adds a further political pressure to decisions to be made by the courts.

Problem 5 – Deregulation baked in. Clause 15 (which has already been described as a ‘do whatever you like power’) gives ministers and devolved administrations the ability to revoke and, critically, replace REUL with regulations that either meet the same or similar objectives or are considered “*appropriate*”. The breadth of this power is alarming – it gives the executive carte blanche to introduce legislation, through statutory instrument, that replaces REUL without any requirement that the replacing legislation performs the same or a similar function – it will be entirely a matter of discretion. More significantly, Clause 15(5) states that no revocation or replacement of REUL may take place unless the minister or devolved administration considers that “*the overall effect of the changes made by it...(including changes made previously) in relation to that subject area does not increase the regulatory burden.*”

‘Regulatory burden’ is defined at Clause 15(10) as including (amongst other things): financial cost; administrative inconvenience; obstacles to trade or innovation; and obstacles to efficiency, productivity or profitability. This clause builds deregulatory pressure into every decision to be made by ministers as to whether to replace a piece of REUL. Such an outcome (alongside other features of the Bill) threatens the government’s ability to satisfy its international obligations, principally under the Trade and Cooperation Agreement (“**TCA**”). The TCA includes a non-regression clause, such that the UK must not reduce levels of environmental or climate protection below those that were in place at the end of the transition period in a manner that affects trade or investment. The ‘trade or investment’ test is a difficult one to overcome, but one could see a government that removes swathes of REUL and replaces it with less effective regulation falling foul, on the basis that the issues REUL influences (e.g., environment and employment) go to the competitiveness of UK products and services.

In addition to potentially breaching the UK’s international commitments, the provisions of the Bill (and in particular Clause 15(5)) are likely to make it difficult for the government to meet its own targets, including in relation to environmental protection. The achievement of targets such as those under the Environment Act, the 25 Year Environment Plan and the Net Zero Strategy is predicated, in large part, on the continuation of REUL. Should the government proceed to replace REUL with less effective regulation, it will be left with fewer tools to achieve what it has obligated itself to achieve – an outcome which is bad for the environment but also opens the government up to litigation.

Conclusion

In principle ClientEarth does not, post-Brexit, oppose a review of REUL to determine what works well and should be kept, what could be amended to the benefit of the UK and what should be revoked. Indeed, the process of replacing EU law with new domestic law has been taking place in a proper manner over the last few years, leading to legislation such as the Fisheries Act 2020 and the Environment Act 2021. But what the Bill entails – a chaotic and inefficient inversion of the legislative process in the name of ideology that will lead to a bonfire of protections – does not constitute the targeted and structured review that is needed. Furthermore, no convincing reasons have been provided by the Government for why this review and rewriting of REUL needs to take place on an expedited basis without proper oversight from Parliament. For the reasons set out in this briefing, the Bill must be abandoned.



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