

The impact of the Retained EU Law (Revocation and Reform) Bill on the regulation of pesticides in the UK

Introduction

This note looks at the potential impact of the Retained EU Law (Revocation and Reform) Bill (“the REUL Bill”) on the existing framework of pesticide regulation in the UK. The note also considers the impact of the REUL Bill on the current restrictions on the use of neonicotinoid pesticides in the UK.

The Retained EU Law (Revocation and Reform) Bill

The REUL Bill provides for the abolition of the existing body of EU-derived law (“retained EU law”) that was incorporated into the UK’s domestic legal system under the EU (Withdrawal) Act 2018 to ensure that the UK maintained a functioning statute book after it left the EU. Retained EU law consists of EU regulations and decisions that have “direct effect” in the UK, secondary legislation passed in the UK to implement EU directives, general principles of EU law as well as rights and obligations developed in the case law of the Court of Justice of the European Union.

The REUL Bill grants a very wide range of powers to ministers and devolved administrations to modify or revoke retained EU law using secondary legislation. Most notably, it provides for the automatic expiry on 31 December 2023 of any retained EU law that has not been modified, ‘saved’ or replaced before that date.

A brief summary of the powers and provisions in the REUL Bill is set out below:

1. an automatic “sunset” or expiry on 31 December 2023 of all retained EU law which remains in force on that date (Clause 1). Under Clause 1(2), ministers can also use regulations to exclude specified retained EU laws from the sunset provisions in Clause 1 or extend the ‘sunset’ of a specified piece of retained EU law up to 23 June 2026 (Clause 2);
2. powers to amend or revoke retained EU by secondary legislation (a process which affords very little parliamentary scrutiny) before the sunset date, including powers to:
 - a. “restate” or “reproduce” retained EU law in order to resolve ambiguities and improve clarity or accessibility (Clauses 12, 13 and 14);
 - b. “revoke” or “replace” retained EU law (clause 15), provided that any replacement provision meets certain requirements including that it “does not increase the regulatory burden” (Clause 15 (5));
 - c. “update” retained EU law to take account of recent changes in technology or developments in scientific understanding (Clause 16);
3. an end to the “supremacy” of EU law on 31 December 2023 and the abolition of general principles of EU jurisprudence that were previously used to interpret domestic legislation (e.g. proportionality, legitimate expectation and fundamental rights) (Clauses 4 and 5);
4. powers to make it easier for the courts to depart from both retained EU case law and previous domestic decisions (Clauses 7, 8 and 9); and
5. general powers to use regulations to make any other provision in consequence of the REUL Bill “as the Minister considers appropriate” including “modifying any enactment”, such as the REUL Bill itself (Clause 19).

The current framework of pesticide regulation in the UK

The existing regulatory framework relating to pesticides in the UK is almost entirely derived from EU law. This regulatory framework is broadly comprised of four main measures:

1. **A regulation governing the placing of pesticides or “plant protection products” (PPPs) on the market**, including the approval of active substances at EU level and the authorisation of PPPs at national level. ([EU Regulation 1107/2009](#)). Under this regulation (which has direct effect in Member States) an active substance contained in a PPP can only be approved if it meets the requirements and conditions specified in the regulation. A PPP can only be authorised by a Member State to be sold on its territory if the PPP contains an EU-approved active substance and fulfils other conditions set out in the regulation.
2. **A regulation governing maximum residue levels (MRLs)**, which sets out the maximum levels of pesticide residues allowed in food and feed placed on the EU market (including active substances, metabolites and reaction products of active substances currently or formerly used in PPPs). ([EU Regulation 396/2005](#))
3. **A directive to promote the “sustainable use of pesticides”** by reducing the risks and impacts of pesticide use (EU [Directive 2009/128/EC](#)). This directive was transposed into domestic law by The Plant Protection Products (Sustainable Use) Regulations 2012.
4. **A regulation governing the placing of biocides on the market**. (EU [Regulation 528/2012](#)). Biocides are products used to protect humans, animals or materials against harmful organisms like pests or bacteria.

When the UK left the EU, all relevant EU law governing the regulation of pesticides that was in force on 31 December 2020 was incorporated into the UK’s legal system. The EU regulations listed above (and related domestic regulations) were subsequently amended by secondary legislation to replace references to EU authorities with UK references.

Since 1 January 2021, an independent regulatory regime for pesticides has been in operation in Great Britain¹, administered by the Health and Safety Executive (HSE). This means that while the existing UK regulatory regime remains closely modelled on the EU regulatory framework, new decisions taken under the EU pesticides regime since 31 December 2020 do not apply in Great Britain. This includes active substance and MRL decisions, any new EU PPP legislation and the ongoing revision of the Sustainable Use of Pesticides Directive at EU level, which seeks to transform the existing directive into a new EU regulation.

The potential impact of the REUL Bill on the regulation of pesticides

As the existing pesticide regulatory framework in the UK is largely made up of retained EU law, this legislation would be subject to the provisions in the REUL Bill (in relation to Great Britain). This means that Government ministers and devolved administrations would have a very wide range of options available to them to amend, replace or revoke the current regulatory framework that governs the authorisation and use of pesticides.

In summary, ministers will have the option of: re-stating or reproducing the current legislation in a similar form; replacing or amending the current legislation (subject to restrictions, including avoiding any

¹ ie. England, Scotland and Wales. A separate system will apply in Northern Ireland – this has not yet been confirmed

increase in the “regulatory burden”); revoking the current legislation or allowing it to expire on 31 December 2023 (or a date up to and including 23 June 2026); or excluding the current legislation from the sunset provisions altogether and ‘saving’ it under Clause 1(2).

The REUL Bill is not about introducing new powers for the UK to make its own legislation after Brexit. Since the UK left the EU, Parliament has been free to legislate to amend or replace the current system of pesticide regulation in Great Britain at any time. However, the main problem with using the REUL Bill for this purpose is that it would give Government ministers very wide “carte blanche” powers to remove or amend current regulations much more easily – and at their discretion. This is because the REUL Bill provides for retained EU law to be amended or replaced by secondary legislation, which is afforded a much more limited degree of parliamentary scrutiny, when compared with the process for passing primary legislation. Furthermore, secondary legislation cannot be easily amended during the approval process and only tends to be rejected completely on very rare occasions. Perhaps the most concerning aspect of the REUL Bill is the fact that if ministers fail to take any action by the sunset date in relation to any particular piece of retained EU law, that law will simply fall away on 31 December 2023.

Given the wide range of powers that would be granted to ministers in the REUL Bill, it is difficult to second-guess how Government ministers are likely to use them in relation to the regulation of pesticides, if the Bill is passed. It is reasonable to assume that some form of pesticide authorisation system will be retained. However, if the current system is to be replaced or amended before the sunset date, it seems more likely that any new system put in place will attempt to weaken rather than strengthen current levels of environmental protection. Under Clause 15(5), replacement legislation made under the REUL Bill must avoid increasing “the regulatory burden”². This effectively means that ministers would be precluded from using the powers in the REUL Bill to increase or strengthen existing levels of environmental protection. Instead, given the ongoing deregulatory agenda of the Government - and the inclusion of Clause 15(5) in the Bill - the Government could seek to ‘simplify’ the current regulatory regime in order to reduce the “regulatory burden” on applicants seeking to obtain approval for PPPs.

Some of the potential changes that ministers could make to the current system of pesticide regulation to reduce “the regulatory burden”, using the powers in the REUL Bill, include the following:

1. **The downgrading of the precautionary principle** - which seeks to avoid harm to the environment at the outset rather than addressing environmental damage after it has occurred - and the adoption of a more “risk-based approach” to the authorisation of pesticides. A risk-based approach (such as that currently adopted in the US) places greater emphasis on assessing and managing the risks of chemicals in use compared to the “hazard-based approach” (such as that currently adopted in the EU) which follows the principle that if an active substance possesses intrinsically hazardous characteristics then it is considered too dangerous to be used safely and should not be authorised;
2. **Reducing the amount of information that is required to be provided by applicants** seeking the approval of new pesticides to demonstrate that the product is safe or removing the requirement to make this information publicly available as part of the approval process;
3. **Removing or weakening provisions which allow the regulating authority to consult independent scientific experts** where appropriate before authorising emergency measures (which apply where an approved active substance comes under review because of a serious risk to human or animal health), temporary derogations and authorisation renewals;
4. **Weakening provisions facilitating the regular review of pesticide authorisations** to make sure that approvals take account of the most up-to-date scientific knowledge;

² Clause 5(10) of the REUL Bill defines a “burden” as including (among other things)— (a) a financial cost; (b) an administrative inconvenience; (c) an obstacle to trade or innovation; (d) an obstacle to efficiency, productivity or profitability; or (e) a sanction (criminal or otherwise) which affects the carrying on of any lawful activity;

5. **Further weakening of the control and assessment of MRLs in marketed foods.** Since the UK left the EU, the rules on MRLs have already been amended to extend the previous time limit for assessment of MRLs from 12 to 36 months and to provide for existing MRLs to be assessed by ministers (at their discretion) rather than by the European Foods Standards Agency (EFSA)³, who have extensive expertise in this area;
6. **Weakening of the current requirements in relation to the sustainable use of pesticides,** including removing the requirements on users of PPPs to take reasonable precautions in high-risk areas to protect human health and the environment⁴;
7. **Removing the current requirement on the Government to produce a National Action Plan for the Sustainable Use of Pesticides.** The action plan is intended to set targets, measures and timetables to reduce the risks and impacts of pesticide use on human health and the environment; and
8. **Weakening of current monitoring and enforcement measures** that are designed to promote compliance with the regulatory framework.

A new system of pesticide authorisation that is intended to be less “burdensome” for businesses could result in a weaker system which is less transparent and which increases the exposure of people, plants and wildlife to harmful chemicals. A regulatory system affording weaker environmental protections would also be in breach of the Government’s existing commitments in the 25 Year Environment Plan to “develop our existing strong regulation of pesticides.”⁵ Furthermore, any new system which sought to reduce the “regulatory burden” of the current regime could conflict with the provisions of the EU-UK Trade and Co-operation Agreement (TCA)⁶. For example, Article 391(2) of the TCA states that: “*A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period...*”.

In addition to the dangers of reducing levels of environmental protection and transparency, the expedited introduction of a new pesticide regime before 31 December 2023 is also likely to pose problems for businesses operating in this sector because of the uncertainty that would be created by the introduction of new rules on pesticides at short notice and without public consultation. This uncertainty would be confounded by the sunset provisions in the Bill which have the potential to result in unknown and unintended consequences for the current legal framework relating to pesticides. For example, it is possible that some retained EU law relating to the control of pesticides or other chemicals could be accidentally ‘missed’ and allowed to expire unintentionally on 31 December 2023, without the knock-on effects in other areas having been properly considered.

The potential impact of the Bill on the current restrictions on neonicotinoids

Some of the most significant legal protections against the harmful effects of pesticides that could be lost if the REUL Bill is passed, are the current restrictions on neonicotinoids. Neonicotinoids are ‘systemic’ pesticides used to control crop-harming insects. They are particularly harmful to bees and other pollinators. These pesticides were first restricted in the EU in 2013⁷ following a risk assessment by EFSA in 2012 which demonstrated their potential negative impact on pollinators. Further EU regulations were introduced in 2018 to restrict the use of three neonicotinoids (clothianidin, imidacloprid and thiamethoxam)⁸. By 2020, all but one neonicotinoid (acetamiprid) had been banned for outdoor use on

³ Pesticides (Maximum Residue Levels) (Amendment etc.) (EU Exit) Regulations 2019, Chapter 2 (4)

⁴ Regulation 10 of the Plant Protection Products (Sustainable Use) Regulations 2012

⁵ The 25 Year Environment Plan (2018) p40 and 41

⁶ The EU-UK Trade and Co-operation Agreement, 30 April 2021, Publications Office (europa.eu)

⁷ Regulation 485/2013 of 24 May 2013

⁸ Regulation restricting the use of imidacloprid, Regulation restricting the use of clothianidin, Regulation restricting the use of thiamethoxam

crops in the EU. The UK supported the EU ban on neonicotinoids in 2018 and there is now general agreement at an international level on the need to restrict the use of these substances⁹.

When the UK left the EU, the EU regulations containing the restrictions on the use neonicotinoids were automatically incorporated into the UK's legal system as retained EU law under the EU (Withdrawal) Act. Consequently, if the REUL Bill is passed, these regulations will be subject to review, amendment and possible automatic expiry under the provisions of the Bill, at ministers' discretion and without proper oversight from Parliament. If the current restrictions were allowed to fall away on the sunset date in response to pressure from industry, the Government would be free to permit a more widespread use of neonicotinoids in Great Britain.

Recent events suggest that Government ministers could be inclined to use the powers in the REUL Bill to relax the current restrictions on neonicotinoids. For example, in January 2021, the UK Government bowed to pressure from the sugar beet industry and granted an emergency derogation from the restrictions on neonicotinoids to allow farmers to use seeds treated with the neonicotinoid, thiamethoxam, for a temporary period, stating that the benefits of using this pesticide outweighed the risks to pollinators. This derogation was authorised contrary to the advice of the Health and Safety Executive at the time¹⁰.

A relaxation of the current restrictions on neonicotinoids could have devastating effects on pollinating insects and the wider ecosystems that rely on them. It would also be contrary to the Government's commitments in the 25 Year Environment Plan which states that the UK "supports further restrictions on the use of neonicotinoid pesticides" and that it will "maintain these increased restrictions after we leave the EU".¹¹ Furthermore, as noted above, any weakening of the current restrictions on the use of certain pesticides could come into conflict with the provisions of the TCA that provide for non-regression of the current levels of environmental protection, where it affects trade and investment between the UK and the EU.

Conclusion

There is nothing objectionable about reviewing the current EU-derived regulatory framework for pesticides. Revising the current regime could, for example, help to make it fairer, more transparent and more effective at reducing the harmful impact of pesticides. However, using the REUL Bill as the means of updating or replacing the regulatory framework is highly problematic for the following reasons:

1. the Bill would unnecessarily expedite the process of reviewing and revising the regulatory framework for pesticides and set it to an entirely unrealistic timescale. This could give rise to a 'rushed' review which may result in new legislation which is inadequate for its purpose or important regulations being accidentally allowed to expire under the sunset provisions;
2. the Bill would effectively remove the important stages of parliamentary scrutiny and public consultation from the law-making process so that any new legislative framework for pesticides would be left entirely to ministers' discretion; and
3. the Bill would make it far easier for Ministers to remove existing restrictions on the use of certain pesticides (including the current restrictions on neonicotinoids) and weaken the current regulatory framework. This could have significant negative consequences for the environment and people's health.

⁹ In 2019, the Food and Agriculture Organization of the United Nations voiced concerns that neonicotinoids are causing large scale adverse effects on bees and other pollinators

¹⁰ [Government approval for the use of neonicotinoids and the impact on bees - House of Commons Library \(parliament.uk\)](#)

¹¹ 25 Year Environment Plan, 2018, Chapter 1, Section 2 (iv), p41

Furthermore, no compelling reasons have been provided by the Government to justify why (i) and (ii) above are necessary, when it is already within Parliament's power to amend or revoke retained EU law at any time, under the existing law-making process.

For the reasons above, ClientEarth believes that the REUL Bill should be withdrawn by the Government. The additional powers it grants and deadlines it imposes for reviewing and replacing retained EU law are unnecessary and instead, pose enormous risks for the stability and functioning of the UK's legal framework to protect the environment. The existing law-making process, which involves full parliamentary scrutiny, is a far more appropriate and transparent means of delivering new legal frameworks. Dispensing with that process under the REUL Bill and introducing automatic expiry provisions for retained EU law would greatly undermine the Government's goal to ensure that the regulation of pesticides is "robust and fit for purpose so as to protect people and the environment."¹²

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¹² 25 Year Environment Plan, 2018, Chapter 1, Section 2 (iv), p41