



Retained EU Law (Revocation and Reform) Bill

Briefing for Peers

About Us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Summary

The Bar Council has two overarching concerns about the Retained EU Law (Revocation and Reform) Bill (the Bill), the primary purpose of which is to sunset retained EU law (REUL), as follows:

- It is anti-democratic. Important changes to our law should be made by Parliament after proper consultation, public debate, and scrutiny.
- The Bill and the attendant legal uncertainty that will follow its adoption as currently drafted will damage the UK's reputation for regulatory stability, predictability, and competence, on which growth-promoting investment in critical sectors of our economy depends.

It is important to carefully examine the implications of any changes to REUL for the UK's trade, and wider relationship, with the EU. Facets of this include the adequacy decisions, level playing field provisions in the Trade and Cooperation Agreement 2020 (TCA), and the commercial reality that many UK businesses will seek to comply with EU regulatory standards in order to trade there. Divergence between UK and EU law and standards creates obstacles and undermines many of these arrangements.

REUL, comprising at least 4,000 individual measures, forms part of the UK legal order. Its status and interpretation are now governed by UK legislation under the control of the UK Parliament. It forms a significant part of the governing law in many areas of commercial and private life in the UK, such as consumer rights, data protection, safety regulation, VAT, employment law, environmental protection, and financial services. It is a matter of public interest that, where it applies, REUL should be both as certain as possible and effective at achieving its goals.

Given its central importance, it is entirely appropriate for the Government to prioritise the ongoing process of assessment, and as necessary revision, of REUL in order to ensure its continuing efficacy and certainty. Any urge to replace REUL merely because it is "EU" in origin should be resisted. Rather, the question should be whether it remains fit for purpose: would alternative UK regulation achieve different and preferable goals, be better or more cost-effective in achieving its goals, or more certain in its application?

It is also important as a matter of democratic principle that replacement legislation be carefully considered and properly scrutinised before it is enacted. Just because much of the REUL affected by the Bill is not in the form of primary legislation (Acts of Parliament) does not mean that it is not of considerable legal importance to the general public. For example, REUL caught by the sunset

provision in Clause 1 and the wide ministerial amendment powers in Clause 15 includes instruments that set out the law on matters as important and diverse as limits on working time, consumer rights to compensation when flights are delayed, protection of habitats, the ban on selling cosmetics tested on animals, the duty on public bodies to provide information on environmental matters and so on. Moreover, even where REUL consists of detailed technical rules, its terms are frequently of great importance to business, and the consequences of getting detail wrong may be very serious: which is why the complete absence of any requirement to consult affected parties as to the exercise of the wide powers given to Ministers in (for example) Clauses 1, 2 and 15 is of considerable concern.

The Bar Council recommends that the proposed legislation be withdrawn. Failing that, for it to be significantly amended in line with our proposals herein.

The Bill

The ongoing assessment, and possible revision, of REUL is desirable. It does not, however, justify the central features of this Bill, namely:

- a) **Sunset:** The setting of an arbitrary and impractical sunset date, with the consequent and entirely unnecessary risk of the disappearance of rules of critical importance to business, consumers, employees and the environment (some of which, due to their sheer numbers, may only be missed once lost) without adequate consideration or any consultation, and conferring an entirely unfettered and unscrutinised discretion to Ministers to disapply or delay the sunset provision or not; as well as the attendant risk of rushed replacement legislation (Clauses 1-3);
- b) **Ministerial powers:** The granting of wide-ranging powers to Ministers to legislate at will to replace or “update” REUL without any requirement to consult in matters of enormous importance to business, consumers, employees and the environment, either with no requirement for any parliamentary vote or scrutiny, or with the minimal scrutiny afforded by the affirmative resolution procedure (Clauses 12-15 and Schedule 3) – and where Parliament may well be confronted with the alternatives of agreeing replacements to REUL which it regards as unsatisfactory or letting the relevant rules fall completely); or
- c) **Legal uncertainty:** The deliberate creation of legal uncertainty, both by the entirely unnecessary rewriting of REUL (in areas where Ministers decide simply to “restate” it) and by provisions that have the effect of creating uncertainty as to the meaning and status of such REUL by removing established principles by which it is to be interpreted. We detect no sign that any assessment has been done as to the legal effect of those changes on the regulations concerned (despite their importance) and can therefore identify no policy rationale for those changes whatsoever (Clauses 4-7).

Background - The source of the underlying EU law

Sections 2 - 4 of the European Union (Withdrawal) Act 2018 (2018 Act) established three categories of retained EU law (REUL), that is EU law as it applied in the UK on 31 December 2020:

- a) Domestic law (regulations, statutory instruments) which implemented or related to former EU obligations (notably directives);
- b) EU legislation which was directly applicable in the UK e.g. the General Data Protection Regulation 2016;

- c) Other rights and principles in EU law that had direct effect in the UK (for example, Article 157 of the Treaty on the Functioning of the European Union (TFEU), which requires equal pay for male and female workers).

In the two years leading up to December 2020, the Government adopted hundreds of pieces of secondary domestic legislation, making around 80,000 amendments to the body of on-shored EU law that is now "retained".

The mere fact that REUL has EU law as its origin and is (in general) to be interpreted as EU law, does not mean that its content is either unacceptable or uncertain.

As to **acceptability**, there are different views as to the democratic acceptability of the EU's legislative processes. However, even if they are regarded as deficient in terms of democratic legitimacy or scrutiny, that can be no justification for creating mechanisms to alter that law which are themselves lacking in democratic scrutiny and run a severe risk of generating uncertainty and unintended consequences.

As to **certainty**, the principles of interpretation of EU law, with which UK lawyers and courts are familiar, are well-settled as principles of interpretation of UK statutes. Removing those principles is likely to generate both uncertainty and unintended consequences, particularly when it is remembered that many of the instruments that will be affected have been the subject of considerable case-law at EU level in which those principles have been applied, the removal of which will generate uncertainty. Indeed, the Government has not explained what the consequences of the removal of those principles will be on the various rules and protections concerned. It is not a good idea to legislate when you have no idea what the consequence of that legislation will be.

Nonetheless, the Bar Council acknowledges concerns about the **transparency and accessibility** of REUL in some areas, largely arising from the speed and complexity of the onshoring process itself. Financial services regulation is a case in point. Here, legislative consolidation would be useful, and may involve some amending and/ or updating of the rules in order to remain effective. Indeed, in many areas of REUL, EU law itself has moved on since 2020.

Further, we note that the very complexity of REUL, and the experience of multiple amendments during the "onshoring" process, is a factor that strongly militates against rushed attempts to remove, rewrite or replace it now, particular absent any power that we can see to amend a restated or replaced regulation once it has come into force¹.

Proposed amendments

The Bar Council has provided detailed proposed drafting changes (for the full text, see our [evidence to the Public Bill Committee](#)), a common thread of which is to require thorough analysis, and impose high standards of transparency and accountability, subject to parliamentary and/or public scrutiny, to the exercise of the various powers granted under the Bill. The Bar Council considers that such requirements should be seen as no more than a responsible approach to the assessment and possible revision or revocation of such a wide-ranging and important body of law. Below are short descriptions of the objectives of the amendments we have suggested:

Clause 1 - Sunset of EU-derived subordinate legislation and retained direct EU Legislation

The Bar Council draft amendment is intended to remove / extend the sunset deadline and / or open the process of review of legislation required by Clause 1 to parliamentary and public scrutiny, by:

¹ That seems to us to be the effect of clauses 12(3), 13(3), and 15(8).

- requiring consultation before Clause 1 has the effect of sunseting any REUL;
- giving Parliament/the devolved Parliaments and the public an opportunity to see the reasoning behind any decision to allow legislation to be sunsetted, and further an opportunity to “rescue” any REUL that would otherwise be sunsetted, and
- avoiding the accidental sunseting of any REUL by requiring a definitive list to be annexed of all REUL to which Clause 1 could apply.

New Clause 5A - Sunset of retained EU rights etc./Assimilation of retained EU law/Commencement – The Bar Council proposal is to require Ministers to analyse, and to explain their analysis of, the effect of the removal of REUL rights, the principle of supremacy of EU law, and of the general principles.

In addition, we suggest that, if it believes it appropriate to remove the remaining vestiges of the principle of supremacy of EU law, Parliament consider retaining, as a general presumption of interpretation that could be set aside only when the legislative texts made it clear that another result was intended, that all domestic legislation that came into force before 31 December 2020 was intended to be consistent with REUL.

Clause 7: Role of the courts – The Bar Council draft amendment directs the higher court to consider the well-established and uncontroversial principles of legal certainty and regulatory stability, as well as the important constitutional principle, with which we assume the Government agrees, that significant changes in the law should be made by Parliament, before departing from ECJ case-law.

New Clause 13A - The Bar Council draft amendment requires the national authority to consult on a draft text of “restatement” regulations, and to set out its reasoning on the choices made when drafting those regulations to Parliament or the relevant devolved legislature. We expect the courts to have regard to such material when interpreting the new legislation, thus increasing legal certainty.

Clause 15/16 - The Bar Council draft amendments, which add additional sub-clauses, would require national authorities to consult on proposed regulations revoking or replacing REUL, and to show Parliament (or the devolved legislature) their working on their reasons for the regulations and to give Parliament/ the devolved legislature time to consider and debate those reasons. It also gives Parliament or the devolved legislature a period within which to consider and recommend changes to the proposed regulations. We again expect the courts to have regard to such material when interpreting the new legislation, thus increasing legal certainty.

Schedule 3 - The Bar Council draft amendment makes all regulations under clause 15(2) (regulations that are intended to achieve the same or similar objectives as the REUL being replaced) and under section 16 (technological developments) subject to affirmative procedure: given the breadth and flexibility of those tests, it seems to us that all such regulations are capable of making major changes to the provisions of REUL that should attract the affirmative resolution procedure. The change would also remove any incentive to push the boundary of the section 15(2) or 16 power as a way of avoiding the affirmative procedure required for regulations under section 15(3).

Bar Council amendment to section 22(6) - It has been suggested that the omission of any reference to Clause 1 might be taken to indicate that Parliament intended the sunset provision to have retrospective effect on the validity of “sunsetted” regulations before 31 December 2023. Inserting a reference to that clause eliminates any such argument.

The Bar Council
February 2023