Retained EU Law (Revocation and Reform) Bill
Bar Council written evidence and proposed / planned amendments
Public Bill Committee

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.

Preliminary remarks - What is retained EU law and how has it operated in practice?

1. 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).
2. In the two years leading up to December 2020, the Government made hundreds of pieces of secondary domestic legislation, making around 80,000 amendments to the body of on-shored EU law that is now "retained", largely technical (e.g. geographical designations), though occasionally substantive in nature (and in some cases profoundly significant, such as the removal of EU law relating to the "four freedoms" or State aid). Thus, several thousand pieces of EU legislation, some duly amended, were on-shored on that date and continue to apply in the UK.
3. By the terms of the 2018 Act, REUL can, as from 31 December 2020, be revoked or amended by Parliament, or in accordance with statutory powers conferred by Parliament, whether or not such changes are consistent with EU law. The “supremacy of EU law” is no longer a feature of UK law (subject to the aspect discussed below, which essentially preserves the status quo as to the relationship between EU law and domestic law made before 31 December 2020 as it stood on that date).
4. REUL now forms part of the UK legal order. Its status and interpretation are now governed by UK legislation under the control of the UK Parliament.

5. REUL now forms the bulk or a significant part of the governing law in many areas of commercial and general life, in areas such as consumer rights, data protection, safety regulation, VAT, employment law, environmental protection, and financial services. It is a matter of great public interest that, where it applies, REUL should be as certain as possible. It is also important as a matter of democratic principle - as well as ensuring that replacement legislation in areas of great importance to business and the wider public is effective in achieving its goals - that replacement legislation be carefully considered and properly scrutinised before it is enacted.

6. Due to the inevitable time lag between issues arising and the resolution of those issues reaching the courts, so far there have been few cases where the courts have had to consider the application of REUL to facts that occurred after the end of the transition period on 31 December 2020. Indeed, even though the Court of Appeal gave useful guidance a couple of months into 2021 as to the approach that the courts should take to questions involving REUL in *Lipton v BA City Flyer Limited* [2021] EWCA Civ 454, that case itself concerned facts that arose before the end of the transition period (and the apparent assumption that that case was governed by REUL as amended by statutory instruments rather than by the EU legislation in force at the time is questionable – see *Chelluri v Air India* [2021] EWCA Civ 1953 at §16). Other courts have simply – and in our view correctly – applied EU law to pre-2021 facts without reference to REUL: see e.g. *Wilson v McNamara* [2022] EWHC 243 (Ch) and *Fratila v Secretary of State for Work and Pensions* [2021] UKSC 53.

7. One set of uncertainties surrounds the extent to which the courts should use the power to depart from pre-2021 Court of Justice of the European Union (CJEU) case-law in interpreting REUL (a power now conferred on the Court of Appeal as well as on certain other UK courts below Supreme Court level). The Court of Appeal has to date declined to exercise that power (see *Chelluri*, cited above, at §§62ff, and *TuneIn v Warner Music* [2021] EWCA Civ 441 at §§73ff), largely because of the absence of any relevant change in domestic law or of academic consensus that the CJEU case-law was problematic; problems of inconsistency with the approach being taken by the EU in areas with a strong international component; and concerns about creating legal uncertainty. However, it is certain that further attempts will be made at that level by parties in whose interests it is to depart from CJEU case-law that stands in the way of their case, with potential implications for delay and costs.

8. Other areas of uncertainty yet to be addressed by the courts include the impact of the application of general principles of EU law to the interpretation of REUL while excluding the application of the Charter of Fundamental Rights (which incorporates several of those principles) and the weight to be given to post-2020 CJEU case-law.

9. The courts have – in our view correctly – been prepared to apply general principles of interpretation of EU law to REUL. A recent example is the case of *re Allied Wallet* [2022] EWHC 402 (Ch), where the court accepted that the EU principle of conforming interpretation (as set out in Case C-106/89 *Marleasing* [1990] ECR I-4135) continued to apply to regulations made under section 2(2) of the European Communities Act 1972 and still operating as REUL, so that those regulations had to be interpreted so as to be consistent with the directive that they sought to implement. Any other result would

a. mean that the meaning and effect of such regulations changed (sometimes dramatically) on 31 December 2020;

b. fail to implement what has to be presumed to be the intention of Parliament in making or approving the domestic implementing legislation, namely to implement the directive; and

c. give rise to considerable uncertainty as to how such domestic implementing legislation should be interpreted, including re-opening areas where domestic case-law has already settled the meaning of such domestic implementing legislation by reference to the relevant directive (see, for example, the area of VAT, where there is a considerable volume of such case-law).

Arguments for replacing REUL

10. 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.

11. As to **acceptability**, it is sometimes claimed that EU law lacks legitimacy compared to legislation passed by Parliament or made by UK ministers. However, those arguments need to be taken with a pinch of salt. Whatever view may be taken as to the UK's membership of the EU, the EU legislative process, whilst certainly capable of much improvement, contains a number of democratic checks and balances: for the vast bulk of EU subordinate legislation, the co-legislators, both of whom must adopt the final text by (normally weighted) majority, are the Council, comprised of elected Ministers from the Member States, and the European Parliament, elected by universal suffrage, and whose membership included democratically elected UK representatives until 2020. Important Commission legislative proposals are preceded by impact assessments and so-called roadmaps, and often accompanied by Staff Working Documents, all publicly available and setting out the policy intent. In addition, public consultations and stakeholder meetings are frequent features of the process, whether concerning binding or non-binding measures. Lobbyists who take part in these activities must be registered on the EU's public institutional register created for the purpose.

12. We also point to the very valuable work over the years of the House of Commons EU Scrutiny Select Committee and other Select Committees, as well as to their equivalents in the House of Lords, in subjecting huge volumes of proposed EU legislation to careful scrutiny over the many years of UK membership. Thus, UK ministers, politicians and officials, stakeholders and policy makers had ample opportunity to, and did, exert influence on the development of EU policy and secondary legislation over the years of UK-EU membership. Indeed, in most cases, the EU legislation was supported, and even promoted, by the UK Government of the day. In our experience, assertions to the effect that the United Kingdom was in anything other than a small minority of cases "outvoted", or abstained because it would lose, are wide of the mark.

13. In any event, even if the view is taken that those procedures offered inadequate scrutiny or lacked democratic legitimacy, we note that one of the fundamental arguments in favour of Brexit was that it would make law-making more democratic. Any proposal for the replacement of REUL should in our view be on the basis that the

replacement legislation would receive at least as effective democratic scrutiny – and its quality and legitimacy is likely to suffer if it does not.

14. As to **certainty**, the principles of interpretation of EU law, with which UK lawyers and courts are deeply familiar, are as well-settled as principles of interpretation of UK statutes, and EU legislation is, in general, no more subject to issues of uncertain interpretation than UK legislation. We note, in particular, that claims that EU law adopts "purposive" principles of construction of regulatory and other legislative texts while the common law does not is hard to reconcile with statements such as this, by the UK Supreme Court in *Uber v Aslam* [2021] UKSC 5, at §70: "*The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose*." Indeed, in evidence to the EU Scrutiny Committee, Sir Richard Aikens, a former judge of the Court of Appeal of England and Wales and public supporter of Brexit, when asked whether interpretation of REUL might differ from the interpretation of other domestic law, observed that he was "doubtful about whether there will be such a marked or clear distinction between interpretive methods used by judges in UK courts" and that he was "not convinced there is any great difference".[1]

15. Any urge to replace REUL merely because it is "EU" in origin should be resisted. Rather, the question should be in each case whether alternative UK regulation would achieve different and preferable goals, whether it would be better or more cost-effective in achieving its goals, or whether it would be more certain in its application. Broad assertions as to the supposed superiority of "common law" over "EU" or "civil law" approaches to regulation are generally without foundation, ignore the way in which much EU law that is now REUL was shaped by UK influence and precedents, and provide no basis for any presumption that REUL should be replaced.

16. It will also be important - as and when replacing REUL is considered - carefully to examine the implications of such changes for the United Kingdom's trade, and wider relationship, with the EU. For example, changes to the UK data protection regime - particularly if they can be seen as weakening that regime - are likely to have implications for the EU's recognition of the adequacy of the UK's data protection regime. If that recognition is removed, that will have significant adverse implications for UK trade in goods and services with the EU (which is still by far the largest UK trading partner in both goods and services). It will also be necessary to consider the implications of changes to REUL for the "level playing field" provisions of Title XI of Heading One of the Trade and Cooperation Agreement. In addition, in many cases it will be right, when considering the replacement of REUL, also to take account of, and to reflect, changes in the equivalent EU regulation since Brexit, particularly in the many cases where UK businesses are likely for commercial reasons to want to comply with EU as well as UK regulation in order to simplify their exports to the EU. All these are good reasons why careful scrutiny by Parliament of such changes will be desirable, and why Parliament should be wary of conferring any broad power on Ministers to legislate without detailed scrutiny and accountability.

[1] See the Fifth Report of the EU Scrutiny Committee, 2022-23 Session, paragraphs 112-113. https://publications.parliament.uk/pa/cm5803/cmselect/cmeuleg/122/report.html

17. Similarly, any proposal to change the status or effect of REUL – such as those made in the Bill – should be judged on whether it makes REUL clearer or more effective, rather than on the basis that any change in its status or effect that can be presented as "domesticating" it must necessarily be a good thing.

18. That said, there are real concerns about the **transparency and accessibility** of REUL (that is, following its onshoring). The "onshoring" of EU law has inevitably affected the clarity and coherence of the statute book. The onshoring of EU regulations has been particularly cumbersome, involving a "snapshot" being taken of the EU law that applied as of 31 December 2020, which "snapshot" then has effect subject to the plethora of statutory instruments drafted over the previous two years that amended the "snapshot". In some instances, multiple statutory instruments amended the same "snapshot", with later versions overriding changes that would have been made by earlier ones. To take an example from the onshoring of EU financial services regulations, a regulation known as EMIR[2] (European Markets Infrastructure Regulation which has already been amended multiple times at EU level) was amended by 14 statutory instruments plus primary legislation. Even experienced practitioners find making sense of such legislation daunting – and this is but one of hundreds of pieces of retained EU law in financial services, many of which are several hundred pages long. And in making sense of such legislation, practitioners are assisted by unofficial consolidated versions of the legislation available on commercial websites – a resource not available to the general public. The complexity of REUL in financial services was such that the financial services regulators were given, and exercised broadly, a statutory power to make temporary transitional provisions to give regulated entities until 31 March 2022 to comply with changes in the law. So there is thus a strong case for legislative consolidation, in the form of a Consolidation Bill, in the area of financial services and potentially in other areas.

19. We note, however, 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 rewrite or replace it – particularly since, as we read the Bill, it provides no power to amend a restated or replaced regulation once it has come into force[3].

20. We also agree that, particularly as EU law develops, it will over time become increasingly anomalous to be maintaining EU law as it stood on 31 December 2020 as the basis for substantial parts of our law. There is also scope in many areas for improvement on REUL, and many areas where changing it would be an entirely proper political choice for Parliament to make.

21. We would also agree that a significant amount of REUL is of a technical nature where there is a strong case for giving Ministers greater powers to replace or remove it by secondary legislation.

[2] Regulation (EU) No 648/2021 of the European Parliament and Council

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

The Bill

22. The Bar Council has profound concerns about the Bill. Its preference is for the proposed legislation to be withdrawn.

23. That is not to say that revision of REUL is not important, or even that it should not be a policy priority. As has been set out above, there are good reasons why it is important to look at all areas of REUL and a number of proper general concerns about its operation, many of which will become more powerful as time passes.

24. However, none of that requires the central features of this Bill as passed at Second Reading, namely:

    a. The setting of an arbitrary, and in all the circumstances, 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. The granting of enormous powers to Ministers to legislate at will to replace or "update" REUL, without any requirement to consult anyone, 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. 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 – and appear to be intended to 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, altering its status vis-à-vis other law, and nudging the courts towards departing from EU case-law that interprets it. 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 detect no policy rationale for those changes whatsoever, beyond a prejudice against EU principles and case-law (clauses 4-7).

25. Those features of the Bill are both anti-democratic and anti-growth. Important changes to our law should be made by Parliament after proper consultation, public debate, and scrutiny, not by Ministerial fiat. And the rushed and uncertain process for replacement or removal of REUL, and deliberate creation of legal uncertainty, will seriously damage the UK's hard-won reputation for regulatory stability, predictability, and competence, on which growth-promoting investment in critical sectors of our economy depends.

26. Points (a) and (b) above have been explained in detail by the Hansard Society, and we would endorse its briefing on the Bill[4]. We also suggest amendments, as listed further below, to address some of the defects identified by the Hansard Society. We would add only that assurances by Ministers that they can be trusted with such wide powers exercised with such limited (or no) scrutiny by Parliament raise the question of why Parliamentary scrutiny is needed at all: and they also ignore the extent to which even decisions in principle to retain key rights and protections still leave innumerable choices as to the detail: details which can matter very much to very many. One very important reason why Parliamentary scrutiny is needed is that it helps get the detail right, and identifies and addresses issues of importance to voters. Similarly, the complete absence in the Bill of any requirement to consult those affected by the exercise (or non-exercise) of Ministers' powers under the Bill is incomprehensible in the context of often complex legislation where mistakes or omissions can have serious adverse consequences for business as well as consumers, workers, and others. As matters stand, businesses can have no confidence that they will have any ability to comment on, influence, or even have prior notice of, legislation that can profoundly affect them: a gap that, in our view, will operate as a serious deterrent to investment if this Bill is passed.

27. We would also add one comment on the scope of the "sunset clause". That clause (1(1)) does not apply to primary legislation: and it is clear from clause 1(3) that that is so even if the provisions in primary legislation were inserted by regulations made under section 2(2) of the European Communities Act. However, whether Ministers using section 2(2) powers chose to exercise them by amending existing primary legislation as opposed to creating stand-alone legislation was essentially a matter of drafting technique. Thus, the reason why (in England and Wales) we have stand-alone Environmental Information Regulations 2004 (made under section 2(2)) rather than provisions inserted into the Freedom of Information Act 2000 is presumably because the predecessor to the 2004 Regulations was made in 1992, well before the 2000 Act was passed: but the result of that drafting choice is that the 2004 Regulations will now be caught by the sunset clause, but would not have been caught had the drafter chosen to amend the 2000 Act rather than continue with stand-alone Regulations. There is simply no policy or principled rationale for that distinction.

28. We would however expand on point (c) in paragraph 24 (legal uncertainty).

29. First, we have serious concerns as to clause 4, which abolishes the "supremacy of EU law". It is important, in analysing that clause, to be clear about what that principle now means in UK law.

30. By section 5(2) of the 2018 Act, the principle of the supremacy of EU law continues to apply "so far as relevant to the interpretation, disapplication or quashing of any enactment… passed or made *before exit day*" (our emphasis). What this means is explained in paragraph 103 of the Explanatory Notes to that Act:

[4] https://www.hansardsociety.org.uk/publications/briefings/five-problems-with-the-retained-eu-law-revocation-and-reform-bill

"Where … a conflict arises between pre-exit domestic legislation and retained EU law, subsection (2) provides that the principle of the supremacy of EU law will, where relevant, continue to apply as it did before exit. So, for example, a retained EU regulation would take precedence over pre-exit domestic legislation that is inconsistent with it."

31. So, as a matter of principle, any legislation now passed (or passed at any time after 31 December 2020) can modify REUL. In that, critical, sense, the supremacy of EU law is no longer part of UK law. All clause 4 would do is to affect the relationship between REUL and domestic legislation passed before the end of transition.

32. We note, at that point, that before the end of transition it was generally understood and can be taken to have been the legislative intention, that any domestic law gave way to inconsistent EU law, whenever enacted.

33. Retrospectively to alter that position alters the effect of domestic legislation in a way that could not have been foreseen by the domestic legislator at the time. That is wrong in principle.

34. Moreover, and critically, as far as we are aware, no analysis has been done as to the precise legal consequences of retrospectively altering the relationship between retained EU law and pre-31 December 2020 domestic legislation and absent such a detailed analysis the effect of such a change on the many important areas covered by retained EU law (ranging from tax to detailed technical regulation) is unpredictable and will give rise to considerable uncertainty and litigation.

35. The rationale for retaining the principle of supremacy of EU law (in its current limited form) is, therefore, legal certainty. That principle is not to be lightly cast aside: individuals and businesses will have taken decisions, sometimes far-reaching and involving significant investment, based on the law as it was, and was understood to be, in the UK at that time. The effect of removing the principle would be to give priority to any subsequent domestic legislation that was (or was successfully argued to be) inconsistent with the EU legislation that became REUL. In the absence of any detailed survey of such legislation, it is impossible to say whether the consequences of removing the principle in any particular case would reduce the clarity of the law or change its effect, but the overall effect could only be to reduce certainty and to lead to unpredicted (and perhaps entirely undesirable or unjust) consequences.

36. We note that the Government must accept that removal of the (now limited) supremacy principle could create undesirable or unjust results: hence the power in clause 8 to (in essence) retain the current hierarchy of status between REUL and pre-2021 domestic legislation. But the fact that the Government accepts the need for that clause both shows that it accepts that there is a real risk of undesirable or unjust results as a result of removal of the principle and raises further questions: what work has been or will be done in order to establish when the clause 8 power should be used? What tests will be used before a clause 8 regulation is made?

37. We discuss a possible amendment below to address some of those issues: but we also 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.

38. Second, and more generally, we have serious concerns about the effect of abolition of remaining rights and duties flowing from EU law (clause 3) and of general principles (clause 5). The effect of the abolition of these principles will inevitably be to throw the meaning of remaining REUL into doubt (in particular primary legislation that was intended to implement EU obligations and thus would, as matters stand, be interpreted in the light of general principles of EU law and rights and duties flowing from EU law). It does not seem to us that any steps have been taken to ascertain what the effect of those provisions will be, and we suspect that the real answer is that it is impossible to predict. We do not see any merit in a change that has no ascertainable effects apart from generating uncertainty (and hence cost).

39. In that regard, we endorse what is said by the Employment Lawyers Association in their briefing on the Bill[5], noting the points made in paragraphs 22 to 25 which apply well beyond employment law: -

> 22) The principal issue is uncertainty. By wiping the slate clean of all the decisions on which our Courts have relied to build up a settled interpretation of EU law that runs through British employment law like a stick of rock. The Bill will create, on 1 January 2024, a raft of EU employment rights whose application, scope and meaning is unclear. Lawyers will no longer be able reasonably accurately to predict the effect of workers' rights or employers' obligations. Businesses will no longer be able reasonably accurately to predict their obligations. Workers will be uncertain as to the scope, meaning, application or entitlement to their working rights.
>
> 23) Fertile ground for litigation will be seeded – litigation begets the triplets of cost, delay and uncertainty: that deters investment.
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> 24) On 1 January 2024 the interpretive principles which have created well understood rights and obligations are guillotined, abolished and wiped from the slate. The hundreds of domestic cases that are based on European principles are erased from the record and the edifice of 50 years of incremental understanding of the regulations is torn down and replaced by a void. There is no phasing out of the old as new decisions supersede them. There is no transition period. There is no gradual introduction of the new principles. The old is abolished. Until new decisions emerge over the next 50 years, there is a vacuum. That vacuum can only be filled by litigation and appeal, after appeal in an Employment Tribunal system that is unlikely to make its first decisions until 2025 or 2026 given the current delays and before any question of any appeal.
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> 25) Of even greater concern are the known unknowns and the unknowns. The Bill is blind to that which it intends to abolish – it is no mean task to identify all the regulations that the Bill intends to abolish – that is the tip of the iceberg. No audit has been carried out of the hundreds of employment cases which

[5] https://www.elaweb.org.uk/sites/default/files/docs/ELA_REU_Bill_BriefingPaper_22Oct22_FINAL.pdf

have been decided over the past 50 years putting flesh on the bones of those identified bare regulations. It is those decisions that have brought clarity and meaning so that they are now well understood. Their meaning will be swept away and with them some rights, which would not even exist without the interpretive principles of direct rights, supremacy and general EU principles, will simply be extinguished and die – nobody knows how many and with what effect.

40. Finally, we comment on the proposals in relation to allowing the higher courts (Court of Appeal and above) to depart from pre-2021 CJEU case-law (we discussed post-2020 cases where that possibility has been discussed above).

41. The Bar Council considers – along with the Court of Appeal in both the *Chelluri* and *TuneIn* cases – that the advantages that the CJEU has in interpreting EU law remain powerful considerations when a court (with the power to do so) is considering whether to depart from CJEU case-law. The advantages of the CJEU over a national court described by Bingham J (as he then was) remain valid, even after UK withdrawal, unless the case can be distinguished because, e.g. the point of law turned on a specific feature of the EU Single Market which is no longer relevant in a UK context. But in such a case, both Counsel before the UK court, and the court itself, will be well placed to distinguish the REUL accordingly.

42. Further, a widespread practice of departing from the CJEU's pre-Brexit interpretation of EU law would inevitably lead to considerable uncertainty, especially in fields (such as VAT or equalities law) where there is extensive case-law putting flesh on sometimes skeletal legislative provisions. Uncertainty in such areas will give rise to considerable difficulty in applying, enforcing, and litigating the law (and, in the field of VAT, would risk prejudicing tax revenues if new interpretations are reached that favour taxpayers over His Majesty's Revenue and Customs – which we suspect is one reason why, according to the BEIS website on the Bill, it is proposed to deal with REUL in the area of tax separately). Though criticism of individual CJEU judgments is inevitable in a complex legal system such as the EU's, we detect no pressure whatsoever from practitioners or clients to throw complex and important areas of our law – such as VAT, among many others – into uncertainty by making general changes in the way in which REUL is to be interpreted or by jettisoning existing CJEU case-law applicable to REUL that remains in force.

43. As to the specific proposals in the Bill, we consider that the statement in §106 of the Explanatory Notes that clause 7(3) is intended to reflect "some" of the factors set out in *TuneIn* is somewhat revealing: the factors chosen are all ones that point away from following CJEU case law, while factors such as legal certainty and the principle that major changes to the law should be made by Parliament are ignored. We are concerned that the perceived effect of the clause will be to "nudge" the courts towards divergence.

44. If this Bill is to be proceeded with, then the Bar Council sets out proposed amendments to the text as tabled to the Bill team on 22 September and has the following comments. The Bar Council proposes to make these suggested amendments available to Members of Parliament in time for them to be tabled before the Public Bill Committee. The Bar Council may well propose further amendments as the Bill progresses.

Amendments

45. Bar Council's proposed drafting changes: (changes / new text in blue for ease of reference)

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

(1) Subject to the following provisions of this section, the following are revoked at the end of 2023—
(a) EU-derived subordinate legislation listed in Schedule [X] to this Act.
(b) retained direct EU legislation listed in Schedule [Y] to this Act.

(2) A relevant national authority may, after consulting such organisations as appear to it to be representative of interests substantially affected by its proposals, and any such other persons as it considers appropriate, by regulation made no later than 31 May 2023 add any EU-derived subordinate legislation or retained direct EU legislation to, respectively, Schedule [X] or [Y].

(3) A relevant national authority may, and if subsection (5), (7) or (8) below applies must, by regulation made at any time before the end of 2023, remove any instrument listed in Schedule [X] or [Y] to this Act from that Schedule.

(4) Before 30 June 2023 a relevant national authority must consult such organisations as appear to it to be representative of interests substantially affected by the inclusion of an instrument in Schedule [X] or [Y} proposals, and any such other persons as it considers appropriate.

(5) This subsection applies if, after considering the responses of organisations and persons consulted under subsection (4) above, a national authority considers that it is not appropriate to revoke the instrument concerned.

(6) By no later than 30 June 2023 a relevant national authority must lay a report before Parliament (or, as the case may be, the Scottish Parliament, the Senedd, or the Northern Ireland Assembly) as to the following matters: -
(a) A summary of the objectives and effect in law of each instrument listed in Schedule [X] or [Y] and of the legal consequences of its revocation;
(b) whether that instrument affords any protections for consumers, workers, businesses, the environment, or animal welfare, and, if so, whether and how that protection is to be continued when the instrument is revoked;
(c) any benefits which are expected to flow from the revocation of that instrument;
(d) the consultation undertaken as required by subsection (4) above;
(e) any representations received as a result of that consultation;
(f) the reason why the national authority considers that it is appropriate to revoke the instrument having considered those representations;
(g) the likely effect of the revocation of that instrument on the operation of the Trade and Cooperation Agreement between the United Kingdom and the EU, and on UK exports of goods or services to the European Economic Area; and

(h) the likely effect of the revocation of that instrument on the operation of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement.

(7) This subsection applies if, after that report is laid and before the end of 2023, either House of Parliament (or, as the case may be, the Scottish Parliament, the Senedd, or the Northern Ireland Assembly) passes a motion calling on the relevant national authority to remove any instrument from Schedule [X] or [Y].

(8) This subsection applies if
(a) a relevant national authority has made or has proposed to make any regulations under section 12 or 15 in relation to any instrument listed in Schedule [X] or [Y]; and
(b) either

(i) those regulations or draft regulations have been annulled by either House of Parliament (or, as the case may be, the Scottish Parliament, the Senedd, or the Northern Ireland Assembly); or

(ii) where those regulations must be approved by a resolution of both Houses of Parliament (or, as the case may be, of the Scottish Parliament, the Senedd, or the Northern Ireland Assembly) before being made or coming into force, those regulations have not been so approved.

~~(3)~~ (9) The revocation of an instrument by subsection (1) does not affect an amendment made by the instrument to any other enactment.
(10) If a national authority is required by subsection (3) to make regulations removing any instrument from Schedule [X[or [Y] but has not made such regulations so as to come into force by 31 December 2023, then such regulations will be deemed to have been made and to have come into force on 31 December 2023.

~~(4)~~ (11) In this section "EU-derived subordinate legislation" means any domestic subordinate legislation so far as—
(a) it was made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972, or
(b) it was made, or operated immediately before IP completion day, for a purpose mentioned in section 2(2)(a) of that Act (implementation of EU obligations etc), and as modified by any enactment.

~~(5)~~ (12) In subsection (4) "domestic subordinate legislation" means any instrument (other than an instrument that is Northern Ireland legislation) that is made under primary legislation.

[amend Schedule 3 to provide that regulations under clause 1(2) are subject to the affirmative procedure, and those made under clause 1(3) are subject to negative procedure]

Clause 2: Extension of sunset under section 1 (1)
(1) A ~~Minister of the Crown~~ A relevant national authority may by regulations provide that section 1, as it applies in relation to a specified instrument or category of instrument or a

specified description of legislation within section 1(1)(a) or (b), has effect as if the reference in section 1(1) to the end of 2023 were a reference to a later specified time.
(2) In subsection (1) "specified" means specified in the regulations.
(3) Regulations under subsection (1) may not specify a time later than the end of 23 June 2026.

Comment:
The object of the proposed amendment to clause 1 is to open the process of review of legislation required by clause 1 to Parliamentary and public scrutiny, to require consultation before clause 1 has the effect of sunsetting any REUL, to give Parliament/the devolved parliaments and the public an opportunity to see the reasoning behind any decision to allow legislation to be sunsetted, to give Parliament/the devolved parliaments an opportunity to "rescue" any REUL that would otherwise be sunsetted, and to avoid the accidental sunsetting of any REUL. Since we assume that this detailed analysis will in any event be conducted by all national authorities, we do not see that this provision imposes any additional burden on them.

The amendment to subsection (1) restricts the sunset provision to legislation identified by national authorities: again, we do not anticipate that that will involve significant additional work as the "REUL dashboard" created by the Government can provide the basis for that list, and subsection (2) allows for the later addition of material to the list if it is accidentally omitted before completion of the Bill's passage through Parliament.

Subsections (4) and (5) impose requirements to consult on the decision to maintain the "sunset". The effect of new subsections (3) and (7) is to require national authorities to report to their respective parliaments on decisions to allow REUL to be sunsetted and for those parliaments to prevent that happening if they disagree, while subsection (8) prevents Ministers from using the imminent sunsetting of existing REUL as a way of "putting a gun to the head" of parliaments when considering replacement legislation. Subsection (9) deals with the possibility that a national authority might not comply with its duty under subsection (3).

As to clause 2, we are not sure that it is needed if amendments are made to clause 1 as proposed – and indeed see no purpose in it even as the Bill stands given the wide power in section 1(2). However, we are not sure why the clause 2 power is confined to UK Ministers (or why the clause 1(2) power as it stands does not allow specification of a description of legislation, instead requiring the specific listing of all legislation that is intended to be covered).

Sunset of retained EU rights etc./Assimilation of retained EU law/Commencement
(Insert new) Clause 5A
(1) None of sections 3, 4 or 5 may be brought into force unless all the following conditions have been satisfied.

(2) The first condition is that a Minister of the Crown has, after consulting organisations and persons representative of interests substantially affected by, or with expertise in the likely legal effect of, that section on a draft of that report, laid a report before each House of Parliament setting out, with reasons, the Minister's view as to the likely advantages and

disadvantages of bringing that section into force, setting out in particular the effect of that section on:
(a) the rights of and protections for consumers, workers, and businesses, and protections of the environment and animal welfare;
(b) legal certainty, and the clarity and predictability of the law;
© the operation of the Trade and Cooperation agreement between the United Kingdom and the EU, and UK exports of goods and services to the European Economic Area; and
(d) the operation of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement.

(3) In relation to section 4, that report shall take into account any regulation made or likely to be made by a relevant national authority under section 8(1).

(4) The second condition is that a period of sixty days has passed since that report was laid before Parliament, with no account to be taken of any time during which Parliament is dissolved or prorogued or during which either House is adjourned for more than four days.

(5) The third condition is that, after the end of that period, both Houses of Parliament have approved a resolution that that section come into force.

(6) If both Houses of Parliament have approved a resolution that that section should not come into force unless it is amended in a way set out in that resolution, then the Minister may by regulation amend that section accordingly, and that section may not be brought into force until that amendment has been made.

[amend Schedule 3 to provide that regulations under clause 5A(6) are subject to negative procedure]

In clause 22(1)(a), replace with "sections 1 and 2"
In clause 22(4), insert at the beginning "Subject to section 5A,"

Comment:
The effect of this proposal is to require Ministers to analyse, and to explain their analysis of, the effect of the removal of retained EU law rights, the principle of supremacy of EU law, and of the general principles. The Bar Council assumes that Ministers have conducted or propose to conduct such an analysis before bringing into force such wide-ranging changes (it would be extraordinarily irresponsible were that not done), and sees no reason why that analysis should not be consulted on, made public, and put before Parliament. The new clause also gives Parliament the chance, in the light of such an analysis, to prevent the bringing into force of those sections or to propose amendments to those sections.

Clause 7: Role of courts
(1) Section 6 of the European Union (Withdrawal) Act 2018 (interpretation of retained EU law) is amended as specified in subsections (2) to (7)……..
(3) For subsection (5) substitute—

"(5) In deciding whether to depart from any retained EU case law by virtue of subsection (4)(a), (b) or (ba), the higher court concerned must (among other things) have regard to—
(a) the fact that decisions of a foreign court are not (unless otherwise provided) binding;
(b) any changes of circumstances which are relevant to the retained EU case law; ~~and~~
(c) the extent to which the retained EU case law restricts the proper development of domestic law;
(d) the undesirability of disturbing settled understandings of the law, on the basis of which individuals and businesses may have made decisions of importance to them;
(e) the importance of legal certainty, clarity and predictability; and
(e) the principle that significant changes in the law should be made by Parliament (or, as the case may be, the relevant devolved legislature)."

Comment:
This amendment directs the higher court to consider the well-established and (we hope) 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.

Clause 13A
(Insert new) Clause 13A
(1) No regulations may be made under section 12(1) or 13(1) unless all the following conditions have been satisfied.
(2) The first condition is that the relevant national authority has consulted on a draft of the regulations with organisations and persons representative of interests substantially affected by, or with expertise in the likely legal effect of, those regulations.
(3) The second condition is that, after that consultation has concluded, the relevant national authority has laid a report before each House of Parliament (or, as the case may be, the Scottish Parliament, the Senedd, or the Northern Ireland Assembly) setting out: -
(a) the authority's view as to whether the proposed regulations make any change in the rights of and protections for consumers, workers, and businesses, and protections of the environment and animal welfare, and the reasons for that view;
(b) whether in making the regulations the national authority has considered using its discretion under section 12(6), 13(6), or 14(2), (3) or (4), and if so, the reason why it has or has not exercised that discretion.
(4) The third condition is that a period of sixty days has passed since that report was laid, with no account to be taken of any time during which Parliament (or, as the case may be, the Scottish Parliament, the Senedd, or the Northern Ireland Assembly) is dissolved or prorogued or during which it was adjourned for more than four days , and where they were laid before Parliament, paragraph 8(11)(a) of Schedule 3 shall apply in determining the commencement of that period.

Comment:
This 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. Since national authorities are bound to be considering those decisions carefully, we see no reason why that reasoning should not be

published. The amendment does not otherwise affect the choice of procedure to be used in Parliament or the devolved legislature (but see a further amendment below). It is also likely that courts will have regard to such material when interpreting the new legislation, thus increasing legal certainty.

Clause 15/16: Insert after clause 15(4) and 16(3);
(4A)/(3A) No regulations may be made under this section unless all the conditions set out in section 15A have been complied with.

And then after clause 15 insert

15A Conditions on the exercise of powers under section 15 and 16
(1) The first condition is that the relevant national authority has consulted such organisations as appear to it to be representative of interests substantially affected by its proposals, and any such other persons as it considers appropriate, on a draft of those regulations.

(2) The second condition is that the national authority has, after that consultation has concluded and after considering any representations made to it, laid a draft of the regulations before each House of Parliament (or, as the case may be, the Scottish Parliament, Senedd or Northern Ireland Assembly), together with a report setting out, with reasons, the authority's view as to the likely advantages and disadvantages of making those regulations, setting out in particular
(a) a summary of the objectives and effect of those regulations as compared to the instrument that they will revoke, replace or modify;
(b) any difference as between that instrument and the proposed regulations in terms of protections for consumers, workers, businesses, the environment, or animal welfare;
(c) any benefits which are expected to flow from the revocation or replacement of that instrument;
(d) the consultation undertaken as required by subsection (2) above;
(e) any representations received as a result of that consultation;
(f) the reason why the national authority considers that it is appropriate to make those regulations, having considered those representations;
(g) the reasons why the national authority considers that section 15(5) and (10) (overall reduction in burdens) does not preclude the making of the regulations, explaining what burdens are reduced or increased as a result of the making of the regulations;
(h) the likely effect of the revocation, modification, or replacement of that instrument on the operation of the Trade and Cooperation Agreement between the United Kingdom and the EU, and on UK exports of goods or services to the European Economic Area; and
(i) the likely effect of the revocation, modification, or replacement of that instrument on the operation of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement.

(3) The third condition is that a period of sixty days has passed since those draft regulations or that report were laid as set out in subsection (3) with no account to be taken of any time during which Parliament (or, as the case may be, the Scottish Parliament, Senedd or Northern Ireland Assembly) is dissolved or prorogued or during which either House or that body is

adjourned for more than four days, and where they were laid before Parliament, paragraph 8(11)(a) of Schedule 3 shall apply in determining the commencement of that period.

(4) The fourth condition is that the national authority has considered any representations made during the period set out in subsection (3) and, in particular, any resolution or report of, or of any committee of, either House of Parliament (or, as the case may be of the Scottish Parliament, Senedd or Northern Ireland Assembly) with regard to the proposals, and has published its reasons for accepting or rejecting any such representations, resolution, or report.

Comment:
The aim of this amendment is to 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. It is also likely that courts will have regard to such material when interpreting the new legislation, thus increasing legal certainty.

Amendment to Schedule 3
In paragraph 7(2)(c), delete all the words after "15(2)"
After paragraph 7(2)(d), add "; (e) regulations under section 16"
In paragraph 7(4), delete subparagraph (c).

Comment:
This 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).

Amendment to section 22(6)

Add "1," before "3".

Comment:
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
November 2022