

Retained EU Law Bill (REUL) and social rights ReWAGE Policy Brief

The [EU Retained Law \(Revocation and Reform\) Bill](#) (the so-called REUL Bill) was laid before Parliament by Liz Truss, then Prime Minister, in September 2022. Much of the preparatory work had been done on the Bill by Jacob Rees-Mogg MP, following the guidelines laid down by Lord Frost. The headline of the Bill is that it sunsets (i.e. turns off) nearly 4000 pieces of 'retained EU law' (REUL), albeit with powers to keep some legislation, delay the sunset on other legislation and reform yet other legislation.

What is Retained EU law ('REUL')?

The concept of 'retained EU law' (REUL) was introduced by the EU (Withdrawal) Act 2018 ('[EUWA 2018](#)'). This Act essentially took a screenshot of all EU legislation, case law and general principles of law on [Brexit day](#) and ensured they continued to apply in the UK just as before Brexit, thus ensuring a functioning statute book. The principle of supremacy of EU law (that is the idea that EU law takes precedence over conflicting national law) was also carried over in respect of pre-Brexit EU Treaty provisions and legislation. The only exception to this was the Charter of Fundamental Rights, which was not carried over.

EUWA 2018 preserves major areas of EU law ranging from airline safety, food safety and, with regard to employment, large swathes of employment legislation ranging from Agency Workers Regulations, Part-time and Fixed Term Work Regulations, and much of equality law. Further, the supremacy of Article 157 TFEU was also carried over. This carry over meant that challenges based on the incompatibility of provisions of the Equality Act with Article 157 could still be made.

The Purpose of the REUL Bill

The 2018 Act was always seen as a holding position, ensuring a functioning statute book after Brexit but giving the Government time to change laws to make them more suitable for their operation in the UK. Some Brexiters feel that this process of reviewing and reforming the statute book has not happened fast enough. The REUL Bill was introduced to speed up the process. It has three objectives:

- 'Sunsetting' all REUL and turning off the supremacy principle and general principles of law;
- (Strongly) encouraging judges to depart from pre-Brexit retained EU case law more readily;
- Giving ministers power to keep REUL, delay the sunset, restate, revoke or replace EU law.

Looking at the three objectives in turn:

Sunsets of REUL

The Bill contains two sunsets:

- the sunset of 'EU-derived subordinate legislation' and 'retained direct EU legislation' (that is secondary legislation). Most importantly, for our purposes, it would cover nearly all EU-derived employment legislation such as the Regulations on Part-time and Fixed term Work, Working Time, Agency Work, but not the Equality Act 2010 since this particular Act is primary legislation and not secondary legislation.

- the sunset of 'retained EU rights, powers and liabilities under section 4 EUWA. Most importantly for our purposes, it puts an end to any directly effective provisions in an unimplemented or incorrectly implemented directive and Article 157 TFEU on equal pay.

The Bill will also turn off the principle of supremacy of EU law so that Article 157 TFEU no longer takes precedence over the Equality Act 2010. It will also turn off the general principles of EU law such as proportionality, fundamental rights and effective remedy.

Role of the courts

The Bill provides domestic courts with greater discretion to depart from retained case law. In deciding whether to depart from pre-Brexit case law the higher court concerned must (among other things) have regard to -

- the fact that decisions of a foreign court are not (unless otherwise provided) binding;
- any changes of circumstances which are relevant to the retained EU case law;
- the extent to which the retained EU case law restricts the proper development of domestic law.

The Bill also contains mechanisms for lower courts to refer cases to higher courts about the possibility of departing from REUL and for the law officers to intervene to similar effect.

Ministerial powers

One of the most striking aspects of the Bill is the breadth of the powers it gives to Ministers and in some cases the devolved administrations to (i) Keep retained EU law; (ii) Delay the sunset; (iii) Restate, revoke or replace REUL. Most of these powers are subject to the [negative procedure](#) which means that Parliament is not required to approve the statutory instrument for it to become law. Either the House of Commons or the House of Lords can pass a motion within a specified period to annul the statutory instrument; the last time the House of Commons annulled a negative statutory instrument was in 1979.

Keep

Clause 1(2) allows 'a relevant national authority' (that is Ministers and the respective devolved authorities) to make regulations to *keep* REUL or provisions of the REUL. No deadline is set. This kept legislation would be called 'assimilated law' after the end of 2023. As the Government explains in [a news story from September 2022](#), the term 'assimilated law' is used 'to reflect that EU interpretive features no longer apply'.

Delay

Clause 2 allows 'A minister of the Crown' (i.e. Westminster, not the [devolved administrations](#)) to adopt regulations to *delay* the application of the sunset (and thus keep specified REUL) until not later than 23 June 2026 (ten years after the Brexit vote). There are some reports that DEFRA and BEIS are exploring making significant use of this route. This delayed legislation will be called 'assimilated law' after the end of 2023.

Restate, Revoke or Replace REUL

Restate

Clause 12 gives powers to a 'relevant national authority' to *restate* retained EU law until the end of December 2023 and Clause 13 gives powers to a 'relevant national authority' to restate assimilated law after the end of December 2023. Clause 14(3) explains that:

A restatement may make any change which the relevant national authority considers appropriate for one or more of the following purposes -

- (a) resolving ambiguities;
- (b) removing doubts or anomalies;
- (c) facilitating improvement in the clarity or accessibility of the law (including by omitting anything which is legally unnecessary).

The Explanatory notes say (para. 154): 'Clause 12 establishes the power to restate provisions of "secondary REUL", (that is including the codification of directly effective rights, retained case law and general principles). Such restatements, however, would not be REUL, and retained general principles, retained case law or the principle of supremacy would not apply for the purposes of interpreting that restatement. The power does, however, enable the effects of those things to be reproduced. So the government might decide to still accord Article 157 precedence over conflicting provisions of the Equality Act 2010 but this precedence would not be called 'supremacy'.

Revoke and remake

Clause 15 allows a 'relevant national authority' by regulations up until 23 June 2026 to:

1. Revoke any secondary REUL without replacing it;
2. Revoke any secondary retained EU law and replace it with such provision as the relevant national authority considers to be appropriate and to achieve the same or similar objectives;
3. Revoke any secondary retained EU law and make such alternative provision as the relevant national authority considers appropriate.

There is much concern in many quarters, not least [various House of Lords Committees](#), about the breadth of the powers in Clause 15, especially Clause 15(3) which appears to have no significant limits other than the requirement in Clause 15(5) that changes made must not 'increase the regulatory burden'.

There is also a question of timing. What if the government decides to keep, say, the Working Time Regulations, which implement the Working Time Directive, but to salami-slice some of the protection from it, such as the prohibition of rolled up holiday pay or the right to take annual leave after maternity leave or a long period of sick leave (both protections which come from Court of Justice case law). If this is done in November 2023 (a few weeks before the sunset deadline) by, for example, a Regulation adopted under Clause 15, the government will be able to issue an ultimatum to the opposition: accept this revised version of the Working Time Regulations or lose them altogether (due to the sunset).

Effect on social law

However, the Government has [committed to keeping legislation](#) which is required to fulfil its international obligations '(including those contained within the Northern Ireland Protocol, the Withdrawal Agreement, and other international treaties)'. More recently it has said:

1. the Bill would not weaken environmental protections;
2. the Government would continue to honour its commitment to protecting workers' rights in matters of health and safety in the workplace;

3. as a priority, the Government would take the necessary action to safeguard the substance of any retained EU law and legal effects required to operate international obligations within domestic law.

Observations

As ReWAGE's focus is on work and employment the following observations deal with points 2 and 3.

In respect of point 2, much EU social law was adopted under Article 118a (now Article 153 TFEU), the health and safety legal basis, such as the Working Time Directive and the Health and Safety Framework Directive and related legislation. Does the Government's commitment cover all of these measures and, if so, what is the legal instrument to do it?

In respect of point 3, it is not clear what international obligations the Government is referring to, although it will include the Trade and Cooperation Agreement (TCA), the Agreement under which the UK trades with the EU. The TCA contains level playing field obligations. Of particular relevance are the non-regression provisions in Articles 386 and 387. Article 387 recognises that the UK and the EU are free to set their own social standards but 'a Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its labour and social levels of protection below the levels in place' on Brexit day. If the EU thinks that the effect of the REUL is that the UK has weakened its labour and social protection 'in a manner affecting trade and investment', then it can trigger the dispute resolution mechanism in Articles 408- 410 which can lead to the imposition of tariffs.

However, there is much uncertainty around what is meant by the phrase 'in a manner affecting trade and investment'. There is a risk that the government would be engaged in a game of chicken with the EU: is the EU prepared to start proceedings under the LPF provisions for an amendment which may not satisfy the threshold of 'affecting trade or investment'.

Issues arising

Political expediency may require some speed but effective law requires clarity of policy, extensive consultation and effective parliamentary scrutiny. In this respect, the Bill raises a number of issues. For example:

- *What is caught by the sunset?* The sunset is the default position but it is not known precisely what is being sunsetted. The [public dashboard](#) now identifies about 3705 pieces of legislation but it is thought there are many more.
- *The asymmetrical nature of the Bill.* The default position is that the Bill overturns REUL over a huge range of areas but, unlike the Financial Services and Markets Bill (FSMB) which does the same for financial services legislation as the REUL Bill does for all other secondary legislation, the FSMB has been consulted on twice so the Government knows what to put in place of the existing EU rules. This is not the case with the REUL Bill.
- *The poor quality of the proposal/process/impact assessment (IA).* In a rare move BEIS's own [Regulatory Policy Committee](#) has said the impact assessment is not fit for purpose (i.e. it is red-rated); 'the quality of different analytical areas in the IA are all either weak or very weak, meaning that they provide inadequate support for decision-making'.
- *The breadth of the powers given to Ministers.* The House of Lords Delegated Powers Regulatory Reform Committee, among other committees, is highly critical of the very broad powers given to ministers in this Bill. For example, its [report](#) says: 'The Bill is

sufficiently lacking in substance not even to be described as “skeletal”. It is a mechanism that gives Ministers the power to decide what becomes of whole swathes of UK law deriving from our membership of the EU. Ministers, not Parliament, will be responsible for determining what stays, what goes and what, if anything, is to replace what goes.

Conclusions

The Bill has been described by the [Delegated Powers and Regulatory Reform](#) (DPRR) Committee as ‘hyper-skeletal’. The [Constitution Committee](#) notes it gives ‘UK ministers and ministers of the devolved administrations the power to revoke, restate or replace a large volume of EU law. It also provides UK ministers and ministers of the devolved administrations with the option of doing nothing and allowing EU law in certain policy areas to be automatically revoked’.

The DPRR Committee recommended that ‘of the six most important provisions containing delegated powers in this Bill, five should be removed from the Bill altogether. The shortcomings of this hyper-skeletal Bill justify our approach.’ This Bill is a major piece of constitutional legislation with the power to affect every aspect of all of our lives. The lack of knowledge of what it covers, the lack of transparency of process over what laws are to be sunsetted, kept, delayed or rewritten, and the lack of parliamentary scrutiny over what is being done, combined with the extraordinarily short time frame in which all of this is to be done, makes the REUL Bill one of the most extraordinary Bills of our lifetime.

Recommendations:

- Carry out further work to clarify what rules are being affected by the sunset, and then provide a comprehensive list of all the legislation in the scope of the sunset;
- Carry out consultation to assist the government in determining what it will need to put in place of existing EU rules and not remove legislation until there is a policy in place to replace it;
- Carry out further impact assessment work to support government with its decision-making on the future of EU rules;
- Reconsider the powers given to ministers to determine the future of EU rules and ensure that these decisions are subject to, at a minimum, the affirmative legislative procedure.

About the author

This ReWAGE policy briefing was authored for ReWAGE Professor Catherine Barnard (Professor of EU law and Employment Law at the University of Cambridge). This paper represents the views of the author based on the available research. It is not intended to represent the views of all ReWAGE members.

About ReWAGE

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