

RETAINED EU LAW (REVOCATION AND REFORM) BILL

Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Retained EU Law (Revocation and Reform) Bill (“the Bill”). The Bill was introduced in the House of [Commons] on [22 September 2022]. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected. This memorandum also identifies provisions within the Bill that changes the functioning of powers within other statutes.

B. PURPOSE AND EFFECT OF THE BILL

Introduction to the Bill

The main purpose of the Bill is to remove the precedence given to retained EU law in the UK statute book and to firmly re-establish our Parliament as the principal source of law in the UK, restoring the primacy of Acts of Parliament in UK statute. We will no longer have a two tiered statute book, with the remnants of our EU membership continuing to have an outside effect on our domestic law.

In order to facilitate the removal of EU-derived laws that are not fit for purpose, we are amending the substance and underpinning rules of retained EU law (“REUL”) as established by the European Union (Withdrawal) Act 2018 (‘EUWA’). In particular the Bill will provide for any REUL that remains in existence as at 31 December 2023 to be repealed (or “sunsetting”) on that date, unless a relevant Minister has exercised a power in the Bill to preserve it. Any REUL that is preserved continues to operate after this sunset date - either because it was preserved under the power, or was outside the

scope of the sunset - will be “assimilated” in domestic legislation. This means stripping those provisions of their EU-related interpretative effects¹ .

As set out below, the Bill will also contain a number of powers to amend REUL or, after the sunset, the body of law that will continue to apply in place of REUL.

Legislative history

The European Union (Withdrawal) Act 2018 (“EUWA 2018”) received Royal Assent in June 2018. It repealed the European Communities Act 1972 (“the ECA”) and prepared the UK statute book for the United Kingdom’s withdrawal from the European Union. It provided for continuity by incorporating into our domestic law much EU law that previously applied in the UK, so that it continued to apply in the UK as REUL. The Act also established a constitutional framework of rules and principles underpinning REUL.

Following the passing of EUWA 2018, the United Kingdom concluded a Withdrawal Agreement with the EU in November 2019. The European Union (Withdrawal Agreement) Act 2020 received Royal Assent on 23 January 2020. That Act amended EUWA 2018 and gave effect to the Withdrawal Agreement in domestic law. On 31 January 2020 the United Kingdom left the EU. The EU Treaties and EU law continued to apply in the UK during a time limited transitional period which expired at 11pm on 31 December 2020 (referred to as ‘IP completion day’ in EUWA 2018). This is the date on which EU law as it applied in the UK was incorporated into our domestic legal system as REUL.

In the two years prior to IP completion day, several Acts of Parliament and more than 1,000 statutory instruments made by the UK and devolved governments were made, amending or repealing provisions of REUL. It is estimated that more than 100,000 amendments were made to provisions of REUL, almost all of them taking effect on IP completion day.

¹ Such as removing the effects of general principles of EU law as an aid to interpretation, ceasing the application of supremacy and repealing directly effective EU rights so that they no longer have any effect in relation to those provisions.

Now the UK has regained its political and economic independence, we are in a position to remove the special status of retained EU law, and the interpretive glosses applied to retained EU law by the EUWA 2018, and address the UK's priorities in these policy areas.

Key features of retained EU law

Sections 2 to 4 of EUWA established three categories of retained EU law:

- a. EU-derived domestic legislation: domestic law which implemented or related to former EU obligations;
- b. Direct EU legislation: EU legislation which was directly applicable in the UK without implementing legislation;
- c. Rights etc under section 2(1) of the ECA: other rights and principles in EU law that previously had direct effect in the UK (ie. directly effective rights contained in the EU Treaties and in EU Directives, though as regards rights in Directives, this was limited to rights recognised in case law before IP completion day).

In addition to these categories of REUL, EUWA also established a constitutional framework of principles and rules that underpin REUL.

Section 5 of EUWA maintained the principle of supremacy of EU law as regards domestic legislation made before IP completion day. It removes the principle in relation to domestic legislation made after IP completion day.

Section 6 of EUWA provided that retained EU law must be interpreted in accordance with retained EU case law (i.e. judgments handed down before IP completion day) and inline with retained general principles. However, it also provided that the Supreme Court and, in certain capacities, the High Court of Justiciary, may depart from that case law, applying the same test that those courts would apply to departing from its own case law precedents. Shortly before IP completion day, subordinate legislation was made² which widened the range of senior domestic courts that may depart from

² The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI. 2020/1525)

retained EU case law to include the Court of Appeal of England and Wales and other comparable courts.

Section 7 of EUWA established rules on the status of different types of REUL, for the purpose (among other things) of determining whether it may be amended by pre-existing powers to make secondary legislation. “Retained direct principal legislation” (that is, former EU secondary legislation usually made by the EU Council and Parliament) is currently treated as akin to Acts of Parliament when considering if it can be amended under an existing delegated power contained in domestic legislation.

In repealing the ECA, section 1 of EUWA 2018 repealed the very broad power to make and amend domestic legislation for the purposes of implementing EU obligations and dealing with related matters³. Section 8 of EUWA 2018 provided a broad power to amend any REUL, for the purpose of addressing technical deficiencies in the application of REUL. However this power is far more limited in scope than the power repealed by section 1 of EUWA 2018. This power is due to expire on 31 December 2022. Therefore, there is in REUL a large volume of domestic secondary legislation made under the ECA, and a large volume of retained direct EU legislation for which ministers have no effective powers to amend or repeal by secondary legislation, which will reduce further by the end of this year.

Key features and effects of the Bill

Sunset of retained EU law and directly effective rights

Clause 1 provides for the revocation of EU derived subordinate legislation and retained direct EU legislation at the end of 2023. Clause 1(2) provides the ability for national authorities to exempt specified legislation from that revocation.

Clause 2 provides for a power to amend the date that EU derived subordinate legislation and retained direct EU legislation will be revoked beyond 31 December 2023, but to no later than 23 June 2026. This mechanism would only apply to specific provisions or descriptions of legislation where necessary to fully review the changes needed to the REUL.

³ See section 2(2) European Communities Act 1972

Clause 3 provides that Section 4 of the European Union Withdrawal Act 2018 is repealed on 31 December 2023.

Abolition of the principle of supremacy of EU law

Clause 4 provides that the principle of supremacy of EU law will come to an end at the end of 2023. It also creates a new rule of conflicts to take effect from the end of 2023, providing that domestic primary or secondary legislation (whenever passed or made) is to prevail over retained direct EU legislation ('RDEUL'⁴) in the event of a conflict between the two. Clause 4 is subject to section 183A and 186 of the Data Protection Act 2018, which relates to protection of prohibitions and restrictions on processing personal data.

Abolition of general principles of EU law

Clause 5 abolishes the retained general principles of EU law after the end of 2023 in so far as their effect continues to apply in domestic law.

Assimilated law

Clause 6 renames "retained EU law" to "assimilated law", in order to clearly signal that this body of law will be subject to different rules of interpretation following the operation of clauses 4 and 5. The clause also includes provision relating to the renaming of related bodies of law (for example, retained direct EU legislation and retained case law).

Role of the courts in relation to REUL

Clause 7 makes provision for new tests for higher courts to apply when considering departing from retained EU case law⁵ and retained domestic case law. It creates a new reference procedure for lower courts to refer questions to higher courts on whether retained case law must be followed. The clause grants a new power on UK law officers and similar persons in devolved authorities to make references, following

⁴ RDEUL is defined in section 20(1) of the European Union (Withdrawal) Act 2018 as 'any direct EU legislation which forms part of domestic law by virtue of section 3 (as modified by or under this Act or by other domestic law from time to time, and including any instruments made under it on or after IP completion day)'. It comprises EU Regulations, EU decisions and EU tertiary legislation (subject to exceptions).

⁵ For the meaning of 'retained EU case law' see footnote 1.

the conclusion of proceedings, on whether retained case law in similar circumstances must be followed in future, as well as an unqualified right to intervene in certain proceedings as to whether retained case law must be followed.

Clause 9 requires a court to make an “incompatibility order” where it concludes that a provision of RDEUL is incompatible with any domestic enactment which it is subject to. Similarly, where the conflict rule has been reversed by regulations made under clause 8(1), so that a provision of RDEUL has priority over a domestic enactment, an order must be made if the court finds that the domestic enactment cannot be read compatibly with the RDEUL specified.

The order could, where the court considers relevant, set out the effect of the incompatible provision in that particular case, delay the coming into force of the order, or remove or limit the effect of the operation of the relevant provision in other ways before the incompatibility order comes into force. For example, where this might give rise to unfairness to individuals or other effects contrary to the public interest.

Powers in other statutes to amend former directly effective EU law

Clause 10 modifies powers contained in other statutes which may be exercised to make secondary legislation amending former directly effective EU law. Schedule 1 makes related amendments with similar effect to powers created in other statutes since EUWA 2018 was first passed. See section C for further discussion.

Removal of procedural requirements relating to certain REUL

Subordinate legislation made under section 2(2) ECA is given special protection under EUWA, with additional procedural requirements applying when it is amended or revoked by SI⁶. Clause 11 repeals these requirements so that it is easier to amend REUL.

Powers in the Bill

Clauses 12, 13, 15 and 16 create new powers to make it easier to amend REUL. Clause 17 makes amendments to an existing power to make subordinate legislation

⁶ These requirements are contained in paragraphs 13, 14 and 15 of Schedule 8 to EUWA.

contained in the Legislative and Regulatory Reform Act 2006 (LRRRA), so that the power can be used to amend RDEUL.

The powers in the Bill, combined with the downgrading of retained direct principal legislation to secondary legislation for the purpose of amendment and the removal of procedural requirements when amending REUL made under section 2(2) ECA, will make it easier for Ministers to amend or repeal this large volume of secondary legislation without the need for primary legislation. In addition, the “sunset” provisions referred to above will mean that REUL remaining on the statute book as at 11.59pm, 31 December 2023 will cease to exist, unless Ministers have exercised their powers in the Bill to preserve it as assimilated law.

C. SUMMARY OF DELEGATED POWERS IN THE BILL

The Bill (including the secondary legislation making powers, the amendments to the status of retained directly effective EU legislation and changes to procedural requirements relating to certain retained EU law) have been designed to make it easier to amend, revoke and replace REUL. The powers are also designed to deal with matters arising in relation to the proposed sunset to end REUL as a legal category at the end of 2023.

Changes to scope and procedures of existing delegated powers

Clause 10 of the Bill does not introduce new powers, but alters the scope and procedures of existing delegated powers. At clause 17, the Bill also makes amendments to an existing power provided by the LRRRA, with the effect of extending that power so that it can be used to amend RDEUL.

Clause 10 “downgrades” retained direct principal EU legislation and any directly effective rights etc. applying under section 4 EUWA 2018, so that they are treated as equivalent to domestic secondary legislation for the purpose of determining whether powers under other statutes may be exercised to amend them. This means that powers under other statutes will be capable of amending retained direct principal EU legislation or section 4 EUWA rights, whether or not those powers are also capable of amending domestic primary legislation, provided the proposed amendments are within the scope of the enabling powers in question.

Clause 10 similarly modifies such powers under other statutes, as regards to the parliamentary scrutiny procedure that applies to the exercise of the powers. By treating retained direct principal EU legislation and Section 4 EUWA rights as equivalent to domestic secondary legislation, the ‘negative’ procedure will generally apply to amendments to them made in exercise of the powers in other statutes.

Schedule 1 makes related amendments that alter parliamentary scrutiny procedure for certain powers. Part 2 of Schedule 1 makes consequential amendments, modifying references to the provisions of Schedule 8 EUWA that are amended by clause 10.

Clause 11 (procedural requirements) removes procedural requirements relating to the amendment or revocation of “subordinate legislation made under section 2(2) ECA” (as defined in paragraph 13(8) of Schedule 8 to EUWA), subject to certain exceptions. These requirements are set out in paragraphs 13, 14 and 15 of Schedule 8 to EUWA in relation to statutory instruments made by the Parliament in Westminster. Paragraph 13 requires the draft affirmative procedure to be followed in relation to certain SIs made on or after IP completion day, which would otherwise be subject to a lesser parliamentary procedure. Paragraph 14 provides for an enhanced procedure to apply to certain statutory instruments to be laid before Parliament which are made after IP completion day and paragraph 15 imposes additional scrutiny and explanation statements to be made before the SI is laid.

Clause 17 (power to remove or reduce burdens under retained direct EU legislation) amends the LRRRA to allow Ministers to use their order-making powers under that Act to amend RDEUL.

New delegated powers

The Bill establishes nine new powers; the new powers are:

- power to preserve the content of retained EU law post sunset (clauses 1(2) and 2(3));
- power to extend the date of the sunset (clause 2);
- power to set legislative hierarchies (“compatibility power”) (clause 8(1));
- power to restate retained EU law (clause 12);
- power to restate assimilated law or sunsetted EU rights, powers, liabilities etc (clause 13);

- powers to revoke or replace (clause 15);
- power to update (clause 16);
- power to make consequential provision (clause 19);
- power to make transitional and savings provision (clause 22).

Under the powers in clauses 12, 13, 15 and 16, only “secondary retained EU law” can be modified (or, as it will be known after 2023, “secondary assimilated law”). They are designed to make it easier for Ministers to amend or repeal this legislation without the need for primary legislation. “Secondary retained EU law” is defined in clause 12(2) (“power to restate retained EU law”) and includes any REUL that is not primary legislation and any REUL that is primary legislation, the text of which was inserted by subordinate legislation.

Clause 19 enables provision to be made in consequence of the Bill, including making modifications of any enactment. Clause 22 enables the making of transitional, transitory or saving provision.

Sifting procedure

A sifting procedure has been introduced at paragraph 7 of Schedule 3.

This will apply to regulations proposed to be made under the power to restate retained EU law (clause 12), under the power to restate assimilated law or sunsetted EU rights, powers liabilities etc (clause 13), and under the powers to revoke or replace (clause 15) by the negative procedure.

The procedure largely corresponds with the sifting procedure under EUWA and under the European Union (Future Relationship) Act 2020. The Government recognises the significant role Parliament has played in scrutinising instruments subject to these sifting procedures and is committed to ensuring the appropriate scrutiny of any secondary legislation made under these delegated powers in this Bill.

Under this procedure, instruments which are proposed to be subject to the negative procedure, must be laid in draft alongside a memorandum from the relevant Minister stating that in their view the negative procedure is the appropriate procedure and

giving the reasons for that opinion. A Minister will then not be able to make the instrument until both the relevant committees of the Lords and the Commons make recommendations on the appropriate procedure or when the time limit for the committees making recommendations has expired. Where either committee recommends that the instrument should follow the draft affirmative procedure, the Minister must either follow that recommendation or publish a written statement as to why they don't agree with the committee's recommendations. If 10 sitting days pass after the instrument has been laid and no recommendations are received from the committees, then the Minister may proceed to make the instrument via the chosen procedure.

A comparable "sifting procedure" is included in paragraph 10 of Schedule 3 of the Bill in respect of the Senedd Cymru. The Scottish Government are content for the Bill not to include a sifting procedure for them, on the basis that similar provisions in EUWA were not extended to Scotland. The Northern Ireland Civil Service are not in a position to seek inclusion of a sifting requirement at the moment. If political circumstances change and the Northern Ireland Executive would like a sifting requirement, this could be included at a later stage of the Bill's passage.

Devolved authorities and powers

Six of the powers being created by this Bill are conferred on the devolved authorities. This includes: the power to preserve at (clause 1); the power to ensure compatibility at (clause 8); the power to restate retained EU law at (clause 12); power to restate assimilated law or reproduce sunsetted EU rights, powers, liabilities etc at (clause 13); the powers to revoke or replace at (clause 15); and the power to update at (clause 16.) This will allow the devolved authorities to exercise those powers in areas of devolved competence (as defined in paragraph 2 of Schedule 2 to the Bill). These powers have been conferred as concurrent powers meaning that they can be used either by a Minister of the Crown or the relevant devolved authority in devolved areas, or both acting jointly, to give flexibility to ensure that the most efficient and appropriate approach to amending and replacing REUL can be taken in every situation.

Further detail about the powers provided for in the Bill

Clause 20 makes further, general provision in relation to powers to make regulations.

Subsection (1) provides that the powers in the Bill may be exercised to make different provision for different purposes or different areas. The powers may also make supplementary, incidental, consequential, transitional, transitory or saving provisions, including modifying provisions made by or under an enactment.

Subsection (5) provides that the duty to review regulatory provisions in secondary legislation under the Small Business, Enterprise and Employment Act 2015 does not apply under this Act (paragraph 13).

Schedule 2 provides that the devolved authorities can only exercise the relevant powers in areas within their devolved competence (and defines devolved competence for that purpose).

Schedule 3 of the Bill provides for the parliamentary procedure applicable to specific powers in the Bill, and provides for equivalent procedures to apply in the devolved legislatures and for joint procedures to be available when Ministers of the Crown are making regulations jointly with devolved authorities.

Part 1 of Schedule 3 also provides that:

- a. Powers to make regulations in the Act are exercisable by statutory instrument where exercised by the Minister of the Crown, by a Welsh minister or by a Minister of the Crown acting jointly with a devolved authority, or by statutory rule where the powers are exercised by a Northern Ireland department alone.
- b. Instruments containing regulations under this Act, which are subject to the draft affirmative procedure, can be combined with regulations made under other powers in this Act or other enactments that are not subject to the draft affirmative procedure. The combined instrument will be subject to the affirmative procedure.

- c. Instruments containing regulations under this Act, which would be treated as hybrid instruments for the purposes of standing orders of either House of Parliament, should be treated as though they were not hybrid instruments.

D. SUMMARY OF DELEGATED POWERS IN THE BILL

	Clause	Power conferred	Purpose	Parliamentary procedure
<i>Delegated powers in the Bill</i>				
	Clause 1(2)	Power to preserve a provision of REUL which would otherwise be subject to sunset conferred on a Minister of the Crown, Devolved Authority or Minister of the Crown acting jointly with one or more of the Devolved Authorities.	To allow the preservation of provisions of REUL as currently drafted, (without the interpretative gloss provided by EUWA) after the sunset date, as assimilated law.	Negative.
	Clause 2(1)	Power to extend the date on which specified REUL will sunset to a date no later than 23 June 2026 conferred on a Minister of the Crown.	To allow for an extension of the sunset of REUL in clause 1 for specific provisions or descriptions of legislation where necessary to implement the changes needed to the REUL. This is a Henry VIII power.	Negative
	Clause 8(1)	Power to set out legislative hierarchy between specified RDEUL and a specified domestic enactment	To allow specific domestic enactments to be read and given effect in a way which is compatible with specified RDEUL, after the abolition of supremacy of EU law,	Draft affirmative where instrument is amending primary legislation, otherwise negative.

	Clause	Power conferred	Purpose	Parliamentary procedure
		conferred on a Minister of the Crown, Devolved Authority or Minister of the Crown acting jointly with one or more of the Devolved Authorities.	where this is the desired policy effect. This is a Henry VIII power.	
	Clause 12	Power to restate retained EU law conferred on A Minister of the Crown, Devolved Authority or Minister of the Crown acting jointly with one or more Devolved Authorities.	<p>To restate in a clearer or more accessible way any secondary retained EU law. That includes the ability to consolidate REUL into a single instrument. This power cannot make substantive change to the policy effect of legislation.</p> <p>Through the restatement, the law will no longer be considered 'REUL', thereby stripping it of its interpretive provisions associated with REUL⁷, except where ministers decide to use this power to explicitly codify individual provisions.</p> <p>The power will not enable change to be made from the meaning of REUL being repealed, save only in limited instances such as for the purposes of clarification (e.g. to resolve ambiguities).</p>	<p>Negative or draft affirmative.</p> <p>Draft affirmative where instrument is amending primary legislation.</p> <p>A sifting procedure will apply to instruments that ministers propose to make under the negative procedure.</p>

⁷ Interpretive provisions include those that have effect as a result of supremacy, directly effective rights, general principles and case law.

	Clause	Power conferred	Purpose	Parliamentary procedure
			This power will be able to act on REUL until the sunset date of 31 December 2023. This is a Henry VIII power.	
	Clause 13	Power to restate assimilated law or reproduce sunsetted EU rights, powers, liabilities etc conferred on A Minister of the Crown, Devolved Authority or Minister of the Crown acting jointly with one or more Devolved Authorities.	<p>To restate in a clearer or more accessible way any secondary assimilated law. That includes the ability to consolidate assimilated law into a single instrument. This power cannot make substantive change to the policy effect of legislation.</p> <p>Through the restatement, the law will no longer be considered 'assimilated law'.</p> <p>Ministers will be able to decide to use this power to explicitly codify individual provisions associated with assimilated law.</p> <p>The power will not enable change to be made from the meaning of law being repealed, save only in limited instances such as for the purposes of clarification (e.g. to resolve ambiguities).</p> <p>The power will be capable of acting on secondary assimilated law following the sunset up to 23 June</p>	<p>Negative or draft affirmative.</p> <p>Draft affirmative where instrument is amending primary legislation.</p> <p>A sifting procedure will apply to instruments that ministers propose to make under the negative procedure.</p>

	Clause	Power conferred	Purpose	Parliamentary procedure
			2026. This is a Henry VIII power.	
	Clause 15	Powers to revoke or replace conferred on A Minister of the Crown, Devolved Authority or Minister of the Crown acting jointly with one or more Devolved Authorities.	To revoke secondary REUL, and where desired, for that REUL to be replaced with appropriate provisions that either achieve similar objectives or implement substantive policy changes. The power will be capable of acting on secondary assimilated law following the sunset up to 23 June 2026.	Negative or draft affirmative. Draft affirmative where either regulations confer a power to make subordinate legislation or create a criminal offence under 15(2) or where alternative provision is being made under 15(3). A sifting procedure will apply to instruments that ministers propose to make under the negative procedure.
	Clause 16	Power to update conferred on A Minister of the Crown, Devolved Authority or Minister of the Crown acting jointly with one or more Devolved Authorities.	To make technical updates to secondary REUL and legislation created under clauses 12, 13 or 15 of the Bill. To take account of changes in technology or developments in scientific understanding. The power will be capable of acting on secondary assimilated law following the sunset.	Negative.
	Clause 19	Consequential, provision conferred on A Minister of the Crown	To make such consequential, provision as is appropriate in connection with the coming into force of any of the provisions of the Bill.	Negative unless amending primary legislation, in which case the draft affirmative will apply.
	Clause 22	Commencement, transitional and savings provision	To make such transitional, transitory or savings provision as	No procedure.

	Clause	Power conferred	Purpose	Parliamentary procedure
		conferred on Minister of the Crown	the Minister considers appropriate with the coming into force of the Bill.	
<i>Amendments to powers in other statutes to amend retained EU law</i>				
	Clause 10	N/A	Amends status of retained direct principal legislation, so that all retained direct EU legislation is treated in the same way as domestic secondary legislation for the purposes of amendment.	N/A
	Clause 11	N/A	Removes procedural requirements which currently apply on the exercise of delegated powers to amend or revoke subordinate legislation made under section 2(2) ECA.	N/A
	Clause 17	Power to remove or reduce burdens under retained direct EU legislation conferred as set out in the LRRRA.	To enable REUL to be explicitly included in the definition of "legislation" in the LRRRA, setting out that the powers within the LRRRA can be used on RDEUL and enabling the LRO processes to be used on RDEUL.	As set out in LRRRA

E. CLAUSE BY CLAUSE ANALYSIS OF DELEGATED POWERS IN THE BILL

Delegated powers created by the Bill

CLAUSE 1(2) POWER to PRESERVE

Power conferred on:

- (a) Minister of the Crown;
- (b) devolved authority; or
- (c) Minister of the Crown acting jointly with one or more devolved authorities.

Power exercised by: Regulations made by statutory instrument.

Parliamentary Procedure: Negative procedure.

Context and Purpose

Clause 1(2) contains a power enabling UK Ministers and devolved authorities to preserve any retained EU law that would otherwise be subject to the sunset (i.e. a limited category of EU derived domestic legislation and retained direct EU legislation), so it is not repealed by the sunset provisions within the Bill. This law would still be stripped of the interpretive effects provided by EUWA, so would essentially be “assimilated” into UK domestic law. The power will be available until the sunset in 2023, or in limited cases to 23 June 2026 under the extension mechanism provided in clause 2 (see below).

This is to enable UK Ministers and devolved authorities to keep specific pieces of legislation where the legislation meets the desired policy effect without having to fully restate or otherwise amend the legislation.

Justification for taking the power

The power is required to ensure that where no change to a policy is desired, this can be done relatively simply, without requiring a full copy across of law via an SI. Without this power, significant amounts of Government and Parliamentary time and resources would be required simply to approve no change.

Justification for the procedure

The power maintains the status quo. It has no substantive effect on the operation, or interpretation of the REUL it affects and enables an expedited process to ensure clarity in the statute book, where possible.

CLAUSE 2 - POWER TO EXTEND THE SUNSET DATE

Power conferred on: A Minister of the Crown

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative

Context and Purpose

This provision allows the Government to change the date of the sunset of EU-derived subordinate legislation and RDEUL in clause 1 of the Bill to no later than 23 June 2026. The power can be used on specified pieces of REUL or descriptions of REUL. Any REUL which is not specified or does not fall into the category of REUL set out in regulations will be revoked on the original sunset date of 31 December 2023, unless preserved using the other powers in the Bill. The power to preserve conferred in Clause 1 will be extended in line with any extension to the sunset date, in relation to the REUL specified in the regulations made under this power.

Justification for taking the power

This power ensures that if the sunset needs to be extended, it can be done so under powers within the Bill, without requiring an additional Bill to amend this Bill. Such an extension may be required to fully review the changes needed to REUL, including where a decision on whether or not to preserve REUL under clause 1 cannot be made before the end of 2023. Requiring additional primary legislation to change the sunset date would be burdensome, and could cause significant legislative problems if the need for an extension is identified and no primary legislative vehicle could be used in time.

The power is limited in that while it can be used more than once it cannot extend the sunset beyond 23 June 2026.

Justification for the procedure

The power's potential impacts are limited and it is not intended for wide usage. Indeed, the power is meant as a fail-safe in case REUL reform is delayed by the parliamentary

process or extenuating circumstances. It would only apply to specific provisions of REUL, or a description or category of REUL (e.g. any REUL that is “relevant separation agreement law”). Moreover, Ministers have confirmed that they don’t intend on allowing the usage of this power without collective agreement.

CLAUSE 8 - COMPATIBILITY

Power conferred on:

- (d) Minister of the Crown;
- (e) devolved authority; or
- (f) Minister of the Crown acting jointly with one or more devolved authorities.

Power exercised by: Regulations made by statutory instruments

Parliamentary Procedure: Negative unless the power is exercised to amend primary legislation, in which case it is subject to the draft affirmative.

Context and Purpose

This power will enable the Government to specify the legislative hierarchy between specified pieces of domestic legislation and specified provisions of retained direct EU legislation, including that which is assimilated after 2023. Specifically, it will be able to give priority to certain individual pieces of retained direct EU legislation which the Government has explicitly decided to preserve using the preservation power. The power would sunset on 23 June 2026.

Justification for taking the power

This enables the government to mitigate unintended consequences associated with the end of supremacy. Specifically, the Government can maintain the current legislative hierarchy, where this is the desired policy intent, after the end of supremacy. This will ensure that, where it is desirable to do so, the UK policy environment remains constant.

Justification for the procedure

The power is limited in maintaining the current legislative hierarchy in relation to provision of REUL which the government explicitly seeks to preserve. Although the power permits amendments to primary legislation, it does not permit any substantive changes beyond specifying the hierarchical relationship between different legislative provisions. It permits no other changes to the operation, or interpretation of, of that body of law.

CLAUSE 12: POWER TO RESTATE RETAINED EU LAW.

Power conferred on:

- (a) a Minister of the Crown;
- (b) a devolved authority; or
- (c) a Minister of the Crown acting jointly with one or more devolved authorities.

Power exercised by: Regulations made by statutory instruments

Parliamentary Procedure: Negative or draft affirmative procedure, unless the power is exercised to amend primary legislation, in which case it is subject to the draft affirmative. Instruments will be subject to the sifting procedure set out above.

Context and Purpose

The purposes of this power should be viewed with the overarching aim of the Bill to end REUL as a legal category in mind. This power enables the UK to clarify, consolidate and restate legislation that is secondary REUL to preserve the effect of the current law whilst removing it from the category of REUL. “Secondary REUL” is any REUL that is not primary legislation or REUL that is primary legislation the text of which was inserted by subordinate legislation. It also provides for the codification of the effects of retained case law and EU-derived principles of interpretation where necessary to maintain the existing policy effect.

Despite it being a restatement, it should also be noted that the provisions made under the powers will not be interpreted in line with the principles of supremacy, general principles or section 6 EUWA (the application of retained case law to the interpretation of REUL), and any restatement will expressly not be retained EU law. In that sense,

the powers are not a pure “restatement”, although as a whole, relevant authorities should be able to achieve the same legal effect without relying on supremacy etc. In particular, the powers expressly provide for the ability to reproduce the effects of supremacy, retained general principles or retained case law in order to ensure the restatement has the same practical outcome.

The power may modify any enactment, including primary legislation. Although only “secondary REUL” may be codified, any restatement may be placed in primary legislation if considered appropriate, e.g. codifying retained case law that is relevant to REUL contained in primary legislation.

Limiting the power

The restatement power can be used to make changes to secondary retained EU law for the purposes of resolving ambiguities, removing doubts or anomalies and/or improving the clarity or accessibility of the law. This power cannot substantively change the policy effect of legislation. Once the power has been used, the legislation it has been used on will no longer be REUL. Therefore it will not be subject to either EUWA’s interpretative gloss or the sunset procedure. The usage of this power will also prevent the power being used upon any restatement itself, and prevent the usage of the powers to revoke or replace on this legislation.

Although the power can to some extent reproduce the “effects” of supremacy or general principles, it cannot reproduce supremacy or general principles themselves. The power is prevented from providing that all enactments are subject to what is restated. The power cannot recreate EU interpretation rules, but instead must rely on traditional domestic statutory techniques and rules of interpretation to achieve the same policy outcomes.

This power would not allow the function or substance of legislation to change nor introduce substantive policy change. The power would be sunset at the end of 2023. A similar power is available after 2023 (and until 2026 only) in clause 13.

Justification for taking the power

The power is required to ensure legal certainty in areas of REUL where policy is not intended to immediately change following the UK's exit from the European Union. It is needed to ensure that where the current desired policy effect of legislation is dependent on an interpretative effect provided by EUWA 2018, that that effect can be transposed into UK law. This will both ensure that where it is desirable to do so, the UK policy environment remains constant with minimal legislative effort, as well as improving the clarity of UK legislation. This means the power is limited as it cannot make policy changes, but is beneficial in improving the clarity of the law. The power is also desirable to ensure that the law may be made clearer and more accessible, improving legal certainty.

In light of the proposed sunset in the Bill, various aspects of interpretation for existing legislation will fall away potentially impacting on the function of the law. As such, this power enables Ministers and devolved authorities to provide policy consistency where desired whilst implementing the ending of REUL as a legal category.

Justification for the procedure

Where primary legislation is being amended the power is subject to the affirmative procedure. In other instances there is flexibility in there being a choice between the draft affirmative procedure or the negative procedure, which means that Ministers or devolved authorities can decide to use the draft affirmative procedure where they feel that this is more appropriate in the relevant circumstances.

In cases where the negative procedure is chosen, there is a safeguarding measure of the sifting procedure⁸. This is similar to that which applies to the exercise of the power under section 8 EUWA whereby the Minister must make a statement explaining this choice, and a committee in each of the Houses must give a recommendation on which procedure should be used. This affords additional scrutiny to the use of this power, whilst retaining the flexibility of using the negative procedure where there are good reasons for doing so.

⁸ For more detail about the sifting procedure see the appropriate section of this memo.

CLAUSE 13: POWER TO RESTATE ASSIMILATED LAW OR REPRODUCE SUNSETTED EU RIGHTS, POWERS, LIABILITIES ETC

Power conferred on:

- (a) a Minister of the Crown;
- (b) a devolved authority; or
- (c) a Minister of the Crown acting jointly with one or more devolved authorities.

Power exercised by: Regulations made by statutory instruments

Parliamentary Procedure: Negative or draft affirmative procedure, unless the power is exercised to amend primary legislation, in which case it is subject to the draft affirmative. Instruments will be subject to the sifting procedure set out above.

Context and Purpose

The power achieves a similar policy effect as Clause 12, except that it acts on “assimilated law” and can operate after the sunset date. The power itself will sunset on 23 June 2026. As above, this power enables the UK to clarify, consolidate and restate assimilated legislation to preserve the effects of law whilst removing it from the category of assimilated law. Assimilated law will already have been stripped of the interpretive effects of supremacy, directly effective rights and general principles by virtue of clauses 3 - 6 of the Bill at the end of 2023. The power further provides, however, that section 6 EUWA (i.e. the application of retained EU case law) will not apply to any restatement of assimilated law.

The power, however, provides for the reproduction of the “effects” of retained case law and EU-derived principles (such as supremacy, general principles, directly effective EU rights) of interpretation — even if these provisions no longer have effect by the time this power is used (i.e. either having been disapplied generally at the end of 2023, or - in the case of the application of section 6 EUWA and retained case law - expressly disapplied by the power). The purpose is to enable departments to achieve the same policy outcome as the REUL had prior to the end of 2023, and the same scope as the restatement power in Clause 12.

Limiting the power

Similar limitations apply as for Clause 12, except that power will sunset on 23 June 2026.

Justification for taking the power

As with Clause 12, the power is required to ensure legal certainty in areas of REUL where policy is not intended to immediately change following the UK's exit from the European Union. It ensures that the UK Government can continue to act to maintain current policy effect (*i.e.*, as of today) after the sunset date and before 23 June 2026, to mitigate any unintended consequences associated with the sunset and the end of the special status of REUL on 31 December 2023.

Justification for the procedure

Where primary legislation is being amended the power is subject to the affirmative procedure. In other instances there is flexibility in there being a choice between the draft affirmative procedure or the negative procedure, which means that Ministers or devolved authorities can decide to use the draft affirmative procedure where they feel that this is more appropriate in the relevant circumstances. Regulations that are proposed to be subject to the negative procedure will be subject to sifting in Parliament. This procedure is consistent with the approach set out at Clause 12 and is justified by the same rationale—see above for details.

CLAUSE 15: POWERS TO REVOKE OR REPLACE

Power conferred on:

- (a) a Minister of the Crown;
- (b) a devolved authority; or
- (c) a Minister of the Crown acting jointly with one or more of the devolved authorities.

Power exercised by: Regulations made by statutory instrument.

Parliamentary Procedure: There is a choice between negative and affirmative procedure under subsection (1) and (2) subject to sifting, unless a delegated power or criminal offence is being created under subsection (2), in which case it will be subject to the affirmative procedure. Where subsection (3) of the power is used to make alternative provision, the procedure must be affirmative. Additional scrutiny requirements apply if a Minister of the Crown or a Welsh Minister decides a negative procedure is most appropriate for the instrument in question. This scrutiny procedure is discussed above.

Context and Purpose

This power gives the UK Government and the devolved authorities the ability to revoke their REUL or assimilated law, and to replace it if they wish to do so. The replacement provision can either achieve the same or similar objectives (under subsection 2), or implement new provisions with different objectives as the Minister (or devolved authority) considers appropriate (under subsection 3). The power can be exercised on whole instruments or provisions within instruments, as necessary to achieve policy objectives. The power will be available for use on “assimilated” secondary law following the sunset at the end of 2023 up to 23 June 2026.

Justification for taking the power

The power is required for the following key reasons:

- a. **EU-derived laws still form part of the UK’s domestic legal framework:** The UK is no longer part of the EU Single Market or the EU Customs Union and is therefore no longer bound by its laws and regulations. Government departments are keen to make changes to the EU-derived laws and obligations that still form part of the UK’s legal system in the form of REUL, either by removing them from the statute book or by replacing that legislation with new provisions that are more fit for purpose now that the UK has left the EU. Parliament has already voted for and enacted a form of Brexit that allowed for significant regulatory divergence, so this power builds upon that decision to

allow for departure from the EU acquired acquis where it is in the UK's best interests to do so and therefore capitalise on the benefits of Brexit.

- b. Inappropriateness of relying on primary legislation:** A significant amount of REUL is technical in nature, such as eco-design requirements of white goods, or the rules to accessing vehicle emissions data. For these pieces of REUL, primary legislation is clearly inappropriate, as matters similar to these are dealt with via secondary legislation in non-REUL scenarios. The power is required as there are approximately 3,200 pieces of retained EU law, including RDEUL, that the Government may wish to replace with legislation more suited to the UK's needs. Doing so purely through sector specific primary legislation would take a significant amount of Parliamentary time. For instance, the Procurement Bill, a large reforming Bill, is repealing 4 pieces of REUL containing 350 regulations. Without this power, and relying purely on primary legislation to address these issues would take decades and would likely result in them never being addressed or suitably adjusted to meet the UK's needs.

- c. Lack of powers to amend REUL:** The Retained EU Law Substance review has indicated a distinct lack of subordinate legislation making powers to remove REUL from the UK statute book where appropriate, and if required replace that provision with legislation that is more fit for purpose for the UK. Had the UK never been a member of the EU, many of the areas identified by the substance review would likely already have similar powers to comparable non EU policy areas to amend. The lack of powers is therefore an oddity created by our EU membership and it is appropriate to take a power that covers the gap that this has created as sectoral specific primary legislation cannot be passed in a timely enough manner to ensure these regulations are made suitable for the UK.

Where there are existing powers to amend REUL, these often contain constraints so that they are not able to be used to modify departments' REUL. For example, section 8 of EUWA provided a broad power to amend any REUL, for the purpose of addressing technical deficiencies in the application of REUL. A political commitment was made during the passage of EUWA stating that this power would not be used to make significant policy changes, preventing

departments from replacing those EU-derived laws for new provision that is more appropriate for the UK.

- d. Equivalent or Higher Level of Scrutiny:** REUL that this power can replace initially either came into force in the UK with the scrutiny of secondary legislation or with no UK Parliamentary scrutiny if it was directly effective EU law. It is therefore appropriate that the first initial change only to this legislation can be done via secondary legislation. Requiring that these policy areas should now be subject to primary legislation when they were not created using primary legislation would be a marked reduction in the UK's legislative dynamism. This would potentially hinder the UK's ability to regulate adequately. This would have knock-on effects to the UK economy and the UK's competitiveness in the medium to long term until new primary legislation was able to be passed across all areas where REUL has been identified.

Limiting the power

Although the power is wide, it does contain some important safeguards. It is time limited so that it cannot be exercised beyond 23 June 2026. The power is also implicitly limited to one usage, as replacement provisions made under the power will no longer be REUL when used on secondary REUL, or assimilated law when used on assimilated secondary law. Once it has replaced the REUL or assimilated law with domestic legislation, the power can then not be used on that domestic legislation. This makes it so the legislation is not an endless power for the Government, rather it is to adapt the body of REUL into a body of domestic legislation fit for the needs of the UK at which point any further changes would need to be enacted via primary legislation.

The individual limbs of the power are also restricted. Subsection (2) is limited such that any replacement legislation must be appropriate and must fulfil same or similar objectives as the REUL or assimilated law that it is replacing. This limits the functionality of this limb of the power to essentially adjusting existing policy to better fit the UK context, rather than radically departing from the existing legislation.

Whilst subsection (3) does not have such a limitation, it may still only provide “alternative” provision to the REUL or assimilated law being replaced. Any replacement legislation must therefore cover similar ground to the REUL or assimilated law being replaced (though may seek to achieve different objectives). This means that the power cannot be used to create new regulations in wholly unrelated policy areas.

Where authorities are revoking REUL or assimilated law and replacing them with new provision, existing powers in the revoked provision can be replicated in the replacement provisions, however no new powers to make subordinate legislation can be created. Where there are financial penalties or criminal offences in the REUL or assimilated law being replaced, the power can create corresponding civil penalties and criminal offences which are the same or broadly similar to the existing ones, but cannot create new penalties or offences. Similarly the power provides for the continuity of existing taxes or public authorities which were imposed or established by the REUL or assimilated law being replaced, but does not permit the imposition or increase of taxes or creation of public authorities.

The power is further restricted so that any replacement provision made under it may not increase the regulatory burden. Clause 15(10)) sets out a non-exhaustive list of what would be considered a regulatory burden, including provisions which would have a financial cost, cause administrative inconvenience, create an obstacle to efficiency, productivity or profitability or impose a sanction which affects the conduct of lawful activity. Provision for voluntary schemes or requirements are not considered regulatory, as creation of and participation in such schemes or meeting of such requirements is not mandatory.

The power is not a Henry VIII power, so it is not capable of amending primary legislation (save only to the extent that primary legislation has been amended by subordinate legislation) (see definition of ‘secondary retained EU law’⁹).

The power is impliedly restricted so that it cannot, amongst other things:

⁹ For the meaning of ‘Secondary retained EU law’ see clause 12(2) and 15(10).

- amend the Human Rights Act 1998;
- amend the devolution settlements¹⁰;
- make retrospective provision;
- subdelegate.

Justification for the procedure

Where legislation is made under 15(2) and either replicates a delegated power or a criminal offence existing in the REUL being replaced, or where it is made under 15(3) the draft affirmative procedure must be used. Other than that, there is flexibility in there being a choice between the draft affirmative procedure or the negative procedure under subsections (1) and (2), which means that Ministers or devolved authorities can decide to use the draft affirmative procedure where they feel that this is more appropriate in the relevant circumstances

Subsection (3) of the clause is subject only to the affirmative procedure, so changes to policy objectives must be actively approved by Parliament. This is to reflect the scope of the power, and that it may change the overarching objective of a policy.

In cases where the negative procedure is chosen, there is a safeguarding measure of the sifting procedure¹¹. This is similar to that which applies to the exercise of the power under section 8 EUWA whereby the Minister must make a statement explaining this choice, and a committee in each of the Houses must give a recommendation on which procedure should be used. This affords additional scrutiny to the use of this power, whilst retaining the flexibility of using the negative procedure where there are good reasons for doing so.

CLAUSE 16: POWER TO UPDATE

Power conferred on:

- (a) Minister of the Crown;
- (b) devolved authority; or

¹⁰ The Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006

¹¹ For more detail about the sifting procedure see the appropriate section of this memo.

(c) Minister of the Crown acting jointly with one or more devolved authorities.

Power exercised by: Regulations made by statutory instrument.

Parliamentary Procedure: Negative.

Context and Purpose

This power enables UK Ministers and devolved authorities to amend any ‘secondary retained EU law’¹² (or, after the 2023 sunset, secondary “assimilated” law) and regulations made under the powers to restate (clause 12 & 13) and the powers to revoke or replace (clause 15) in this Bill, to take account of changes in technology or developments in scientific understanding. This power enables UK Ministers and devolved authorities to amend the body of law remaining after the sunset date of 2023, as well as regulations made under the powers to restate and the powers to revoke or replace in this Bill.

There are a number of areas where it is desirable to update REUL on a regular basis in order to ensure it is effective over time. This includes modifications of REUL to reflect advances in technology and developments in scientific knowledge that happen over time. Many of these amendments could have previously been achieved through the exercise of section 2(2) of the European Communities Act (“ECA”) 1972 or via the direct flow of legislation from the EU via directly effective EU law. However, following the UK’s departure from the EU, the power within the ECA is no longer available to amend legislation on the UK statute book. Accordingly, the power within the Bill is required to facilitate such updates.

This power will allow UK Ministers and devolved Ministers to make regulations to update REUL, in order to fulfil these specific purposes. The power is not intended to make significant policy changes, but is only intended to make relevant technical updates to REUL for these specific purposes. The power is designed to be used more

¹² For the meaning of ‘Secondary retained EU law’ see clause 12.

than once, so it can continue to be used on the same piece of legislation as multiple advances in science and technology take place over time.

Justification for taking the power

The power is required for the following key reasons:

- a. **Future scientific developments and technological advances:** The power is necessary to ensure that UK legislation can be updated to reflect future advances in science and technology. These are matters that by their nature cannot yet be known or legislated for, but when these advances do happen the power will ensure that government departments can efficiently update their REUL to reflect these advances, without the need for primary legislation, reducing the pressure on parliamentary time. This was previously accomplished either by the direct effect of EU law, or the usage of a section 2(2) power. As such, now requiring primary legislation to make these amendments would be a marked reduction in the UK's legislative dynamism and would potentially hinder the UK's ability to regulate adequately. This would have knock on effects to the UK economy and the UK's competitiveness.
- b. **Practicality:** The Retained EU Law substance review showed a lack of subordinate legislation making powers with the scope to make technical amendments to REUL for these purposes. This is because while the UK was an EU member, departments had previously relied upon section 2(2) of the ECA for implementation or on the direct effect of UK law. The power conferred by section 8 of EUWA, used in some instances by the UK Government to make these kinds of changes, is due to expire on 31 December 2022 (and was, in any case, limited to remedying specified deficiencies in REUL). In the absence of these, departments have been left without the ability to update these technical standards and regulations. This power seeks to address this.

The power will be exercised by UK Ministers and devolved authorities, enabling them to make the necessary amendments to the statute book to ensure it remains up-to-date and functional in their respective areas of competence. Without this power, there is the risk that technical standards that are referred to

in secondary legislation and other REUL become “orphaned” on the statute book, with no further ability to change them. For key REUL policy areas this would pose significant risks to the success of the policy which often depends on frequent technical updates, and would place pressure on the legislative programme to address these potential deficiencies via primary legislation. In time, we would anticipate this power being superseded by sector specific legislation.

Limiting the power

The changes made under the power will be limited to making amendments that are considered by a relevant national authority (i.e. a UK Minister or devolved authority, or both acting jointly) to be “appropriate to take account of changes in technology or developments in scientific understanding”. What is considered an “appropriate” amendment for the purposes of changes in technology or developments in scientific understanding will be a judgement for the UK Minister and/or the devolved authority . Such scientific or technological advancements must be relevant to the REUL being amended and in line with policy the REUL being amended was designed to achieve.

The power is not a Henry VIII power, so it is not capable of amending primary legislation (save only to the extent it has been amended by subordinate legislation)¹³.

The power is impliedly restricted so that it cannot, amongst other things:

- amend the Human Rights Act 1998;
- amend the devolution settlements¹⁴;
- make retrospective provision;
- subdelegate;
- impose or increase taxation;
- create or amend criminal offences.

¹³ For the meaning of ‘Secondary retained EU law’ see clause 12.

¹⁴ The Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006

The power is also restricted by usual public law restrictions to act reasonably and take into account relevant factors only. This restriction means that UK Ministers and devolved authorities can only make amendments to legislation that are relevant to the particular technological or scientific advancement they are legislating for.

Justification for the procedure

The power is limited to making amendments that are considered by an authority to be “appropriate to take account of changes in technology or developments in scientific understanding”. Given this, any provisions are expected to only make minor, technical amendments, and so it is subject to the negative procedure.

There are no affirmative triggers on the face of the Bill because the power is already restricted in a number of ways. As a result, it is not possible to make certain provisions where use of the affirmative procedure might be expected. For example, the power is not capable of creating or widening criminal offences which is sometimes a trigger for the affirmative procedure¹⁵.

CLAUSE 19: POWER TO MAKE CONSEQUENTIAL PROVISION

Power conferred on: A Minister of the Crown

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative, except when amending primary legislation when the draft affirmative procedure will apply.

Context and Purpose

This clause enables a Minister of the Crown to make regulations as he or she considers ‘appropriate’ as a consequence of the Bill.

¹⁵ For example, paragraph 1(2) of Schedule 7 to EUWA mandated the affirmative procedure when creating or widening a relevant criminal offence. Another example is seen in section 31 of the European Union (Future Relationship) Act 2020 where

Clause 6 clarifies that the power to make provision under clause 19 also includes the ability to amend EUWA in consequence of retained EU law being renamed “assimilated law”.

Justification for taking the power

A power to make consequential provision is a power commonly taken in Bills to deal with any small additional changes that are necessary in consequence of the changes contained in that Bill. As a result of changes made in this Bill there are likely to be consequential amendments required to ensure that the statute book functions appropriately.

While the Government has endeavoured to include those consequential provisions identified on the face of the Bill (in Part 2 of Schedule 1), it is prudent that the UK Government takes a power to deal with consequential amendments or modifications that may only be identified at a later date to provide legal certainty and clarity to citizens and businesses.

Justification for the procedure

The consequential power is subject to the negative procedure, or the draft affirmative procedure where primary legislation is being amended. Such an approach is justified because the consequential power, like consequential powers in other primary legislation, will be construed strictly by the courts and, in effect, to making the minimum amendments necessary to reflect the provisions of the Act or instrument concerned. In particular there will be a presumption against substantive changes that interfere with rights and liberties¹⁶.

CLAUSE 22: POWER TO MAKE COMMENCEMENT, TRANSITIONAL AND SAVINGS PROVISION

Power conferred on: A Minister of the Crown

Power exercised by: Regulations made by statutory instrument

¹⁶ Ye Olde Cheshire Cheese Ltd v Daily Telegraph Plc [1988] 1 W.L.R. 1173

Parliamentary Procedure: No procedure

Context and Purpose

This clause contains a standard power for a Minister of the Crown to bring provisions of the Bill into force through commencement regulations. Clause 22 specifies which provisions of the Bill come into force on the day the Bill gains Royal Assent. For the remaining provisions, the Minister of the Crown is empowered by subsection (3) to appoint the day, or different days, on which they come into force.

The clause also contains power to make transitional, transitory or saving provisions in connection with the coming into force of any of the provisions of the Bill, the revocation of anything by clause 1 (sunset of EU derived subordinate legislation and retained direct EU legislation), or anything ceasing to be recognised or available in domestic law as a result of clause 3 (sunset of retained EU rights, powers, liabilities etc).

Justification for taking the power

Some parts of the Bill may need to be commenced earlier than others. Where provisions are not expressly commenced upon Royal Assent by clause 22(1), the Minister of the Crown is able to make commencement regulations for the provisions when needed.

The transitional, transitory and savings power is a standard power to make transitional, transitory and saving provision in connection with the bringing into force of provisions in the Bill. This is a power commonly taken in Bills, its purpose is to ensure a smooth transition of affairs under the law as it currently stands and the law as it will stand after the provisions of the Bill come into force.

Justification for the procedure

It is usual for commencement regulations to not be subject to parliamentary procedure. Parliament has already scrutinised and given its consent to the substance of the provisions by voting on the Bill. Commencement regulations enable the provisions to be brought into force at the appropriate time.

The transitional, transitory and savings power is subject to no procedure as is normal practice for such a power. There is recent precedent for this type of power to attract no procedure, for example in section 41 of the European Union (Withdrawal Agreement) Act 2020, in section 6(4) of the Direct Payments to Farmers (Legislative Continuity) Act 2020, section 26 of the Business and Planning Act 2020 and section 39 of the European Union (Future Relationship) Act 2020.

Powers in other statutes to amend retained EU law

CLAUSE 10 SCOPE OF POWERS

Context and Purpose

Approximately over 50% of REUL is retained *direct* EU legislation (RDEUL). This includes EU Regulations. At present, much of this can only be amended by primary legislation or Henry VIII powers. Downgrading the status of RDEUL so that it can be amended by ordinary powers to amend secondary legislation (including the proposed powers in the Bill, see above) will save parliamentary time. The downgrading of the status of RDEUL is only for the purposes of amendment and does not change the status of this law in any other way.

This clause amends Schedule 8 EUWA removing three restrictions on the use of powers to make secondary legislation in a way that amends RDEUL or rights and obligations under section 4 EUWA:

- the restriction that some existing powers may only be used to amend retained direct principal EU legislation or section 4 EUWA rights if they are also capable of being exercised to amend domestic primary legislation;
- the restriction that, where an existing power is exercised in order to amend retained direct principal EU legislation or section 4 EUWA rights, the parliamentary scrutiny procedure applying to exercises of the power amending domestic primary legislation must be applied;
- the restriction that existing powers not capable of amending primary legislation may only be used to amend retained direct EU legislation in ways that are consistent with retained direct principal EU legislation or Section 4 EUWA rights.

The clause also introduces Schedule 1 to the Bill, which makes amendments to provisions of primary legislation containing powers to make secondary legislation amending RDEUL. The amendments reflect the removal of the three restrictions.

Overall, the change in status will make it possible to amend or repeal a greater amount of RDEUL using secondary legislation, which will enhance the ability for amending RDEUL more quickly without the need for primary legislation. This is a more proportionate status for RDEUL, as when made it was not subject to the same degree of UK Parliamentary scrutiny as an Act of Parliament or even domestic secondary legislation. It is proportionate therefore not to treat RDEUL the same as a UK Act of Parliament for the purposes of amendment. Additionally, significant amounts of RDEUL is technical in nature, and is therefore better seen as being equivalent to secondary legislation in content and therefore more suited to be subject to similar amendment procedures.

CLAUSE 11 PROCEDURAL REQUIREMENTS

Context and Purpose

Clause 11 repeals paragraphs 13 to 15 of Schedule 8 to EUWA, removing additional procedural requirements which apply when subordinate legislation made under section 2(2) ECA is amended or revoked. Now that section 2(2) ECA has been repealed, amendments or revocations that are made to subordinate legislation made under that section are made under other, existing powers. These existing powers have their own Parliamentary procedure attached which means that those amendments or revocations are still being scrutinised by Parliament. The requirements in paragraphs 13-15 add an additional layer of Parliamentary scrutiny.

However, no tangible benefit has been identified as a result of these extra requirements, and in practice they add a layer of complexity which makes it difficult for users of legislation containing section 2(2) ECA provisions that are being amended to determine which scrutiny procedures apply and it takes up valuable Parliamentary time. Given Parliament has already decided the scrutiny procedures for the exercise of these other powers, it is unnecessary for extra protections to be given to subordinate

legislation made under section 2(2) ECA, which is in contrast to legislation made under other powers.

The removal of these requirements reflects the main purpose of the Bill, which is to take a new approach to REUL, removing the precedence given in the law of the UK to law derived from the EU that is not considered fit for purpose now that the UK is no longer an EU Member State. This is in contrast to the position at the time of the Parliamentary passage of EUWA, which contains the requirements, the main purpose of which was to preserve REUL to ensure a functioning statute book on IP completion day.

CLAUSE 17 POWER TO REMOVE OR REDUCE BURDENS UNDER RETAINED DIRECT EU LEGISLATION

Power conferred on: A Minister of the Crown¹⁷

Power exercised by: Legislative Reform Order

Parliamentary Procedure: Negative, affirmative or super affirmative route including committee report and possible parliamentary debate

Context and Purpose

This provision amends the Legislative and Regulatory Reform Act 2006 (“LRRRA”) to explicitly include “any retained direct EU legislation” (“RDEUL”) in its definition of legislation.

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Presently, there is uncertainty whether the LRO process set out in the LRRRA is open to reforming RDEUL. This amendment to the LRRRA would explicitly include RDEUL, enabling Ministers to utilise the LRO process for RDEUL.

¹⁷ Clause 17 in the Bill amends the Legislative and Regulatory Reform Act (“LRRRA”) 2006. It does not change who the power to use a Legislative Reform Order (“LRO”) is conferred on, exercised by or its parliamentary procedure.

Justification for taking the power

This amendment to the LRRRA 2006 by the Bill explicitly confirms that the existing parliamentary framework of LROs extends to RDEUL such that the powers within the LRRRA can be exercised on RDEUL through the current procedures and scope of the LRO process (i.e. to make legislation removing or reducing burdens resulting from RDEUL). The delegation has not fundamentally changed through this amendment. There is no reason to exempt RDEUL from the LRO process, and this functions as an update rather than a fundamental change to the LRO process.

Justification for the procedure

The procedures involved in the LRO process have not been amended and therefore this is an appropriate measure for LROs featuring RDEUL. The negative, affirmative and super-affirmative procedures will all apply to RDEUL as they apply to all other legislation.

Department for Business, Energy and Industrial Strategy

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