Retained EU Law (Revocation and Reform) Bill 2022

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Dr Emily Hancox, University of Bristol

1. This briefing outlines the key provisions of the Retained EU Law (Revocation and Reform) Bill 2022 (henceforth the 'REULRR Bill') and draws attention to the legal consequences.

Retained EU law: Aims and Categories

2. The UK Government decided to preserve the content and some of the effects of EU law following Brexit to ensure 'a functioning statute book'.[1] The EU Withdrawal Act (EUWA) 2018 provided for continuity by essentially taking a snapshot of the law in force on 31 December 2020 (implementation period completion day) and providing for this picture to continue. The EUWA granted UK Ministers and Ministers of the devolved governments the power to deal with 'failures' or 'deficiencies' in retained EU law.[2]

3. Retained EU law is a category of domestic law linked by its origins in EU law. It is not a cohesive category because it includes laws with differing domestic status as well as directly applicable EU laws. There are three broad categories of retained EU law:

    a. *EU-derived domestic legislation*: This category includes Acts of Parliament, Acts of the Scottish Parliament, and subordination legislation that gave effect to, or related to, the UK's EU law obligations.[3]

    b. *Retained direct EU legislation*: directly effective EU law including regulations, decisions and non-legislative acts.[4]

    c. *Other EU law preserved by section 4 EUWA*: other directly effective provisions of Union law such as rights found in the EU Treaties, general principles of EU law, and some non-implemented directives.[5]

Sunsetting Retained EU Law

4. The REULRR Bill provides for the 'sunset' of almost all retained EU law—including retained EU law modified under the EUWA 2018[6]—at the end of 2023.[7] It creates a new deadline whereby, unless UK Ministers or Ministers of the devolved governments save

[1] Explanatory Notes to the European Union (Withdrawal) Act 2018, para 10.
[2] EUWA 2018, section 8.
[3] EUWA 2018, sections 1B(7), 2.
[4] EUWA 2018, section 3.
[5] EUWA 2018, section 4.
[6] REULRR Bill 2022, clause 1(4).
[7] REULRR Bill 2022clauses 1, 3 and 5(2).

specific provisions of retained EU law, they will cease to form part of the statute book.

5. The key exclusion from the sunsetting clauses is retained EU law found in Acts of Parliament—such as the Equality Act 2010 and the Health and Safety at Work Act 1974 – as well as Acts of the Scottish Parliament and other devolved legislatures. Anything referred to in Schedule 1 of the Financial Services and Markets Bill is also excluded.[8]

6. The UK Government *alone* has the power to extend the sunset date up until 23 June 2026.[9] However, the UK and devolved governments (in non-reserved areas) have the power to 'save': (1) statutory instruments implementing EU obligations and (2) retained direct EU law i.e. converted regulations, decisions and tertiary legislation. There is no power to reverse the sunsetting of the general principles of EU law or retained EU law preserved by section 4 EUWA i.e. directly effective provisions of Union law such as rights found in the EU Treaties, general principles of EU law, and some non-implemented directives.[10] However, it is possible for UK Ministers or Ministers of the devolved governments to restate, reproduce or replace those rights.[11]

7. Any retained EU law that is saved will become known as 'assimilated law' from the end of 2023. This appears to be the case even following an extension of the sunset date.

8. The consequences of the sunset provisions are hard to predict because it will depend on which instruments, or provisions within instruments, are saved. It appears that the Bill requires a piecemeal approach and the power in clause 1(2) does not appear to allow UK Ministers or Ministers of the devolved governments to save whole categories of retained EU law.

9. There is somewhat greater certainty when it comes to the implications of clauses 3 and 5(2) abolishing retained EU law preserved by section 4 EUWA and the general principles of EU law. All such provisions will expire (although they may be restated or replaced). However, it is important to note that the retained EU law dashboard is clearly incomplete regarding this category of retained EU law. Currently, the dashboard identifies only 28 items of 'Directly effective rights incorporated under section 4 EUWA' and suggests that only one of those has been repealed. Several items appear to be mischaracterised. Furthermore, there are omissions such as Article 157 TFEU on equal pay between men and women (although cases interpreting that provision are included) and the general principles of EU law.

10. It should also be noted that abolishing the general principles of EU law may be damaging from the perspective of fundamental rights protection. The EU Charter of Fundamental Rights does not form part of retained EU law. Justifying this exclusion, the UK Government noted that 'The Charter did not create new rights, but rather reaffirmed rights and principles which already existed in EU law.'[12] The EUWA 2018 thus opted to save the rights and principles codified by the Charter such as those found in the general

[8] REULRR Bill 2022, clause 22(5).
[9] REULRR Bill 2022, clause 2.
[10] REULRR Bill 2022, clauses 3, 5(2).
[11] REULRR Bill 2022, clauses 12, 13 and 15.
[12] Explanatory Notes to the EUWA 2018, para 106.

principles of EU law. Any references to the Charter in the case law of the European Court of Justice were to be read as if they were references to corresponding principles.[13] While this may ensure a replication of Charter rights in terms of content, the EUWA 201 downgraded the role and remedial consequences of invoking EU fundamental rights. Under the EUWA, general principles are unable to found a cause of action and cannot be relied upon to disapply incompatible domestic law.[14] The consequences of this downgrading are already clear in *Beattie.*[15] With the removal of general principles, unless their effects are restated, fundamental rights protection may be further weakened.

Abolishing the supremacy of retained EU law

11. The principle of the supremacy is a constitutional principle governing the relationship between EU law and national law. As developed by the European Court of Justice, the principle requires national courts to interpret their national law, so far as is possible, in a manner compatible with EU law.[16] Should an EU-compatible interpretation not be possible, the European Court of Justice requires that national courts disapply the conflicting provision of national law.[17] Importantly, the supremacy operates in relation to all national law, regardless of its status and whether adopted before or after the inconsistent EU law. Whereas should a conflict arise between e.g. two Acts of the UK Parliament, the more recent would prevail.

12. The supremacy of EU law—in the sense understood by the European Court of Justice—has already come to an end. Acts of the UK and devolved parliaments adopted from the end of 2020 take precedence over all conflicting retained EU law. What the EUWA 2018 did was to preserve the legal position for pre-2021 domestic enactments and retained EU law. It did so to ensure legal certainty and continuity.

13. Under the REULRR Bill, from the end of 2023, the principle of supremacy 'is not part of domestic law … in relation to any enactment or rule of law (whenever passed or made)'.[18] The key impact of this provision is that domestic law will no longer be disapplied where incompatible with retained direct EU law.

14. Retained direct EU law consists of retained direct principal EU law and retained direct minor EU law. The former has a status close to primary law, and the latter a status close to secondary law. If retained direct EU law was given the status of primary law then, following the UK's usual conflict rule,[19] the more recent would apply (if between e.g. an Act of the UK Parliament and retained direct principal EU law). The REULRR Bill essentially gives all retained direct EU law a subordinate status. According to the Bill, retained direct EU law must be 'read and given effect in a way which is compatible' with domestic law and is 'subject to all domestic enactments, so far as it is incompatible with

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[13] EUWA 2018, section 5(5).
[14] EUWA 2018, Schedule 1 and Schedule 8, para 39(5).
[15] *Secretary of State for Work and Pensions v Beattie* [2022] EAT 163 ("Beattie") who, instead, correctly at [135] applies the reasoning that I set out above in relation to section 4 of the EU(W)A:
[16] Case C-573/17 *Popławski II* EU:C:2019:53*,* para 57.
[17] *Popławski II,* para 58.
[18] REULRR Bill 2022, clause 4(1).
[19] This is known as the doctrine of implied repeal, see *Ellen Street Estates v Minister of Health* [1934] 1 KB 590, 595-97.

them'.[20] The intention behind this provision appears to be to make the remaining retained EU law subject to *all* domestic enactments even if adopted prior to the relevant retained EU law.

15. The UK Government and Ministers of the devolved governments have the power to reverse the abolition of the supremacy principle in relation to specified provisions of domestic and retained direct EU law.[21] Given that again this power can only be recognised in relation to domestic enactments 'so specified', all possible inconsistencies will need to be identified. The exercise of this power will be aided by the requirement that courts make an 'incompatibility order' where a conflict arises between retained EU law and domestic enactments.[22] In making an incompatibility order, courts will also have the power to set out the conflict and to delay, remove or limit its effects.[23]

16. In its Explanatory notes, the UK Government considers that clause 4(1) will also remove 'the principle of consistent interpretation in relation to all domestic legislation'.[24] The principle of consistent interpretation, otherwise known as the *Marleasing* principle of interpretation,[25] is grounded upon the principle of sincere cooperation (Article 4(3) TEU)[26] as well as the principle of supremacy.[27] It is thus unclear that abolishing the principle of supremacy will remove the *Marleasing* principle. In *Re Allied Wallet*, the High Court treated the principle of consistent interpretation as part of 'retained case law',[28]ine which will still bind domestic courts by when interpreting retained EU law. Removing the principle of supremacy may thus only alter the possibility of disapplication, a power rarely used by UK courts.

17. Were the *Marleasing* principle effectively removed by clause 4(1), the consequences are difficult to predict. Given that domestic courts have historically attempted, in the first instance, to interpret domestic law compatibly with EU law the effects of this change may be widespread and difficult to predict. One survey of domestic case law identified over 600 cases referencing *Marleasing*.[29] Furthermore, the power to reinstate the previous relationship between provisions found in clause 8 only exists in relation to retained direct EU law. It thus does not appear capable of reinstating the requirement of consistent interpretation. The effects of the *Marleasing* principle may, however, form part of a restatement of retained or assimilated EU law.[30]

18. The consequences of the removal of the supremacy principle are again hard to predict because of the specific power to reinstate the existing legal position. There is a real risk of strategic litigation seeking to revive legislation not explicitly repealed. There may also

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[20] REULRR Bill 2022, clause 4.
[21] REULRR Bill 2022, clause 8.
[22] REULRR Bill 2022, clause 9.
[23] REULRR Bill 2022, clause 9(3).
[24] Explanatory Notes to the Retained EU Law (Revocation and Reform) Bill, para 86.
[25] With regards to, Case C-106/89 *Marleasing* EU:C:1990:395.
[26] See *Marleasing,* para 8.
[27] Case C-573/17 *Popławski II* EU:C:2019:53*,* para 57.
[28] *Re Allied Wallet* [2022] EWHC 402 (Ch), [57].
[29] S Drake, 'The UK perspective on the principle of consistent interpretation' in Franklin (ed.), *The Effectiveness and Application of EU and EEA Law in National Courts* (2018 Intersentia) pp. 213-256 at 215.
[30] REULRR Bill 2022, clauses 12-13.

be attempts to reopen previously settled questions of interpretation.

Interpretation of retained EU law

19. Under the EUWA 2018, distinct interpretative rules apply to the whole category of retained EU law. The meaning, validity and effect of any retained EU law is to be determined with reference to the 'retained case law', 'retained general principles of EU law' and with regard to the limits of EU competences.[31] Retained case law encompasses decisions of the European Court of Justice and of domestic courts relating to retained EU law handed down before the end of 2020. Specific courts could depart from decisions of the European Court of Justice following the test applied by the UK Supreme Court when departing from its own case law i.e. 'where it appears right to do so'.[32]

20. The REULRR Bill removes the requirement to interpret retained EU law in light of the general principles of EU law.[33] Interpretation in light of general principles may be viewed as part of 'retained case law', similar to the argument raised above in relation to the *Marleasing* principle. If not, the effects may be wide-ranging unless the relevant general principles are replicated in common law principles.

21. The REULRR Bill adds new factors for specified courts—including the UK Supreme Court, the High Court of Justiciary, the Court of Appeal and the Inner House of the Court of Session—to consider when deciding whether to depart from retained case law. The specific courts are instructed to consider the following:

    a. the fact that decisions of a foreign court are not binding;

    b. any relevant change of circumstances; and

    c. the extent to which the retained EU case law restricts the proper development of domestic law.[34]

    First instance courts and tribunals remain bound by retained case law, but will have the power to refer the question to a higher court.[35]

22. The intention is seemingly to make it more likely that domestic courts will depart from retained case law. In the Explanatory notes, this revised test is said to reflect the factors considered by the Court of Appeal in *TuneIn* when deciding whether to depart from retained EU case law.[36] Given that in that case the Court of Appeal was following the case law of the Supreme Court on when it may 'appear right to do so' it is unclear that it will introduce a significant change.

23. It is also a simplification to treat clause 7(3) as codifying the decision in *TuneIn.*

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[31] EWUA 2018, section 6.
[32] 1966 Practice Statement [1996] 3 All ER 77.
[33] REULRR Bill 2022, clause 5(3).
[34] REULRR Bill 2022, clause 7(3).
[35] REULRR Bill 2022, clause 7(8).
[36] *TuneIn v Warner* [2021] EWCA Civ 441.

Discussion in *TuneIn* largely concerned reasons for *not* departing from retained case law. The reference to foreign courts here is a particular misnomer; Arnold LJ in *TuneIn* did consider it helpful to consider the approach of jurisdictions *besides* the EU given that 'the statutory framework differs in those countries and the case law cannot be said to offer settled or consistent guidance' to the court.[37] By way of contrast, he pointed to the CJEU's long history and experience in interpreting the relevant provisions of retained EU law. There were also several factors mentioned by the Court of Appeal in *TuneIn* that militated *against* departing from retained case law most notably legal certainty.[38]

Powers to restate, revoke, replace and reduce retained EU law

24. All preceding implications of the Bill must be read in the light of the delegated legislative powers to restate, reproduce, revoke, replace, update or reduce certain retained EU law or assimilated law. While the Bill does not confer the power to 'save' all retained EU law from the sunsetting provisions, there are no similar exclusions from the powers to restate, reproduce or replace.

25. The powers conferred by the REULRR Bill are able to be exercised jointly, in areas of devolved competence, by the UK Government and the Governments of Scotland, Wales or Northern Ireland. The Bill makes no provision for any consent mechanism should the UK Government seek to act in areas of devolved competence.

26. The following powers cannot be relied upon to modify retained EU law found in primary law.

Restatement of retained EU law or assimilated law.

27. Clauses 12 and 13 grant powers to restate or reproduce retained or assimilated law. Restatement need not use the same 'words or concepts',[39] and changes may 'resolve ambiguities', 'remove doubts or anomalies' or improve 'clarity or accessibility.[40] The restatement may codify retained case law as well as effects stemming from the principle of supremacy, the general principles of EU law, or EU primary law. Codification of case law is always tricky and, where different interpretations are possible, may allow Ministers to choose which is preferable.

28. Restated or reproduced law is not retained or assimilated law. A key consequence of this recategorization is that the special interpretative rules for retained EU law will no longer apply.

Revoke and/or replacing retained EU law

29. Clause 15 allows for the revocation and/or replacement of retained EU law. Replacement is a wider power than restatement; the restated provision can pursue the 'same' or 'similar objectives'. The power may be used to confer secondary lawmaking

[37] At [82] per Arnold LJ.
[38] At [83] per Arnold LJ, and at [202] per Sir Geoffrey Vos M.R.
[39] REULRR Bill 2022, clause 14(2).
[40] REULRR Bill 2022, clause 14(3).

powers on Ministers, to confer functions, recreate a criminal offence or provide for the imposition of monetary penalties. Any replacement may not, however, 'impose taxation', 'establish a public authority', or 'increase the regulatory burden'.

30. Replacement provisions are again no longer retained or assimilated law.

Update retained EU law

31. Clause 16 grants a power to update retained EU law to take account of 'changes in technology' or 'developments in scientific understanding'.

Remove or reduce burdens in retained EU law

32. Clause 17 grants the power to remove or reduce burdens created by retained direct EU law.