RETAINED EU LAW (REVOCATION AND REFORM) BILL
REMARKS TO THE BAR EUROPEAN GROUP, 19.10.22
Jonathan Jones KC (Hon)

1. Background: why do we have retained EU law?

I was working for the government at the time of the EU referendum in 2016. One of the earliest conversations I had after the referendum was about the legal structures we would need to secure a legally orderly exit from the EU. It was clear that we would need some way of carrying forward the large body of EU law which had become part of our domestic law during the period of our membership, if we were to avoid major gaps and uncertainty in the law when we left.

The result was the EU Withdrawal Act 2018. It created the concept of retained EU law. It provided (in summary) that EU law, as it had effect in the UK at the end of the transition/implementation period, was to continue as part of UK national law – until parliament chose to change it of course. The 2018 Act also said that this law was to continue to be interpreted in the same way as previously, so EU case law was also retained along with the principles established by that case law, and the doctrine of supremacy under which EU law – now retained EU law – prevails over any (other) inconsistent national law.

At the same time it was recognised that some retained EU law would need to be adapted so as to work once the UK had left the EU – to reflect the fact we were no longer a member state but a third country, remove or change references to the EU institutions and some of the other terminology, and ensure the law worked technically. So the 2018 Act contained a power for Ministers to make regulations to deal with "deficiencies" in retained EU law – to make the necessary technical and terminological changes. Many hundreds of sets of regulations were made to do that.

The aim overall was to make the minimal changes necessary for the law to work but otherwise to secure as much legal certainty, predictability and continuity as possible, and therefore minimal (legal) disruption to businesses, consumers and other users of the law.

By and large this has worked. Whatever you think of Brexit the *legal* process has been tolerably smooth. There has been very little litigation about the meaning of retained EU law. The 2018 Act and the regulations made under it by and large gave businesses and citizens the legal certainty they needed.

Bear in mind all this was sanctioned by an Act of the UK Parliament. Retained EU law is now UK domestic law.

Now we've left the EU, obviously Parliament can change any aspect of retained EU law it wants (subject to the UK's international law obligations). The normal way of

doing that would be for the government to bring forward a Bill on any particular policy area; perhaps consult on it; members of both Houses would debate it and be able to table amendments to it; when enacted it would become law and the UK courts would give effect to it.

2. Uncertainty

The Retained EU Law Bill takes a very different approach. Instead it asks Parliament to take the whole block of retained EU law in one go (the explanatory notes to the Bill say this amounts to over 2,400 pieces of REUL); provides that it all automatically expires unless Ministers decide otherwise; changes the way in which it is to be interpreted; and gives very wide powers for Ministers to amend or replace it. It also says that any retained EU law which survives this process becomes "assimilated law".

To expand on that.

Clause 1 provides that most retained EU law expires at the end of 2023, unless Ministers decide to retain it. That deadline can itself be extended by Ministers, by regulations, for specific legislation or categories of legislation, to any date up to 23 June 2026. So there is not even any certainty about the sunset date.

The explanatory notes (para 17) say that "the sunset gives businesses certainty by setting the new date by which a new domestic statute book, tailored to the UK's needs and regulatory regimes will come into effect".

But as noted there is in fact no certainty about the date (because it can be moved). And there can be no certainty about which elements of retained EU law Ministers will decide to retain, or amend, or replace. The explanatory notes (technically thorough and helpful though they are) give no indications of any particular legal or policy areas which the government thinks should either be retained or changed.

So at the time of passing this Bill neither Parliament, nor businesses nor anyone else, can know what the law will be by the end of 2023 in any area currently covered by retained EU law, which of course spans much of the statute book and the whole period of our membership of the EU. This is all treated as "Brussels red tape". It will all go (at least nominally) and we have no way of knowing what, if anything will replace it.

That will require much work by civil servants – to determine which aspects of this law should be kept, which should be changed – within a very tight timetable entirely of the government's choosing. The default position is that, if no conscious decision is made to keep a particular piece of REUL (with or without amendments), or if indeed a particular piece of REUL is missed by accident, it will automatically expire on the sunset date, with no further involvement by Parliament at all. But at the moment we simply don't know what will happen to any particular law.

The other area of uncertainty arises from the abolition of the principle of supremacy of EU law (cl 4); the abolition of the general principles of EU law (cl 5); and greater provision for the UK courts to depart from prior EU case law (cl 7). These are very complex provisions, which may be partly symbolic, in that they distance or detach domestic law from the previous trappings of EU law; but they are also undoubtedly intended to change the way the law is actually interpreted and applied (otherwise why do it?).

Consider for example the test for whether a "higher court" can decide to depart from retained EU case law. The Bill extends the range of UK courts which may do this. The court must have regard (among other things) to:

- Any change of circumstances which are relevant to the retained EU case law.
- The extent to which the retained EU case law restricts the proper development of domestic law.

These are highly subtle tests which will draw the courts into essentially policy judgments. But again no examples are given of particular areas of law or factual situations where such a change is intended to have effect. Again we don't know. It will be left to parties to litigate and the courts to decide. There is no legal certainty.

3. The scope of the powers conferred on Ministers

These include:

- A power to move the sunset date from the end of 2023 to any date up to 23 June 2026 for particular legislation or categories of legislation (cl 2)
- Power to restate secondary retained EU law (including a complex power to provide that effects equivalent to supremacy and EU law principles continue to apply to it …) (cl 12)
- Power to restate assimilated law or reproduce sunsetted retained EU rights, powers and liabilities etc (cl 13)
- In doing that the Minister can use different words from the original REUL and make any changes they think appropriate for resolving ambiguities, doubts or anomalies (cl 14)
- Power to revoke secondary REUL without replacing it (cl 15(1))
- A particularly wide power to revoke and replace REUL with such alternative provision as the Minister considers appropriate (cl 15(3)). (Can't increase the overall regulatory burden (cl 15(5), and see the other limitations on the power in cl 15(4))
- Power to update any secondary REUL in any way the Minister thinks appropriate to take account of changes in technology or developments in scientific understanding (cl 16).

These are very wide powers to revoke, restate and amend large parts of the statute book. Part 3 of Schedule 3 sets out the parliamentary procedure which is to apply. In some cases these require a debate in both Houses, in some not. As is well known there is no power to amend an SI, so even if there is a debate the choice is either take it or leave it. But it any case the consequences of rejecting a “bad” SI may be worse than approving it – given that the default position under the Bill is that, unless preserved, REUL falls away altogether at the sunset date.

The breadth of powers conferred on Ministers and the lack of parliamentary scrutiny of their exercise is a familiar theme. It came to the fore in the covid legislation, it arises in many other Bills including the NI Protocol Bill currently before parliament. I’ve written about it, the Hansard Society is doing a big project on it, and two Lords Committees have published highly critical reports on the subject. But this Bill is an extreme example.

Overall summary. The Bill opens the way to major changes to the way in which REUL operates, or ceases to operate, in our domestic law. But it doesn’t of itself make any substantive legal or policy change. That is all left to the decisions of Ministers (or to the automatic sunset provision in clause 1 if Ministers don’t do anything), and to the courts in the way they approach the changed rules on the status and interpretation of REUL. It gives major powers to the executive, largely leaves parliament on the sidelines, and creates great uncertainty as to what the law will actually be.

Jonathan Jones
19.10.22