

Legislative Consent Memorandum

The Retained EU Law (Revocation and Reform) Bill

Introduction

1. This memorandum has been lodged by Angus Robertson MSP, Cabinet Secretary for the Constitution, External Affairs and Culture, under Rule 9B.3.1(a) of the Parliament's standing orders. The Retained EU Law (Revocation and Reform) Bill ("**the Bill**") was introduced in the House of Commons on 22 September 2022. The Bill can be found at the UK Parliamentary website.¹

Background

EU law in the UK

2. During the UK's period of EU membership, EU law applied in the UK. The legislation which gave effect to EU law in the UK was the European Communities Act 1972 (the "**ECA**"), in particular section 2 of that Act which made provision for the "General implementation of the EU Treaties". Section 2(1) provided that all "rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties" were to have legal effect in the UK and be part of the UK's legal system. Section 2(2) of the ECA (together with Schedule 2) conferred a power on government Ministers to make regulations to implement any of the UK's EU obligations or to otherwise give effect to EU law (where it didn't already have effect by virtue of section 2(1)).

3. The ECA therefore provided for a comprehensive application of EU law in the UK: where EU legislation had direct effect it applied automatically under section 2(1) and all other EU legislation could be given effect by section 2(2).

4. During the UK's membership of the EU, the European Commission would plan, prepare and propose new European laws. The Commission would then submit a legislative proposal to the European Parliament and the Council of the European Union, which – after discussion, negotiation and amendment - agreed on the text for it to become EU law.

5. National governments and the European Commission are responsible for seeing that those laws passed are then implemented. The two most common forms of EU legal act are Regulations and Directives. Both Regulations and Directives are legally binding, and both are applicable to all members of the EU (although they can be specifically addressed to particular Member States rather than them all). This applied to the UK when it was a Member State.

¹ [Retained EU Law \(Revocation and Reform\) Bill - Parliamentary Bills - UK Parliament](#)

6. As a Member State, the UK had the opportunity to shape the policymaking process through its representation in the European Parliament and Council. Over the course of the UK's 47-year membership, EU law influenced a wide range of areas of UK law, including agriculture, financial services, the environment, employment and immigration. For example, UK employees have benefitted from the introduction of the Working Time Directive.

7. On 12 May 1999, the Scottish Parliament was reconvened in accordance with the wishes of the people of Scotland expressed in the referendum on Scottish devolution held in 1997. The Scottish Parliament is established under the Scotland Act 1998 ("**the Scotland Act**"). Under the terms of the Scotland Act, the Scottish Parliament is empowered to legislate generally for Scotland, but may not legislate for "reserved matters". Reserved matters are those areas which are specified as being the responsibility of the UK Parliament. They include foreign affairs, defence and most economic policy.² Other areas of governance in Scotland, such as health, justice, education, and agriculture/fisheries, are within the legislative competence of the Scottish Parliament.

8. Through devolution, the Scottish Parliament and the Scottish Government became responsible for EU law in devolved areas. Indeed, the Scottish Parliament was expressly prohibited from legislating in a manner which would be contrary to EU law.³ The power in section 2(2) of the ECA to implement EU obligations became exercisable by the Scottish Ministers in devolved areas.⁴

9. Engagement between the devolved and UK Governments in respect of areas where policy making impacted upon devolved competence were set out in a concordat⁵ on EU policy development between the UK and Devolved Administrations. This acted as the underpinning on which inter-UK engagement would take place by which to influence EU policy development.

10. This committed to the full and continuing involvement of Scottish Ministers and officials in the processes of policy formulation, negotiation and implementation, for issues which touch on devolved matters, while emphasising the need to respect the pursuit of a single UK policy line.

11. In practice, this would involve devolved Government representatives working directly within EU groups and contributing directly to EU initiatives, in particular in areas of significant interest to Scotland such as environmental management and protection, research, common fisheries and international further education. Although reflection of the Scottish Government position was variable in terms of the establishment of a common UK line, our direct involvement played a significant role in influencing the EU position in a number of key areas, ensuring Scotland's devolved position was reflected and Scottish expertise was well respected by EU counterparts.

² A full list of reserved matters is set out in Schedule 5 of the Scotland Act.

³ This constraint was provided by the reference to "EU law" in section 29(2)(d) of the Scotland Act which has now been repealed.

⁴ See section 53 of the Scotland Act.

⁵ Concordant on European Union Policy Issues, Supplementary agreement to Memorandum of Understanding on Devolution between the UK Government and Devolved Administrations.

12. The UK voted to leave the EU in a referendum held on 23 June 2016. On 31 January 2020 (“**exit day**”) the United Kingdom left the EU under the terms of the UK/EU Withdrawal Agreement.⁶ This provided for a transition period during which EU law continued to apply in the UK. At 11:00 p.m. on 31 December 2020 (“**IP completion day**”) the transition period ended and EU law (as such) ceased to have effect in the UK. Simultaneously with the end of the transition period, the main substantive provisions of European Union (Withdrawal) Act 2018 (“**EUWA**”) came into force. Sections 2, 3 and 4 of EUWA established a new body of law in the UK known as retained EU law (“**REUL**”).

Retained EU law

13. REUL is a snapshot of the EU law which applied in the UK on 31 December 2020, IP completion day.

14. REUL is divided into three categories. The first category is known as “EU-derived domestic legislation” and is established under section 2 of EUWA. This is any domestic law which implemented the UK’s EU obligations during its period as a Member State. The majority of this legislation is regulations made under section 2(2) of the ECA by UK Ministers, the Scottish Ministers or the ministers of other devolved governments. However, any legislation which was enacted for the purpose of implementing EU law or otherwise for a purpose “relating otherwise to the EU or the EEA” is EU-derived domestic legislation. There were cases when EU obligations were implemented by primary legislation and this constitutes EU-derived domestic legislation. It also includes regulations made using non-ECA powers.

15. The second category is known as “retained direct EU legislation” and is established under section 3 of EUWA. This is the body of EU legislation which had direct effect in the UK immediately before IP completion day. It is mainly EU Regulations but any legislation with direct effect was caught (for example, Decisions addressed to the UK). EU legislation which did not apply in the UK or which was not in force on IP completion day did not become retained direct EU law.

16. The third category of retained EU law is established by section 4 of EUWA. This comprises rights which existed in, and were directly enforceable under, the EU Treaties in the UK.

17. The final component of retained EU law is retained case law. Retained case law comprises judgments of courts which relate to anything which is retained EU law by virtue of sections 2, 3 and 4 of EUWA and were issued prior to IP completion day. Judgments both of the UK’s courts and of the Court of Justice of the European Union (“CJEU”) are retained case law although they are subject to different treatment. Case law developed after IP completion day is not part of retained EU law. The general rule is that retained EU law must be interpreted in accordance with retained case law. Section 6 of EUWA sets out when retained case law may be departed from.

⁶ The agreement, titled the “Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community” is available here: <https://www.legislation.gov.uk/eu/withdrawal-agreement/contents/adopted>

Only certain courts may depart from retained case law. Initially in Scotland it was only the Supreme Court and the High Court of Justiciary which could do so but this was subsequently extended to include the Inner House.

18. A further distinction within EU law is that some of it is reserved and some of it is devolved, falling within the legislative competence of the Scottish Parliament. Indeed, REUL encompasses many regulations made under section 2(2) of the ECA for Scotland by Scottish Ministers and scrutinised by the Scottish Parliament, or made on a UK-wide basis by UK Ministers with the agreement of the Scottish Ministers.

19. The status of retained EU law in the UK's legal systems is governed by EUWA. Section 5(2) retains the principle of supremacy of retained EU law over pre-IP completion day enactments (the principle does not apply in relation to post-IP completion day enactments). This means that where there is a conflict between retained EU law and domestic law passed before IP completion day, the retained EU law will prevail. Section 7 and Schedule 8 of EUWA set down rules as to how retained EU law can be amended and how it interacts with domestic law.

20. Section 8 of EUWA confers a power on UK Ministers to amend or revoke retained EU law to address "deficiencies". Schedule 2 confers a corresponding power on the Scottish Ministers and other devolved governments. The power has been used to amend retained EU law so that it functions outside of the European Union. It cannot be used to update retained EU law for future policy or technical requirements. The deficiency power will expire shortly - two years after IP completion day, 31 December 2022 (section 8(8) of EUWA).

21. The scheme set out for REUL in EUWA was intended to provide a stable and consistent legal framework on EU exit, including the treatment of precedent - the concept of supremacy and the general principles of EU law - and allow for any reform of these areas of law to be done in an orderly and considered manner.

Content of the Retained EU Law (Revocation and Reform) Bill

22. The Explanatory Notes which accompany the Bill set out the UK Government's view on its purpose and effect. These state that the main purpose of the Bill is to "remove the precedence of 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 the UK statute book".

23. The Bill makes the following provision, which significantly alters the application of EUWA as described above:

Sunset of retained EU law

24. The Bill provides that the majority of retained EU law will be brought to an end, removing its effect in domestic law. This is referred to in the Bill and Explanatory Notes as a “sunset” of retained EU law.

25. Clause 1 of the Bill provides that retained EU law which falls into either of two categories is revoked at the end of 2023. These are “EU derived subordinate legislation” and “retained EU direct legislation”. Detail of the scope of this revocation (including an explanation of these terms) is provided in the Annex. Essentially, the sunset will cover domestic law which implemented EU obligations and is retained EU law under section 2 of EUWA (with the exception of provisions in Acts of the Scottish Parliament and other primary legislation) and EU law which had direct effect in the UK before IP completion day and became retained EU law under section 3 of EUWA.⁷

26. Clause 1(2) of the Bill sets out how retained EU law may be preserved. “A relevant national authority” may make regulations to specify that all or part of a piece of retained EU law is not to be revoked (and so remain in force after the end of 2023). As regards devolved matters in Scotland, the appropriate national authority is the Scottish Ministers or Ministers of the Crown (UK Government Ministers) either separately or acting together. Only UK Ministers may decide to preserve retained EU law which relates to reserved matters.

27. Clause 2 of the Bill allows for the possibility of an extension of the sunset for specified instruments or classes of instrument to a date no later than 23 June 2026 at the discretion of Ministers of the Crown; this power is not exercisable by Scottish Ministers.

28. Clause 3 of the Bill provides a further sunset by repealing section 4 EUWA by the end of 2023. This will bring to an end the rights which were retained under that section. There is no provision enabling anything retained under section 4 to be preserved and the sunset date cannot be extended.

“Assimilation” of retained EU law

29. The preceding provisions of the Bill provide for the sunset of retained EU law unless it is specifically preserved. Where retained EU law is preserved it will remain on the statute book and the Bill makes changes to its status within the legal system. The Bill and Explanatory Notes refer this as “assimilation”.

30. Clause 4 of the Bill abolishes the principle of supremacy of EU law over pre-IP completion day enactments. Under current arrangements, where there is a conflict between a provision in retained EU law and a provision in domestic law which was enacted prior to IP completion day, retained EU law will prevail. The Bill switches the hierarchy of this position.

⁷ Other matters excluded from the sunset are “Northern Ireland legislation” and certain financial services rules, regulations and requirements which are not relevant for this memorandum.

31. Clause 8 enables a relevant national authority to make regulations to disapply the removal of supremacy in respect of the relationship between specified pieces of retained EU law and domestic law (therefore maintaining the status quo).

32. Clause 5 of the Bill abolishes the retained general principles of EU law which are currently relevant for interpreting retained EU law.

33. These changes are effected by amendments to EUWA which come into effect at the end of 2023. There is no provision to allow them to happen at a later date even if the sunset provision of clause 1 is extended. Clause 6 provides that retained EU law will become known as “assimilated” law from then on.

Interpretation of retained EU law

34. At present, EUWA enables certain senior courts to overrule (and depart from) retained case law. In Scotland these courts are the Supreme Court, the Inner House of the Court of Session and the High Court of Justiciary. The Bill seeks to make it easier for them to do so and creates new routes for questions about retained case law to come before them.

35. Clause 7 changes the criteria which the superior courts must take into account when deciding to depart from retained case law. It also creates a new referral procedure whereby the lower courts (or the Law Officers of governments across the UK) may make references to the superior courts for a determination about departing from retained case law.

Modification of retained EU law

36. The Bill is intended to make retained EU law easier to amend. At present EUWA provides a scheme setting out how retained EU law can be departed from. This varies between “retained direct principal EU legislation” (as mentioned, largely EU Regulations) and “retained direct minor EU legislation”. The former category requires either primary legislation or specific powers in secondary legislation to amend. The latter may be amended by secondary legislation generally.

37. Clause 10 and Schedule 1 of the Bill makes modifications to EUWA which will remove the protected status of retained principle EU legislation so that it can be amended in the same way as retained minor EU legislation. Clause 11 removes certain procedural requirements which currently must be satisfied before retained EU law can be modified.

Powers related to retained EU law and assimilated law

38. Clauses 12 to 16 confer a number of new powers to make changes to retained EU law.⁸ In devolved areas these powers are conferred on the Scottish

⁸ Clause 17 confers a power on UK Ministers to “reduce or remove burdens”. It does so by extending the existing power in section 1 of the Legislative and Regulatory Reform Act 2006 to include retained EU law. It cannot be exercised in areas of devolved competence and so is not relevant for this memorandum.

Ministers and Ministers of the Crown. Following the sunset of retained EU law, these powers will be exercisable in relation to preserved retained EU law (which will then be known as “assimilated law”). The new powers will enable Ministers to make the following changes to retained EU law/assimilated law: restate (clauses 12, 13 and 14), revoke with or without replacement (clause 15) and update (clause 16). The revocation power is additional to the “sunset” and is exercisable, including by UK Ministers, ahead of the sunset date and up to 23 June 2026.

Provisions which relate to Scotland

39. The Bill applies to Scotland in its entirety. The Bill is a relevant Bill within Rule 9B.1.1 of the Standing Orders of the Scottish Parliament as it makes provision applying to Scotland for purposes within the legislative competence of the Parliament; it makes provision which alters the legislative competence of the Scottish Parliament; and it makes provision which alters the executive competence of the Scottish Ministers.

40. The clauses of the Bill which require the legislative consent of the Scottish Parliament are:

- a) Clause 1: Sunset of EU-derived subordinate legislation and retained direct EU Legislation,
- b) Clause 2: Extension of sunset under section 1,
- c) Clause 3: Sunset of retained EU rights, powers, liabilities etc.,
- d) Clause 4: Abolition of supremacy of EU law,
- e) Clause 5: Abolition of the general principles of EU law,
- f) Clause 6: “Assimilated law”,
- g) Clause 7: Role of courts,
- h) Clause 8: Compatibility,
- i) Clause 10: Scope of powers,
- j) Clause 12: Power to restate retained EU law,
- k) Clause 13: Power to restate assimilated law or reproduce sunsetted retained EU rights, powers, liabilities etc.,
- l) Clause 14: Power to restate or reproduce: General,
- m) Clause 15: Powers to revoke or replace,
- n) Clause 16: Power to update,
- o) Clause 19: Consequential provision,
- p) Clause 20: Regulations: General
- q) Clause 21: Interpretation,
- r) Schedule 1: Amendment of certain retained EU law,
- s) Schedule 2: Regulations restrictions on the powers of devolved authorities,
- t) Schedule 3: Regulations: procedure.

41. Full details of the provisions which require legislative consent are set out in the Annex.

42. In a letter to the Cabinet Secretary for the Constitution, External Affairs and Culture dated 22 September 2022, the Secretary of State for Business, Energy and Industrial Strategy set out the UK Government’s views on which clauses of the Bill

require the consent of the Scottish Parliament. These clauses are listed in a table in the Explanatory Notes published alongside the Bill. There are a number of clauses which the Scottish Government considers to require the legislative consent of the Scottish Parliament, but which the UK Government does not.⁹ These clauses are included in this Legislative Consent Memorandum as the Scottish Government considers them to be relevant provisions under Rule 9B of the Scottish Parliament's Standing Orders.

Recommendation on legislative consent

43. The Scottish Government believes that the Parliament should not give consent to the Bill for three reasons. Firstly, the Bill's deregulatory agenda poses risks to important protections and high standards. Secondly, it significantly undermines devolution. And thirdly, the Scottish Government believes that the sunset approach brings significant risk to the coherence of the statute book, and that the proposed 2023 date for sunset is impractical and unachievable, imposing unrealistic burdens on both government and Parliamentary resources to complete the necessary work to preserve REUL in the available time.

Deregulation

44. The Scottish Government does not believe that REUL should be sunsetted in Scotland or indeed the UK as a whole. EU law provides for high standards across a range of important areas including devolved matters, such as the environment and agriculture, and reserved matters such as employment law. The Bill risks 47 years of these protections gained via EU membership, and could usher in a deregulated race to the bottom, for society and economy. This is clearly at odds with the wishes of the vast majority of the people of Scotland, 62% of whom voted to remain part of the EU in 2016 and maintain these benefits of membership. Polling from August 2022 shows that support for EU membership has risen since 2016, with 69% saying they would vote to rejoin the EU.

45. The Scottish Government has therefore requested that the UK Government exclude devolved areas of REUL from the sunset, and other areas of the Bill that would impact on the coherence of the application of REUL in Scots law, such as the principle of supremacy.

Respect for devolution

46. A currently drafted, the Bill is another example of a UK Bill that gives UK Ministers powers to act in devolved areas without a formal legal requirement for consent from Scottish Ministers, accountable to the Scottish Parliament for the exercise of that consent. Both the Scottish Government and the Scottish Parliament have made clear their increasing concern at the UK Government taking more of such

⁹ These are: clause 4 (Abolition of supremacy of EU law), clause 5 (Abolition of the general principles of EU law), clause 6 ("Assimilated law"), clause 19 (Consequential provision), clause 20 (Regulations: general), clause 21 (Interpretation), and Schedule 1 (Amendment of certain retained EU law).

powers in Westminster legislation, without the consent of the Scottish Parliament, as they undermine democratic accountability and responsibility for devolved matters.

47. There are no practical or legislative bars to a formal consent requirement which would allow the flexibility to make GB or UK-wide instruments where that is agreed to be best, while recognising and respecting devolution.

48. An example of a recent Westminster Bill where the legislative consent convention was duly respected, and where arrangements were agreed that gave devolved administrations full control over devolved matters was the UK Coronavirus Act 2020. The Scottish Parliament gave legislative consent to the Bill on 24 March 2020, including that the Scottish Ministers had sole authority to decide when temporary devolved, Scottish provisions should be expired, suspended or extended. Key temporary powers included public health protection powers and provision for telephone registration of deaths which were essential to Scotland's response to coronavirus. This demonstrates that the case for giving UK Ministers sole or concurrent powers over devolved, Scottish matters is not made simply because the legislative context is sensitive or complicated. In line with Scottish Ministers' commitment to expire temporary provisions that are no longer necessary, all temporary devolved Scottish provisions of the UK Coronavirus Act 2020 have now expired.

49. The Scottish Government has requested the UK Government amends the Bill to include a statutory consent requirement for UK Ministers' use of the powers in relation to devolved matters in or as regards Scotland. The Scottish Government also believes that, if the Bill is passed, UK and Scottish Ministers should have broadly equivalent powers for example in extending the sunset for specified REUL, a power that rests solely with UK Ministers in the current version of the Bill.

Practical issues

50. The 31 December 2023 sunset date for over 2,400 pieces of REUL creates an unacceptably high risk that vital standards and protections are not properly considered and may, through oversight, disappear overnight at the end of the period. The Scottish Government considers this to be a reckless way to proceed with this crucial legislative framework, and that, if passed in this form, the Bill will create extremely significant burdens on both government and Parliament, potentially jeopardising other elements of the legislative programme and Parliament's work.

Conclusion

51. The Scottish Government believes that the Parliament should not give consent to the Bill for three reasons: its deregulatory agenda; its undermining of devolution; and the risk posed by the sunset provision to automatically repeal this body of law unless Ministers take legislative action and the date of sunset which will disrupt Scottish Government work, including the legislative programme.

Scottish Government
November 2022

Annex

Retained EU Law (Reform and Revocation) Bill: requirement for legislative consent

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

1. Clause 1(1) of the Bill revokes EU-derived subordinate legislation and retained direct EU legislation at the end of 2023. EU derived subordinate legislation is defined in clause 1(4) as:-

“any domestic subordinate legislation so far as

- (a) it was made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972, or
- (b) it was made, or operated immediately before IP completion day, for a purpose mentioned in section 2(2)(a) of that Act (implementation of EU obligations etc.)

and as modified by any enactment”

2. The revocation applies to everything which is retained EU law by virtue of section 2 of EUWA with the exception of primary legislation. The majority of retained EU law in this category comprises regulations made by UK Ministers, the Scottish Ministers or the ministers of other devolved governments under the power in section 2(2) of the ECA. However, the revocation is wider than those instruments and subordinate legislation made under those powers is within scope if it falls into the description of subheading (b). This includes subordinate legislation made under other powers for the purpose of implementing EU law and subordinate legislation which was made for another purpose but which was functioning to implement EU law on IP completion day.

3. Retained direct EU legislation takes its meaning from section 6(7) of EUWA.¹⁰ It is “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”.¹¹ Any EU legislation which forms part of retained EU law is retained direct EU legislation. There is also a body of retained direct EU legislation which has been created after IP completion day by the exercise of powers conferred in retained EU law.

4. The revocation in clause 1(1) is subject to a number of exclusions. As the Bill applies in Scotland, the primary exclusion is set out in clause 1(2). This clause provides that the revocation “does not apply to an instrument, or a provision of an

¹⁰ See Schedule 1 of the Interpretation Act 1978.

¹¹ It also includes a limited body of EU law which was retained on exit day by the Direct Payments to Farmers (Legislative Continuity) Act 2020.

instrument, that is specified in regulations made by a relevant national authority”.¹² In devolved areas, the Scottish Ministers are a relevant national authority as are Ministers of the Crown. This clause confers a power on the Scottish Ministers to specify in regulations (either alone or jointly with Ministers of the Crown) EU-derived subordinate legislation and retained direct EU legislation to be excluded from the revocation and so remain on the statute book. The Scottish Ministers may specify entire instruments or parts of instruments. Paragraph 2 of Schedule 2 provides that the Scottish Ministers may only make regulations which are within devolved competence.

5. Prior to IP completion day, section 29(2)(d) of the Scotland Act 1998 provided that it was outwith the legislative competence of the Scottish Parliament to make provision which was incompatible with EU law. On IP completion day this restriction was removed. Instead, a new restriction on competence was inserted by section 12(1) of EUWA which provided that the Scottish Parliament could not modify any retained EU law specified in regulations made by the Secretary of State within the period of 2 years from IP completion day. The power of the Secretary of State to do so expired without any such regulations being made and the restriction was removed from section 29(2)(d).¹³

6. In contrast to the position of the Scottish Parliament during the period of the United Kingdom’s membership of the EU, incompatibility with retained EU law is not a constraint on the legislative competence of the Scottish Parliament. The Scottish Parliament may modify, including by revocation and repeal, retained EU law in devolved areas. Clause 1(1) of the Bill applies to EU-derived subordinate legislation and retained direct EU legislation in devolved areas and the Scottish Parliament would have the power to revoke that body of law. This clause is within the legislative competence of the Scottish Parliament.

7. Separately, the power to specify instruments in clause 1(2) to be excluded from the revocation is conferred on the Scottish Ministers and so is a modification of the executive competence of the Scottish Ministers.

Clause 2: Extension of sunset under section 1

8. Clause 2(2) confers a power conferred on Ministers of the Crown to modify the date of the revocation in clause 1 to be a date no later than 23 June 2026. The exercise of this power has the effect of delaying the revocation of EU-derived subordinate legislation and retained direct EU legislation to the date specified.

9. For the reasons set out above, the revocation of retained EU law in devolved areas is within the legislative competence of the Scottish Parliament. The conferral of the power to specify a date of the revocation is also within the legislative competence of the Scottish Parliament.

¹² Clause 1(5) provides an exclusion for subordinate legislation which is “Northern Ireland legislation” and clause 23(5) provides that the revocation does not apply to certain financial services regulations, rules and requirements. These exclusions are not relevant for the purposes of this LCM.

¹³ See the European Union (Withdrawal) Act 2018 (Repeal of EU Restrictions in Devolution Legislation, etc.) Regulations 2022

Clause 3: Sunset of retained EU rights, powers, liabilities etc.

10. This clause repeals section 4 of EUWA. The effect of this will be to cease the effect in domestic law of anything retained by that section. Section 4 of EUWA retained “rights, powers, liabilities, obligations, restrictions, remedies and procedures” which were recognised and enforceable under section 2(1) of the ECA immediately before IP completion day (often referred to as “directly effective rights”).

11. Like clause 1, this clause is described as a “sunset of retained EU law” but it operates in a different manner than the revocation in clause 1. Whereas that clause revoked retained EU law while maintaining the legal effect of sections 2 and 3 of EUWA, this clause effects the sunset by repealing section 4 of EUWA itself.

12. Section 29(2)(c) of the Scotland Act provides that a provision is outside the competence of the Scottish Parliament if “it is in breach of the restrictions in Schedule 4”. Paragraph 1(2)(g) of Schedule 4 provides that the Scottish Parliament cannot modify EUWA.¹⁴ It would therefore not be within the legislative competence of the Scottish Parliament to repeal section 4 of EUWA.

13. However, the repeal of section 4 will cease the effect of directly effective rights in domestic law. It would be within the legislative competence of the Scottish Parliament to revoke directly effective rights in devolved areas. This clause is within the legislative competence of the Scottish Parliament.

Clause 4: Abolition of the supremacy of EU law

14. Clause 4 of the Bill abolishes the supremacy of EU law. While the UK was a member state, EU law had supremacy over domestic law. This meant that domestic law would be interpreted so as to be consistent with EU law. EU law would take precedence over domestic law in the event of an inconsistency. Section 5(1) of EUWA ended the principle of supremacy in relation to post-IP completion enactments. Laws which have been passed since IP completion day have not been subject to the principle of supremacy and prevail over retained EU law. In devolved areas, the Scottish Parliament can modify retained EU law, including by modification or repeal.

15. The principle of supremacy forms part of retained EU law in relation to pre-IP completion day enactments by virtue of section 5(2) and (3) of EUWA. Subsection (3) provides:-

“Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after IP completion day of any enactment or rule of law passed or made before IP completion day if the application of the principle is consistent with the intention of the modification.”

16. The effect of this is to provide that domestic law which existed before IP completion day remains subject to retained EU law and must be interpreted in a manner which is consistent with it.

¹⁴ With the exception of a number of provisions listed in paragraph 1(3) of Schedule 4.

17. Clause 4(1) of the Bill inserts new sections 5(A1), (A2), and (A3) into EUWA. Section 5(A1) provides that the principle of supremacy does not apply to any enactment whenever passed and clause 5(A2) provides that any provision of retained direct EU legislation:-

“(a) must, so far as possible, be read and given effect in a way which is compatible with all domestic enactments, and

(b) is subject to all domestic enactments, so far as it is incompatible with them”.

18. As a result of this clause, pre-IP completion day domestic law will have precedence over retained EU law. This includes domestic law in devolved areas. It would currently be within the competence of the Scottish Parliament to make certain provision in respect of supremacy in an Act of the Scottish Parliament (Clause 8 of the Bill also confers a delegated power on the Scottish Ministers to reinstate supremacy in relation to specific enactments by regulations). The rule in section 5(A1) inserted by clause 4(1) will not be able to be modified, which is a change to the Parliament’s legislative competence.

Clause 5: Abolition of the general principles of EU law

19. Clause 5 of the Bill abolishes the general principles of EU law in domestic law. The general principles of EU law are principles which have been identified by the CJEU which EU institutions and Member States must comply with (for example, proportionality). While the UK was a member state, its legislative and administrative actions which were within the scope of EU law needed to comply with the general principles or be at risk of challenge.

20. The general principles of EU law form part of retained EU law by virtue of section 6(3) of EUWA.¹⁵ This provision provides that:-

“any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it—

(a) in accordance with any retained case law and any retained general principles of EU law, and

(b) having regard (among other things) to the limits, immediately before IP completion day, of EU competences”.

21. The general principles of EU law are not a fixed list and may be added to from time to time by CJEU jurisprudence. Paragraph 2 of schedule 1 of EUWA provides that no general principle of EU law will be part of retained EU law if it is recognised for the first time after IP completion day. Paragraph 3(1) of Schedule 1 of EUWA removes any rights of action in domestic law based on a failure to comply with any of the general principles of EU law. Paragraph 3(2) provides that a court may not

¹⁵ See section 6(7) of EUWA which provides a definition.

quash an enactment or conduct because it is incompatible with any of the general principles of EU law. The incorporation of the general principles of EU law into retained EU law is clarified by section 5(5) of EUWA. This subsection provides that general principles of EU law form part of retained EU law notwithstanding the fact that the Charter of Fundamental Rights does not (the Explanatory Notes for EUWA explain that a number of general principles of EU law are re-affirmed by the Charter).

22. Clause 5(2)(a) of the Bill inserts a new section 5(A4) into EUWA which provides “No general principle of EU law is part of domestic law after the end of 2023”. The remaining provisions of this section make consequential provision to give effect to this in other parts of EUWA.

23. This clause modifies the rules by which retained EU law operates. The rules are contained in sections 5, 6 and Schedule 1 of EUWA which are protected enactments. The Scottish Parliament could not modify these provisions and this clause is not within the legislative competence of the Scottish Parliament.

24. It is within the legislative competence of the Scottish Parliament to modify retained EU law in devolved areas. At present, the Scottish Parliament may make provision about the application of the general principles of EU law to devolved retained EU law. The effect of this provision is to end the application of those principles in domestic law which will limit the Scottish Parliament’s ability to legislate for their application. This is a modification of the Scottish Parliament’s legislative competence.

Clause 6: “Assimilated law”

25. Clause 6(1) provides that retained EU law is to be known as assimilated law after the end of 2023.

26. Clause 6(2) enables Ministers of the Crown to use the consequential amendment power in clause 19 to amend enactments in consequence of the change in terminology. This would enable UK Ministers to amend devolved legislation and as such is within the legislative competence of the Scottish Parliament.

27. Retained EU law is established by sections 2 to 4 of EUWA and it would not be within legislative competence of the Scottish Parliament to modify the terminology by which it is established. It would be within the legislative competence of the Scottish Parliament to make provision which is consequential on the change in terminology, for example by amending references to retained EU law in Acts of the Scottish Parliament or Scottish Statutory Instruments.

Clause 7: Role of courts

28. Clause 7 provides for amendments to section 6 of EUWA (interpretation of REUL) about the application of retained case law by domestic case law interpreting and applying REUL.

29. It is within the legislative competence of the Scottish Parliament to modify retained EU law in devolved areas. At present, the Parliament is restricted in the provision it can make to modify section 6 of EUWA, as it is a protected enactment. It may, however, otherwise make provision about the interpretation of REUL in devolved areas in certain circumstances where not modifying section 6. The effect of clause 7 is to amend the detail of those provisions, which will accordingly modify the Scottish Parliament's legislative competence.

Clause 8: Compatibility

30. Clause 4 of the Bill provides for the abolition of supremacy of retained EU law. Currently, section 5(2) of EUWA provides that the principle of supremacy applies to enactments passed before IP completion day. Pre-IP completion day enactments require to be read in accordance with retained EU law and where there is a conflict retained EU law will prevail. Section 5(1) of EUWA ended supremacy in respect of enactments passed after IP completion day. Clause 4(1) adds a new sections 5(A1) to (A3) to EUWA. These will end the remaining effects of the principle of supremacy after the end of 2023 and provide that retained direct EU legislation must be read so as to be compatible with, and subject to, domestic legislation.

31. Clause 8 confers a power to provide by regulations for the relationship between parts of retained EU law and domestic law. Regulations may specify that a particular domestic enactment must be read so as to be compatible with, and subject to, retained EU law. In devolved areas, a relevant national authority is the Scottish Ministers or Ministers of the Crown.

32. This clause alters the executive competence of the Scottish Ministers by conferring a function on them.

Clause 10: Scope of powers

33. Clause 10 makes a number of amendments to Part 1 of Schedule 8 of EUWA. This Part sets out how retained direct principle legislation (as defined in section 7(6) of EUWA) and anything retained under section 4 of EUWA may be modified by subordinate legislation. At present, modifications of these types of REUL are subject to restrictions which do not apply to modifications of other types of retained EU law. This clause removes a number of these restrictions enabling retained direct principle legislation and anything retained under section 4 of EUWA to be modified more easily, for example by removing the requirement that they can only be amended or repealed by subordinate legislation that is capable of amending primary legislation (or is expressly capable of modifying that piece of REUL).

34. The effect of this clause is to change the scope of delegated powers generally with regard to their use to modify the categories of REUL mentioned above. This includes delegated powers conferred on the Scottish Ministers and so this clause modifies the executive competence of the Scottish Ministers.

Clauses 12 to 16: new powers to amend retained EU law

35. This set of clauses confer powers on a “relevant national authority”. Clause 21 defines this term:-

“relevant national authority” means—

- (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”

36. The Scottish Ministers are a devolved authority. Schedule 2 sets out the scope of the powers of the Scottish Ministers when making regulations under the Bill including these powers. Paragraph 2(2) of Schedule 2 provides that the Scottish Ministers may exercise the powers to make provision if it would be within devolved competence. A provision is within devolved competence if the Scottish Parliament could include it within an Act.¹⁶

37. Each of these clauses modify the executive competence of the Scottish Ministers by conferring functions on them. The powers which are conferred in these clauses are as follows.

Clause 12: Power to restate retained EU law

38. Clause 12(1) confers a power to restate EU law. It applies to any retained EU law which is not primary legislation. This catches law which retained under each of sections 2, 3 and 4 of EUWA as well as rules contained in retained case law. The power can be used to amend the text of primary legislation which was inserted by subordinate legislation. Clause 14 clarifies what is meant by a “restatement”.

39. Clause 12(3) provides that a restatement is not retained EU law and so EUWA will cease to apply to it. The power is time limited by clause 12(7) and it cannot be exercised after the end of 2023.

Clause 13: Power to restate assimilated law or reproduce sunsetted retained EU rights, powers, liabilities etc.

40. Clause 13(1) confers a power in relation to assimilated law that corresponds to the power conferred by clause 12 in relation to retained EU law. Clause 6 of the Bill provides that after the end of 2023 retained EU law will become known as assimilated law and this is the date that the clause 12 power expires.

41. Clause 13(9) provides that the power may not be exercised after 23 June 2026.

¹⁶ Or if it could be made by the Scottish Ministers, the First Ministers or the Lord Advocate in subordinate legislation (see paragraph 2(2)(b) of Schedule 2).

Clause 14: Power to restate or reproduce: general

42. This clause provides what is meant by a “restatement” for the purposes of clauses 12 and 13.

43. Clauses 14(2) and 14(3) sets out the extent to which a restatement may differ from the law being restated. Clause 14(2) provides that the restatement may be drafted using different words or concepts that are used in the original law. Clause 14(3) provides three purposes for which the substance of the restatement may differ. These are to resolve ambiguities, remove doubts or anomalies or to facilitate improvements.

Clause 15: Powers to revoke or replace

44. Clauses 15(1), (2) and (3) confer three separate powers, each of which enables the revocation of retained EU law with different options following the revocation. Clause 15(1) is a power to revoke retained EU law without replacing it. Clause 15(2) is a power to revoke retained EU law and “replace it with such provision as the relevant authority considers to be appropriate and to achieve the same or similar objectives”. Clause 15(3) is a power to revoke retained EU law and “make such alternative provision as the relevant national authority considers appropriate”.

45. These powers may be used to make provision as described in the heads of clause 15(4). These include provision to “create a criminal offence that corresponds or is similar to a criminal offence created by secondary retained EU law revoked by the regulations (and may not otherwise create a criminal offence)” (head (c)) and provide the imposition of monetary penalties (head (d)) and fees (head (e)) but may not impose taxation (head (f)(i)).

46. Clause 15(5) provides that the exercise of the powers in this clause cannot be used to increase a regulatory burden.

47. The powers in this clause may not be exercised after 23 June 2026.

Clause 16: Power to update

48. Clause 16 confers a power to modify secondary retained EU law (or, after the end of 2023, assimilated law) to take account for changes in technology or development in scientific understanding. This power is not time limited.

Clause 19: Consequential provision

49. This clause confers a power on UK Ministers to make consequential provision including amending any enactment, including Acts of the Scottish Parliament and Scottish Statutory Instruments. It would be within the legislative competence to confer a power such as this on the Scottish Ministers.

Clause 20: Regulations: General

50. This clause clarifies the scope of powers conferred under the Bill including powers conferred on the Scottish Ministers. This clause modifies the executive competence of the Scottish Ministers.

Clause 21: Interpretation

51. This clause introduces defined terms which are used in clauses which are within devolved competence and confer functions on the Scottish Ministers. It would therefore be within devolved competence to that extent and so requires an LCM.

Schedule 1

52. This Schedule makes consequential modifications to enactments which refer to retained EU law. One of these enactments is the Professional Qualifications Act 2022 which is within devolved competence.¹⁷ The Scottish Ministers have conferred powers under that Act and this clause will modify the procedure to which those powers are subject. This clause therefore modifies the Scottish Ministers' executive competence.

Schedule 2

53. This Schedule makes provision about the extent of the powers conferred on the Scottish Ministers under the Bill. This schedule therefore modifies the Scottish Ministers' executive competence. This is similar to schedules contained in the other UK "Brexit" legislation.

Schedule 3

54. This Schedule makes provision about procedure that powers conferred under the Bill are subject to, including powers conferred on the Scottish Ministers. This schedule therefore modifies the Scottish Ministers' executive competence.

¹⁷ The Scottish Government's legislative consent memorandum for the Professional Qualifications Act 2022 is available here: [Professional Qualifications Bill | Scottish Parliament Website](#)

This Legislative Consent Memorandum relates to the Retained EU Law (Revocation and Reform) Bill (UK legislation) and was lodged with the Scottish Parliament on 8 November 2022

Retained EU Law (Revocation and Reform) Bill – Legislative Consent Memorandum

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