

Retained EU Law (Revocation and Reform) Bill

Which? Written Evidence to House of Commons Public Bill Committee, 9 November 2022

Overview of Which?'s position

The Retained EU Law (Revocation and Reform) Bill will affect swathes of consumer law. Much of this is fundamental to how the UK economy operates, and deals with matters of child and adult safety and wider consumer protections, including food and consumer product safety. In reviewing retained EU law (REUL), there is an opportunity to modernise and improve consumer policy and consumer protections in the UK. This includes the changes the government is already making to REUL on financial services through the existing Financial Services & Markets Bill, and the planned draft Digital Markets, Competition and Consumer Bill.

However, Which? warns that the 2023 sunset on REUL means ministers and civil servants will need to make fast decisions on a very large number of fundamental laws, in a very short period of time. This creates a bureaucratic challenge for government, businesses, regulators, enforcement agencies and consumers at a time of economic uncertainty and the cost of living challenge. The approach to the current sunset clause therefore risks missing out on opportunities for considered reform and, in a worse case scenario, gaps or mistakes occurring, including on matters of human safety.

We therefore encourage the government to re-think the approach set out in this Bill in order to allow a realistic timeframe to review and amend key legislation to ensure that it is fit for purpose, both for consumers and for businesses. At the very least, the government should be more permissive than restrictive in its exercise of the clause 2 power to extend the REUL sunset until 23 June 2026 - particularly for regulations which are fundamental to the working of the UK economy. However, even this timeframe may be challenging to meet given the extent of the legislation included within REUL and its impact on so many aspects of people's daily lives. We note the Financial Services and Markets (FS&M) Bill takes a different approach, and does not place a sunset clause on when REUL pertaining to financial services is removed from the statute book (see schedule 1 and clause 72).

1. Impacted legislation and case law

The REUL Bill will affect a large number of consumer regulations in UK law, including those covering safety, consumer rights, consumer information, consumer redress, and environmental protection. Like other organisations and civil servants, Which? is still building an understanding of every piece of impacted legislation. We will provide more detailed views as the Bill progresses. However, we are concerned that the scale of the task and timescales

involved will limit the depth at which key stakeholders will be able to fully engage with these potentially profound changes to the legislative landscape.

We note that the FS&M Bill enables HM Treasury to determine when any REUL pertaining to financial services is removed from the statute book without an attached sunset clause (see schedule 1 and clause 72). This could provide a more flexible approach for handling REUL in other sectors by not assigning a fixed and short deadline, if accompanied by effective consultation and scrutiny.

We are also calling for the Government to urgently publish the Draft Digital Markets, Competition and Consumer Bill (DMCC Bill) which was promised in the 2022 Queen's Speech. It will provide an opportunity to update REULs and modernise UK competition and consumer policy, including protecting consumers from fake reviews and rip-offs, and strengthening the powers of the Competition and Markets Authority to enable the regulator to take swift and decisive action to boost competition and protect consumers - particularly online.

This is particularly important for online marketplaces. Which? has repeatedly highlighted the need for new laws to help tackle the dominance of a handful of tech giants who are inhibiting the ability of UK businesses to effectively compete and who have a disproportionate impact on consumers' lives. The DMCC Bill can address subscription traps and fake reviews - but also go further to deal with consumer harm in relation to drip-pricing, misleading green claims, use of manipulative online 'dark patterns' (i.e. online deceptive or manipulative practices which exploit consumer behaviour to influence choice) and ensuring platforms have clear responsibilities for compliance with consumer rights and protection legislation. Updated and future proofed consumer protections, including updating the Consumer Protection from Unfair Trading Practices Regulations (CPRs), through the DMCC Bill would address consumer needs and fulfil the rationale of the REUL Bill.

This is, however, an example of where the interplay between the REUL Bill and other important pieces of legislation need to be carefully thought through. Under the sunset clause, there is the potential for key pieces of legislation that the DMCC Bill is intended to update and build upon to be removed.

Impact on case law

Much of the commentary on the Bill to date has focused on the legislative impact it directly makes to REUL. However, the Bill will also impact how the higher Courts apply well-established principles to protect consumers. Clause 5 will mean 'no general principle of EU law is part of domestic law after the end of 2023' and, under Clause 7 of the Bill, judges must bear in mind 'changes in circumstances' and whether that following EU law may 'restrict the proper development of domestic law'.

As a result of these clauses, the way some regulations are implemented might therefore still change even where they are 'saved'. Civil servants not only need to review hundreds of pieces of legislation, but also the EU case law that legislation relates to in order to determine whether the interpretation of the legislation will be different. This generates further

uncertainty for businesses, consumers and regulators in how even 'saved' regulation then gets interpreted.

Case studies of impact on case law

Earlier in 2022, the Court of Appeal decided a key case dating from 2018 when passengers were denied rights to compensation because of airline strikes. Under the current position derived from EU case law, the decision was in favour of passengers. However, if decided after the REUL Bill comes into effect, any outcome becomes more uncertain depending on how UK law develops.

Similarly, the Consumer Protection from Unfair Trading Regulations 2008 - which for instance ban misleading or aggressive sales tactics such as falsely stating a product will only be available for a limited time - are currently interpreted as far as possible in conformity with the original EU Directive they transpose (Unfair Commercial Practices Directive 2005/29/EC). This is a general principle of EU law abolished by Clause 5 of the REUL Bill.

The importance of this principle in interpreting the Consumer Protection from Unfair Trading Regulations 2008 was shown in a successful legal action taken by the Office of Fair Trading in 2011 against Purely Creative and others. In Purely Creative's case, the company operated promotions whereby a promotional letter or insert was sent to almost 11.5m people telling them they had won a prize and invited them to call or text a premium rate number to find out what they had won. It was ultimately held in the case as a whole that the Regulations must be interpreted strictly in line with the wording of the Unfair Commercial Practices Directive and that the companies concerned were in breach because they had not sufficiently explained the circumstances to consumers. In relation to Purely Creative, consumers had to stay on the premium rate line for almost six minutes to find out what they had won. If the case had been decided on the wording of the Regulations alone, it may well not have succeeded.

2. Safety legislation

A number of REULs provide for wide ranging safety regulations which clearly cannot be allowed to lapse. We urge the government to ensure these laws are retained or modernised. Consumer spending accounts for around 60% of UK economic output. As well as the potential risk to child and adult safety, a reduction in consumer confidence would significantly damage the economy if consumers became concerned that product safety standards were being downgraded.

A large number of regulations relate to **food safety**, as well as food quality and composition. This includes a wide range of protections consumers assume will be in place from basic food hygiene requirements for all types of food businesses, controls over meat safety, maximum

pesticide levels, regulations to protect people from chemical contaminants in food, food additive regulations and controls over the use of growth hormones in food production, through to controls over allergens in foods and requirements for baby foods. We know from the consumer research we have conducted into food standards over the last few years that people are proud of the UK's high food standards, and think that they should be maintained, and not undercut by imports produced to lower standards. But the REUL Bill presents the risk that these standards will no longer exist at all beyond 2023. There is room to update and modernise regulations to better reflect today's risks, but the REUL Bill risks missing out on this benefit due to the short timeframe the sunset clause imposes.

Building on existing food safety regulations

Around 90% of food law is contained within REUL. This body of legislation has built up over decades in order to provide appropriate protections in light of lessons learned from various food scandals - most notably the BSE and horsemeat scares. Within the regulations are a mixture of overarching principles as well as more specific requirements and obligations. Regulations also set out specific requirements in relation to risks from imports from other countries and requirements for how food enforcement should be conducted.

The General Food Law Regulation, for example, sets out a range of requirements that underpin our current food standards. This includes obligations on food and feed businesses, how they are defined, requirements for traceability so that products can be traced and recalled if necessary when there is a safety issue, and the approach to how products should be assessed for safety. Also within REUL are fundamental requirements for food hygiene, including controls over meat safety and meat inspection. These are essential to prevent consumers becoming ill from eating food that is unfit for consumption, but also essential for facilitating trade in food.

There are opportunities to improve and modernise food law and how it is applied. The pandemic brought new business models and a greater focus on deliveries and on online sales of food which are currently inadequately addressed. Some aspects of food law, including how meat inspection is carried out for example, can also be updated to reflect the types of risks that consumers are more likely to face - and factors such as climate change are more likely to spread. Risk assessment and broader risk analysis approaches that underpin how food products and ingredients are approved can also be made more robust and comprehensive - and considerations relating to sustainability can be better integrated within food safety law.

It is estimated that there are still over 2 million cases of foodborne illness in the UK every year. Food safety law, which is just one element of the many types of food law set in REUL, therefore needs to be improved and strengthened. The current sunset clause will not allow enough time for a meaningful and evidence-based review of any changes now needed.

Numerous regulations relating to **product safety** across different types of products could fall under the sunset clause. Most notably, this includes the cross-cutting General Product Safety Regulations 2005/1803, which set out obligations for safe products to be placed on the market and cover a whole raft of consumer goods, including those used by babies such as highchairs. More specific regulations brought in because of the risks posed by products with particular characteristics would also be caught, including those affecting child safety. The Toys (Safety) Regulations 2011/1811 provide, for example, standards about the chemicals used in toys, which might affect the safety or health of children. They also provide for required information on the safe use of toys, including warning labels.

Case study: modernising product safety legislation

The Office for Product Safety and Standards (OPSS) launched a call for evidence on how the product safety regime could be improved, given the flexibility to make changes outside of the EU in the Summer of 2021. Which? responded to this call, appreciating the opportunity for the wide range of regulations that set requirements for product safety, including the General Product Safety Regulations, but also regulations that relate to specific product categories, from toys through to cosmetics, to be updated to reflect the nature of today's markets and today's risks.

This includes, for example, the opportunity to address the lack of obligations on online marketplaces to only place safe products on the market, in a similar way to how obligations apply to more traditional retailers. This is despite online marketplaces having become a regular choice for how most people now shop, and Which? regularly finding unsafe products offered for sale through them. We also highlighted inconsistencies within current obligations including when products were subject to legislative requirements or voluntary standards that could be tightened up. The risk posed to children by button batteries is, for example, covered by a voluntary standard, but the risk from blind chords by a mandatory standard. It is not clear why there are different approaches when a mandatory standard would appear to be appropriate for both cases.

Which? also argued that the General Product Safety Regulations that effectively act as a catch-all for products not covered by specific regulation fail to give companies clarity as to their responsibilities. The regulations refer to six different ways to assess the safety of a product including 'codes of good practice in the sector concerned', 'the state of the art technology', and 'reasonable consumer expectations concerning safety'. Voluntary standards are also an option however the company's product may not be covered by a standard, or only partially covered.

There are therefore many opportunities to improve the regime and the myriad of regulations that currently work together to give consumers reassurance that they can safely buy consumer products. But sunseting these regulations at the end of next year would not be a realistic way to achieve this given the complexity of the framework and the very serious risks that could result if important provisions were removed or weakened.

In the case of **transport safety**, REUL sets out a number of important provisions around the operation of civil aviation services, establishing rules and requirements aimed at safeguarding passengers, including on the safety approvals of aircraft engines and parts, pilot licensing, and the prevention and investigation of airline accidents. REUL also establishes the framework for the safety of railways and other transport systems such as tramways, as contained in the Railways and Other Guided Transport Systems (Safety) Regulations 2006.

3. Consumer rights

Existing REUL sets out vital consumer rights and the UK played an important role developing these requirements. While there is a need for supplementary provisions to modernise the regulations in some key areas, they provide some fundamental protections that consumers need to be able to rely on. Consumer confidence is vital for the UK economy, as set out in a recent Which? [policy report](#). So, it is extremely important that the Government provides early assurance on its intention for these regulations, which are fundamental to the way the UK economy operates. This includes the Consumer Contracts (Information, Cancellation and Additional charges) Regulations 2013 which set out consumers' cancellations rights, what information traders should provide to consumers, and measures to prevent hidden costs. Similarly, the Consumer Protection from Unfair Trading Regulations 2008 set out important protections, including a 'blacklist' of banned trading practices such as falsely stating a product will only be available for a limited time, and aggressive selling practices. Effective redress for consumer law breaches across many sectors, including energy, relying on alternative dispute regulation under the Alternative Dispute Resolution Regulations 2015.

Various regulations set out important consumer law regarding **air travel and holidays**, including airlines' liability requirements in the event of airline accidents, loss of or damage to passengers' baggage and the rights to assistance of disabled passengers when travelling by air. There is the potential to enhance the Package Travel and Linked Travel Arrangements Regulations 2018 - these regulations provide fundamental legal and financial protection to consumers, such as in case of cancellation or the travel company becoming insolvent, which can now be enhanced following the UK's departure from the EU. For example, the current complex separate category of 'linked travel arrangements' could be included in the overall definition of 'package' for the purposes of the regulations, thereby improving consumer protection, reducing uncertainty for businesses and consumers and simplifying the law.

The air passenger rights contained in Regulation EC 261/2004 establish rules on compensation and assistance in the event of delayed or cancelled flights. Within the recent Aviation Consumer Policy Reform Consultation there was a proposal to reduce compensation for domestic flights under a system that would reflect "Delay Repay" in rail. Following the chaos in air travel this year, we were pleased to hear the former Transport Secretary, Anne-Marie Trevelyan, indicate these proposals may not go ahead. This rightly reflects the consequential losses incurred by consumers impacted by disruption, and the deterrent effect these rules have on business compliance. We look forward to the

government ensuring this important legislation continues to provide a high level of consumer protection.

Passenger rights for those travelling on rail and ferry services, including measures to provide assistance to disabled passengers and those with reduced mobility, compensation rights in case of delays and cancellations, and the provision of passenger information, are also set out in REUL (Regulation EC 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations and Regulation EC 1177/2010). There are also specific EU derived rights for bus and coach passengers with disabilities.

4. Consumer information

Various regulations set out requirements for information to be provided to consumers to support product choice and safety. This includes setting out how to use products safely, the display of quantity information, and appropriate warnings. In the case of food, regulations such as the Regulation on the Provision of Food Information to Consumers sets out fundamental food labelling requirements, helping consumers to make informed choices and to consume food safely. Such information may be a matter of life or death for those with severe allergies. This includes requiring the need to display ingredients, the quantity, the 'use by' date, nutritional information, any special conditions of storage, the country of origin, alcohol strength, and other similar requirements.

5. Sustainable choices

In the context of high energy bills and the drive to net zero, many consumers are keen to reduce their carbon footprint and understand the energy efficiency of products. Again, REUL sets out rules around energy efficiency of products and the display of energy efficiency information, improving the energy performance of British products and empowering consumers to make more sustainable decisions. Although the UK government has introduced more stringent ecodesign requirements for certain products in recent years, it is not clear how these will be impacted by the REUL Bill. There are numerous other consumer products which may be covered only under REUL, such as vacuum cleaners, and may no longer be regulated.

About Which?

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