

Written evidence to Public Bill Committee—John Bell, LLM
Retained EU Law (Revocation and Reform) Bill

Introduction

1. This written evidence is in response to the Public Bill Committee’s call for evidence as part of its scrutiny of the Retained EU Law (Revocation and Reform) Bill (REUL Bill).
2. I hold an LLM (Distinction) from Queen Mary University of London. I was previously a Schuman Trainee at the European Parliament, within the Directorate for Legislative Cooperation and Conciliations, Directorate-General for Internal Policies of the Union (DG IPOL).

Sunset of REUL

3. Retained EU Law (REUL) is a bespoke statutory response to the UK’s exit from the EU. In aiming to avoid a legislative cliff-edge, the creation of REUL by the European Union (Withdrawal) Act 2018 (EU(W)A 2018) is a crystallisation of the *acquis* as it had effect in domestic law at IP completion day.
4. REUL comprises thousands of legal acts covering a multitude of policy areas.¹ Following the statutory scheme, REUL includes EU-derived domestic legislation (EU(W)A 2018, s 2), Direct EU legislation (EU(W)A 2018, s 3), and Retained case law (EU(W)A 2018, s 6).
5. If enacted, clause 1 of the REUL Bill would sunset all EU-derived subordinate legislation and retained direct EU legislation at the end of 2023. I submit that this approach raises questions of legal certainty and accountability.

Legal certainty and accountability

6. The sunset clause would create a new legislative cliff-edge, the very situation which the creation of REUL aimed to avoid. Whilst it is not inconceivable that REUL would eventually be phased out of domestic law, it is a question of time and process. The UK is still transitioning from 47 years as a member of the world’s most integrated Single Market. Indiscriminately revoking the entirety of secondary REUL risks legal uncertainty.

¹ The *Financial Times* reported on 7th November 2022 that the National Archives ‘discovered’ an extra 1,400 REUL in addition to the 2,417 already recorded on the Cabinet Office REUL Dashboard. See: *UK plan to scrap all EU laws suffers new setback* (*Financial Times*, 7th November 2022). REUL Dashboard: <https://public.tableau.com/app/profile/governmentreporting/viz/UKGovernment-RetainedEULawDashboard/Guidance> (Accessed 11th November 2022).

7. In addition, the REUL Bill does not contain any provision for pre-sunset consultation by stakeholders or interested parties. The thousands of REUL contained on the Cabinet Office REUL Dashboard reveals that 570 REUL fall within the ambit of DEFRA, with 424 for the Department for Transport, 374 for HM Treasury, and 208 for the DWP.² I submit that there is a case for these Government Departments considering a form of consultation process prior to the coming into force of the sunset clause.
8. I further submit that the Committee recommends that the Government considers adding clauses to the REUL Bill providing for a duty to consult on REUL prior to the coming into force of the sunset clause.
9. In addition to questions of legal certainty and accountability, the Civil Service will face a considerable burden as a result of the sunset clause. Post-pandemic and during a cost of living crisis, Civil Service resources might be better spent by taking a gradual approach and consulting on REUL rather than facing the Leviathan of a mass revocation of REUL next year.

Potential extension of the sunset clause

10. An alternative or complementary approach is found in clause 2 of the REUL Bill, which provides for an extension of the sunset clause for specified REUL to no later than 23rd June 2026. A minister could extend the sunset for a whole swathe of REUL. Whilst this would be kicking the can down the road, it has the advantage of creating a pause to consider legal certainty and a tailor made approach to the sunset of REUL through consultation.
11. I therefore submit that the Committee engages with the Government on any proposed use of the power to extend the sunset clause.

Assimilated law

12. Clause 6 states that ‘at all times after the end of 2023’ REUL is ‘to be known’ as ‘assimilated law.’ It is hard not to reach the conclusion that this is a purely cosmetic change to remove in the eyes of the electorate any reference to EU law. It appears to serve no practical purpose.
13. Accordingly, I recommend that the Committee engages with the Government on the potential removal of this provision.

Judicial consideration of REUL

14. EU(W)A 2018, s 6(2) provides that a court may ‘have regard’ to CJEU judgments made after IP-completion day. This accommodates any eventual divergence between the UK and EU legal orders and enables the court to interpret REUL in the context of the EU legal order in which it was created. Treating CJEU judgments as persuasive is part of the process of post-IP completion day transition.

² Cabinet Office REUL Dashboard (accessed 11th November 2022).

15. Useful guidance on the judicial approach to REUL was provided by the Court of Appeal in *Lipton & Anor v BA City Flyer Ltd* [2021] EWCA Civ 454, which set out a ‘roadmap’ premised on an analytical approach to EU(W)A 2018. As Lord Justice Green observed in *Lipton*, the Court of Appeal’s task was ‘relatively straightforward’ since the REUL regime had only been in place for a few months. His Lordship continued:

‘As time moves on, and the case law of the CJEU evolves, then the differences between the current state of EU law and that which the Court is to take account of might become more accentuated. At that stage the analysis might become more complex.’³

16. This dictum was in the context of the REUL regime which the REUL Bill aims to revoke. Whilst it is true that CJEU case law was always bound to evolve and make the court’s task more complex, I submit that the REUL Bill adds further layers of complexity and risks legal uncertainty.

Departure from retained EU case law

17. EU(W)A 2018, s 6(4) provides that the Supreme Court is not bound by retained EU case law and may depart from retained EU case law applying the same test it would in departing from its own case law (EU(W)A 2018, s6(5)). Following EU(W)A 2018, s 6(4)(ba),⁴ a minister may provide for a ‘relevant court’ to depart from retained EU case law. The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, SI 2020/1525 provide that the Court of Appeal is a ‘relevant court’ for these purposes.

18. As part of the Ministry of Justice consultation into the 2020 Regulations, the Bar Council submitted a response⁵ warning of the risks to legal certainty in extending to the Court of Appeal the ability to depart from retained EU case law. Departure from an established interpretation of EU law would be a ground of appeal and lead to unnecessary litigation.

19. Clause 7 of the REUL Bill goes further and lists new considerations to which the court must have regard in deciding whether to depart from retained EU case law. These considerations are:

- a) the fact that decisions of a foreign court are not (unless otherwise provided) binding
- b) any changes of circumstances which are relevant to the retained EU case law
- c) the extent to which the retained EU case law restricts the proper development of domestic law

20. These additional statutory considerations may make it easier for a court to depart from retained EU case law. Both this fact and the considerations, I submit, risk legal uncertainty. The reference to ‘decisions of a foreign court’ as opposed to the CJEU by name is curious and appears unnecessary, since post-IP completion day CJEU judgments will continue to have persuasive effect. ‘Change of circumstances’ is

³ *Lipton* at [83] per Green LJ. The steps of the roadmap can be found in the same paragraph.

⁴ Inserted by section 26 of the European Union (Withdrawal Agreement) Act 2020.

⁵ The Bar Council, *Bar Council response to the Ministry of Justice’s Departure from retained EU case law by UK courts and tribunals consultation* (12th August 2020).

ambiguous, and the latter consideration sets up retained EU case law (itself a creature of statute) against domestic law in a way which paradoxically affirms the point that REUL is a bespoke creation and cannot be simply ‘assimilated’ into domestic law.

21. I recommend that the Committee engages with the Government on the operation of clause 7 in relation to legal certainty.

Reference procedure and incompatibility orders

22. Perhaps the most curious aspect of the REUL Bill is the creation of a new reference procedure modelled on the preliminary reference procedure in EU law whereby a lower court can refer to the Supreme Court a question of REUL where it is bound by retained case law and considers a point of law to be of general public importance.
23. It is premature to ascertain how (if enacted) this procedure would work in practice. I simply observe the potential for a further development of the Supreme Court into a constitutional court on the model of several European jurisdictions.
24. Clause 9 would (if enacted) enable the court to make an incompatibility order. Inspired by declarations of incompatibility created by section 4 of the Human Rights Act 1998, incompatibility orders would represent another development in constitutional law resulting from Brexit.
25. Again, it is premature to foresee how this order would work in practice. I would, however, submit that an order declaring a provision of REUL incompatible with domestic law appears to contradict the REUL Bill’s objective of ‘assimilating’ REUL into domestic law, and marks out the REUL as a bespoke creation of *domestic* law.
26. I recommend that the Committee engages with the Government on the operation of these provisions in practice, in addition to their role in the development of UK constitutional law post-Brexit.

Henry VIII clauses

27. I wish to draw the Committee’s attention to the extensive use of Henry VIII clauses and the provisions granting considerably wide powers to ministers. There appears to be a trend in the use of these clauses in Brexit-related Bills, eg clause 6 of the Northern Ireland Protocol Bill.⁶
28. Clause 15 of the REUL provides that a relevant national authority may make regulations revoking ‘any’ REUL without replacing it. This is in addition to widely-drafted ministerial powers such as the power to restate REUL (clause 12) and restate assimilated law (clause 13).
29. In addition to my submissions regarding the sunset clause in the context of legal certainty and accountability, there appears to be a significant democratic deficit in these

⁶ ‘The Treasury or HMRC may, by regulations, make any provision about customs matters which they consider appropriate in connection with the Northern Ireland Protocol.’

provisions. Although REUL would need to be replaced eventually, the REUL Bill provides for a bonfire of REUL without consultation, with ministers ‘taking back control.’ I submit that the Government should pause and take a more pragmatic approach to the thousands of REUL concerning whole swathes of environmental, employment and competition law.

30. I submit that the Committee recommends that the Government considers adding clauses to the REUL Bill providing for a duty to consult before the exercise by a minister of the powers in clauses 12-17.

Comparison with Financial Services and Markets Bill

31. I wish to draw the Committee’s attention to comparisons between the Financial Services and Markets Bill and REUL Bill (FSM Bill). Much like clause 1 of the REUL Bill, clause 1 of the FSM Bill provides for the revocation of financial services and markets-related REUL (FSM-related REUL) listed in Schedule 1 to the FSM Bill. The REUL Bill is, of course, broader in scope.
32. Further, the FSM Bill gives HM Treasury the power to make transitional amendments ‘in relation to the transitional period’ (clause 2). The ‘transitional period’ is defined as ‘the period ending with the revocation of that legislation’ (in relation to ‘any’ legislation).
33. I wish to draw the Committee’s attention to a potential inconsistency between the transitional period in the FSM Bill and the sunset provisions in the REUL Bill. FSM-related REUL in Schedule 1 to the FSM Bill is also⁷ arguably covered by the sunset clause in the REUL Bill. Yet, I submit that the operation of the revocation and sunset provisions in the respective Bills for the FSM-related REUL do not speak to each other.
34. There is the potential for a scenario where an FSM-related REUL in the FSM Bill also falling within the sunset clause in the REUL Bill is considered sunsetted at the end of 2023⁸ (per the REUL Bill) but still in force (per the FSM Bill) until revoked according to the definition of the ‘transitional period’ in the FSM Bill.
35. I therefore recommend that the Committee raises these matters with the Government, with a view to including appropriate clauses in the REUL Bill making provision for the relevant FSM Bill provisions to be read-across.

Summary of recommendations

36. In summary, I recommend as follows:
 - a) that the Committee recommends that the Government considers adding clauses to the REUL Bill providing for a duty to consult on REUL prior to the coming into force of the sunset clause

⁷ With the exception of 7 provisions of primary legislation.

⁸ Setting aside any potential sunset extension in the REUL Bill.

- b) that the Committee engages with the Government on any proposed use of the clause 2 power to extend the sunset clause
- c) that the Committee engages with the Government on the potential removal of clause 6
- d) that the Committee engages with the Government on the operation of clause 7 in relation to legal certainty
- e) that the Committee engages with the Government on the operation of the proposed new reference procedure and incompatibility order (clauses 7 and 9) in practice, in addition to their role in the development of UK constitutional law post-Brexit
- f) that the Committee recommends that the Government considers adding clauses to the REUL Bill providing for a duty to consult before the exercise by a minister of the powers in clauses 12-17
- g) that the Committee raises the matters at paragraphs 31-35 with the Government, with a view to including appropriate clauses in the REUL Bill making provision for the relevant FSM Bill provisions to be read-across

John Bell, LLM

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