

RETAINED EU LAW (REVOCATION AND REFORM) BILL 2022

EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

Introduction and summary of the Bill

1. This memorandum addresses issues arising under the European Convention on Human Rights (“Convention”) in relation to the Retained EU Law (Revocation and Reform) Bill 2022. The memorandum has been prepared by the Cabinet Office.
2. The Secretary of State for Business, Energy and Industrial Strategy has made a statement under section 19(1)(a) of the Human Rights Act 1998 (“HRA”) that, in his view, the provisions of the Bill are compatible with Convention rights.
3. The Bill amends the substance and underpinning rules of the body of law that is retained EU law (“REUL”) established by the European Union (Withdrawal) Act 2018 (“EUWA”). It does so in three ways that may impact on Convention rights:
 - it ‘sunsets’ most REUL legislation so that it is revoked on 31 December 2023, subject to powers to preserve it or extend that date by secondary legislation;
 - it removes the special EU law features attached to REUL of the principle of supremacy of EU law, directly effective EU rights, and general principles of EU law, so that legislation on the UK statute book is interpreted and applied without reference to these features;
 - it facilitates domestic courts departing from retained case law based on EU case law, including the establishment of new court procedures for interventions and references by government law officers.
4. The Government has identified more than 2,000 instruments of REUL legislation that will be impacted by the Bill’s reforms. This consists of domestic primary and secondary legislation related to former EU obligations, and retained direct EU legislation (“RDEUL”). REUL legislation covers a wide range of subject matters, including employment rights, indirect taxation, aviation safety, consumer protection, data protection, environmental protection, energy regulation and health and safety.
5. The Government has taken into account Convention rights in preparing the Bill and considers that the Bill is compatible with Convention rights. The Government attaches great importance to reviewing and reforming all REUL individually so that it is fit for purpose following the UK’s departure from the EU. Powers in the Bill to make secondary legislation enable provisions of REUL or their effects to be preserved when the Bill’s reforms are implemented, where appropriate. When reviewing REUL in order to implement the reforms in the Bill in relation to different instruments of REUL legislation, the Government is committed to doing so in a

way that ensures the continued protection of Convention rights. This may include making secondary legislation under the powers in the Bill where necessary to protect Convention rights.

Sunset of REUL legislation

Summary of Bill provisions

6. Clause 1 of the Bill ‘sunsets’ most REUL, so that it is revoked on 31 December 2023. The sunset applies to:
 - a. domestic secondary legislation which implemented former EU obligations; and
 - b. RDEUL.
7. Domestic primary legislation is not subject to this sunset. Clause 1(2) provides that other instruments or provisions are also excluded from the sunset if specified by secondary legislation. Clause 2(1) provides that the date of the sunset may be extended in relation to REUL specified by secondary legislation, to a date no later than 23 June 2026. The powers in clause 12 and 13 (restating REUL) and 15 (revoking and replacing REUL) enable secondary legislation to be made replacing REUL legislation subject to the sunset.
8. In general, most EU legislation and EU-derived domestic legislation was not made for the purpose of ensuring compliance with Convention rights or remedying a breach of those rights. However, the provisions of REUL legislation which may be revoked by the Bill include provisions falling under the following categories which are relevant to Convention rights:
 - provisions regulating a right to operate a business under licence or other permission;
 - provisions setting conditions in which justified and proportionate interferences with Convention rights are permitted;
 - provisions setting out procedures for reviewing or appealing administrative decisions;
 - provisions regulating the safety of objects, materials or activities that pose a threat to human life;
 - provisions imposing obligations on individuals which constitute a criminal offence if convicted.

Convention rights potentially engaged

9. If provisions falling under these categories are revoked, this could engage the following Convention rights.

10. Article 1, 1st Protocol provides that there should be no interference with the peaceful enjoyment of possessions and no deprivation of property except lawfully and proportionately in the public interest. What amounts to protected possessions or property can include a broad range of economic interests. It is possible that the revocation of provisions regulating a right to operate a business under licence or other permission may engage or interfere with this right.
11. Article 8 guarantees the right to respect for private and family life. It permits interferences with this right if necessary for certain reasons of public interest, provided that such interferences are clearly provided for in law. It is possible that the revocation of provisions setting conditions in which justified and proportionate interferences with Convention rights are permitted may result in interferences with Article 8 rights that are not clearly provided for in law.
12. Article 6 protects an individual's right to determination of their civil rights and obligations. It provides that everyone is entitled to a fair and public hearing within a reasonable time, by an independent and impartial tribunal. It is possible that the revocation of provisions setting out procedures for reviewing or appealing administrative decisions may interfere with this right.
13. Article 2 provides that the right to life should be protected by law. It is possible that the revocation of provisions regulating the safety of objects, materials or activities that pose a threat to human life may engage or interfere with this right.
14. Article 7 provides that no person may be convicted of a criminal offence, unless it is clearly provided for in national law at the time the offence was committed. It is possible that the revocation of provisions imposing obligations on individuals which constitute a criminal offence may result in offences not being clearly provided for in national law, interfering with this right.
15. Article 14 provides that there should be no discrimination in the enjoyment of Convention rights. It permits differences of treatment which are objectively justified. It is possible that the revocation of provisions relating to Convention rights which impact some individuals more than others, according to their characteristics or status, may engage this right.
16. The Government will review individually all REUL legislation subject to the REUL sunset, to determine if it is fit for purpose. Consideration will include the options of preserving it by exercise of the power in clause 1(2) or replacing it by exercise of the powers in clauses 12, 13 and 15. In doing so, the Government will ensure that legislation continues to ensure the protection of Convention rights. Where these powers are exercised, section 6 HRA requires them to be exercised compatibly with Convention rights.

Removing special EU law features attached to REUL

Summary of Bill provisions

17. Clause 4 of the Bill provides that, with effect from 31 December 2023, the principle of supremacy of EU law no longer forms part of domestic law and as such, it no longer applies in relation to any domestic primary or secondary legislation, whenever passed or made. This also means that two propositions inherent in the principle also cease to apply from that date:
- the principle of consistent interpretation, requiring that, so far as possible, domestic courts must interpret national legislation consistently with provisions of EU law that they give effect to;
 - the conflict rule requiring domestic legislation to give way to provisions of RDEUL, where a consistent interpretation of the two is not possible;
18. Clause 3 repeals all directly effective EU rights and other obligations falling under section 4 EUWA (which also have effect by virtue of the principle of EU law supremacy) on 31 December 2023. These include directly effective rights contained in the EU Treaties and in EU directives which have been recognised in case law as sufficiently clear, precise and unconditional as to confer rights directly on individuals, so they may be relied on in national law where domestic legislation does not fully give effect to them.
19. Clause 5 provides that general principles of EU law cease to form part of domestic law on 31 December 2023. General principles have been applied by courts when determining the lawfulness of legislative and administrative measures within the scope of EU law, and they are also an aid to interpretation of EU law. General principles recognised in the case law include the protection of fundamental rights (Case 44/79 *Hauer* EU:C:1979:290).
20. Clause 6 provides that REUL is to be known as “assimilated law” from the end of 2023, to reflect the removal of these special EU law features.
21. The power in clause 8 (compatibility) enables secondary legislation to be made which preserves the legislative priority of specified RDEUL provisions over specified provisions of domestic legislation. The powers in clauses 12 and 13 (restating REUL) and 15 (revoking and replacing REUL) enable secondary legislation to be made replacing REUL legislation subject to the sunset. Clauses 12(6) and 13(6) enable a restatement to produce effects equivalent to the principle of EU law supremacy, general principles of EU law, or directly effective EU rights.

22. The Bill's reforms may potentially modify the interpretation and application of all REUL legislation that remains in force after 31 December 2023, changing its meaning and effects. The provisions of legislation which may be affected include provisions falling under the categories relevant to Convention rights described in paragraph 8 above.

Convention rights potentially engaged

23. By modifying the effects of REUL legislation in these categories, the Bill may potentially engage the Convention rights described in paragraphs 10 to 15 above.

24. The Government will review individually all REUL legislation subject to the REUL sunset, to determine if it is fit for purpose. The review will include consideration of the modified effects of any REUL that remains in force after 31 December 2023. Consideration will include the options of replacing it by exercise of the powers in clauses 12, 13 and 15, and whether to make provisions to produce effects equivalent to the principle of EU law supremacy, general principles of EU law, or directly effective EU rights. It will also include the option of exercising the power in clause 8 to preserve the legislative priority of specified REUL provisions over specified provisions of domestic legislation. In carrying out this review, the Government will ensure that legislation continues to ensure the protection of Convention rights. Where these powers are exercised, section 6 HRA requires them to be exercised compatibly with Convention rights.

Role of the courts and retained case law

Summary of Bill provisions

25. Clause 7 of the Bill makes provision about the role of the courts in relation to the interpretation of REUL, and the application of retained case law based on EU case law.

26. Clause 7 amends section 6 EUWA to establish new tests which the higher courts are to apply when considering departing from retained case law. It also inserts a new section 6A into EUWA to introduce a new procedure to allow any lower court or tribunal (which otherwise remains bound by retained case law) to refer a question to one of the higher courts on whether retained case law must be followed on a particular point of law, if it is of general public importance.

27. Clause 7 inserts a new section 6B into EUWA conferring a power on UK government and devolved administration law officers, in relation to proceedings which have concluded in the lower courts or tribunals, to make a reference to a

higher court on a question of whether retained case law must be followed in future cases considering a particular point of law in those proceedings.

28. Clause 7 inserts a new section 6C, into EUWA conferring on UK government and devolved administration law officers and devolved law officers to intervene in proceedings before a higher court (including references from a lower court) on a point of law as to whether retained case law must be followed in those proceedings.
29. These provisions do not modify the effects of any REUL. They do not require a court to depart from retained case law, and the question of whether to depart will remain an issue to be decided by the relevant court on a case by case basis.

Convention right engaged

30. Article 6 protects an individual's right to determination of their civil rights and obligations. It provides that everyone is entitled to a fair and public hearing within a reasonable time, by an independent and impartial tribunal.
31. The new test which the higher courts are to apply when considering departing from retained case law engages Article 6. However, it does not interfere with the courts' ability to decide cases independently and impartially.
32. The reference procedure for lower courts in new section 6A engages Article 6. The procedure does not in any way limit the ability of parties to proceedings to ensure that their rights and obligations are determined in accordance with the requirements of Article 6.
33. Whilst these new provisions may affect the forum in which a case is heard and the test that the courts will use in considering whether to depart from retained case law, the overarching Article 6 protections built into our domestic courts system are not disturbed. For example, the courts will continue to act independently, ensuring that all parties' arguments can be heard and considered.
34. The reference procedure for UK government and devolved administration law officers in new section 6B engages Article 6. The procedure allows a law officer to reopen a point of law in proceedings between other parties that have been concluded, thus determining their rights and obligations for the purposes of Article 6. However, new section 6B(6) provides that the reference on that point of law has no effect on the outcome of the concluded proceedings between the parties, ensuring that it does not interfere with their Article 6 rights.
35. The intervention procedure for UK government and devolved administration law officers in new section 6C engages Article 6. The procedure does not in any way

limit the ability of parties to proceedings to ensure that their rights and obligations are determined in accordance with the requirements of Article 6.

36. In addition, under section 6 HRA, the courts remain under a duty to act in a way that is compatible with Convention rights. Accordingly, the courts are required to apply the new test and procedures in clause 7 compatibly with Article 6 ECHR.

Cabinet Office

[date]