

Retained EU Law (Revocation and Reform) Bill - Update

1 Purpose of the paper

- 1.1 This paper is for information and decision. .
- 1.2 The UK Government amended the Bill at Report stage and Third Reading in the House of Lords on 15 and 22 May 2023, most significantly removing the general ‘sunset’ clause in favour of a schedule to the Bill in which REUL to be revoked at the end of the year is listed. Whilst a sensible step, this reversal is likely to result in a targeted UKG impetus towards regulatory reform, including in policy areas that FSS are responsible for in Scotland. This paper provides an update on the status of the Bill and what it may mean for FSS.
- 1.3 The Board is asked to:
 - **Note** this update;.
 - **Agree** that FSS should continue to raise our concerns as appropriate with Ministers, key stakeholders and Parliamentarians.

2 Background

- 2.1 The Retained EU Law (Reform and Revocation) Bill has attracted significant criticism during its parliamentary passage since its introduction in September 2022. In its original form, it contained a clause that would automatically sunset any retained EU Law on the UK statute book at the end of 2023, unless expressly preserved or reformed using powers in the Bill. Almost all of food law is “retained EU Law” as defined in the EU Withdrawal Act 2018 therefore the effect of an automatic sunset without any preservation taking place would have been catastrophic for public health protection. However, counter to the original policy intent, the response of most Whitehall departments to meet the totally unrealistic original sunset deadline was to ‘preserve’ laws.
- 2.2 On 10 May, the UKG tabled a number of amendments to the Bill accompanied by a Written Statement to the House of Commons. These amendments were agreed to by the House on 15 May 2023. In summary, they modify the Bill in the following ways:
 - **The sunset:** The automatic sunset of REUL is removed. The Bill will no longer revoke all “EU-derived subordinate legislation” and “retained direct EU law” unless preserved and those terms are no longer relevant to the sunset.
 - **Revocation Schedule:** Instead of the automatic sunset of REUL, the Bill instead provides that 587 specific instruments listed in a new Schedule are revoked, in a “sunset” list. The date of the revocation remains “the end of 2023”. The UKG have published the list, alongside their rationale for removing this

REUL from the statute book.

- **Preservation and extension powers:** The power to preserve REUL is replaced with a new power which relates to instruments listed in the revocation Schedule. REUL can be removed from the Schedule (i.e. saved) by a relevant national authority (including the Scottish Ministers in relation to devolved matters). This power cannot be exercised after 31 October 2023. The UKG's extension power is removed so there will be no scope to move the sunset beyond the end of 2023.
- **Consequential amendment powers:** The Scottish Ministers, together with other devolved governments, are conferred the consequential amendment powers at clause 20 and clause 23 of the Bill. These are currently limited to UKG Ministers only. The failure to confer these powers at introduction carried a risk that the Scottish Ministers would not be able to make consequential changes to manage the significant changes to the devolved statute book being brought forward by the Bill.

2.3 The amendments do not affect other parts of the Bill. The clauses providing for assimilation, retained case law and the modification of retained EU law/assimilated law will remain on the face of the Bill and this includes:

- **“Assimilation”:** The Bill provides for any REUL to become known as “assimilated law”. Assimilated law would be changed by the abolition of supremacy and the retained general principles of EU law at the end of 2023.
- **New powers:** The Bill confers broad new powers on UK and Scottish Ministers to modify including the revocation of REUL/assimilated law. This power cannot be used after 23 June 2026.

2.4 The change in position regarding the sunset is in line with what FSS and a large number of stakeholders had said throughout – sunsetting law in a completely arbitrary way is totally contrary to good policy making and regulatory practice, is not in line with Common Framework Agreements, and it has the potential to undermine consumer and trading partner confidence in UK food and feed safety and standards.

2.5 The Bill in its revised form (as at 5th June) is currently subject to a supplementary Legislative Consent process in the Scottish Parliament. The UK Government has indicated that they will proceed with the Bill irrespective of consent being granted. The Scottish Government has recommended consent be withheld, primarily on the basis that the Bill continues to confer powers on UK Ministers to act in areas of devolved competence without the consent of Scottish Ministers or Parliament.

2.6 The following summarises the Bill timetable:

<u>Bill stage</u>	<u>Date</u>
House of Lords Third Reading	22 May
Commons consideration of Lords amendments	24 May
Consideration of Commons amendments	6, 12 June
Further Lords and Commons stages	TBC
Royal Assent	Unknown. Expected in June

3 Discussion

3.1 What do these changes and the Bill overall mean for FSS? In the first instance it means that our work to identify all affected REUL has been paused. However that considerable effort helped inform our assessment of the legislation proposed to be revoked in the Schedule to the Bill. Our view is that as drafted, there is no impact in FSS policy areas. Secondly, the principles that the Board agreed in December 2022 to inform our discussions with UK Government departments on proposals for revoking and amending food and feed law using powers under the Bill can now be meaningfully applied. FSS also maintains a place on the Scottish Government Retained EU Law Programme pending further clarity on next steps.

3.2 The principal FSS policy area up for extensive reform by UK Government concerns the regulated products regimes which govern products such as food and feed additives and food contact materials as well as novel foods. As set out in the Risk Analysis Paper (Paper number – 230601) discussions on this are ongoing with FSA and they largely concern standardising processes across 12 separate regulated product regimes. This work will require to be considered in tandem with other areas identified within the risk analysis process (as well as fast moving policy areas which are developing outwith that process for example: in relation to implementation of the Windsor Framework and Border Target Operating Model). In relation to novel foods the UK Government has already stated that:

"We will use the freedom Brexit gives us to review our novel foods regulatory framework. This will include working with the Food Standards Agency to update the process for approving novel foods, to create a transparent and effective system that is the best in the world for innovators, investors and consumers and encourages safe innovation in the sustainable protein sector". *Benefits of Brexit: How the UK is taking advantage of leaving the EU, HMG policy paper, January 2022*

- 3.3 The position with regards Department of Health and Social Care plans for reform are less clear. The health claims approval regime bears some similarity to other regulated product regimes and we understand that DHSC would like to review the system – but timings and content of any review remain tbc.
- 3.4 We are not aware of any Defra led plans for significant reform in the area of food labelling standards and composition. There are however inter-operabilities between policy teams and interests – for example whilst labelling policy generally is a Defra lead for UK Government, GM labelling requirements sit within GM REUL and is an FSA/FSS policy lead. Likewise, Defra are leading the review of import controls for UK Government but FSS and FSA have the lead policy interest in relation to food and feed safety as it applies to imports.
- 3.5 The change of policy approach in relation to the Bill from UK Government was also accompanied with a policy paper [“Smarter regulation to grow the economy”](#) and it is this paper with its emphasis on regulatory reform and innovation that will inform how our UKG opposite numbers in FSA, DHSC and Defra approach are required to frame any potential policy change in their respective areas.

Whilst the paper largely rephrases the content of earlier policy papers (for example [The benefits of Brexit - GOV.UK \(www.gov.uk\)](#) a number of points to note with relevance for FSS include: a further critique of the precautionary principle (a basic principle of food law); pursuit of non-regulatory options where possible and an indication that they expect their independent regulators to have “driving innovation investment and growth at the heart of everything they do” such that “they prioritise growth alongside delivery of their core functions, such as protecting consumers”. From a FSS perspective growth alongside consumer protection would be and is acceptable, but any scenario that prioritises growth over consumer protection is not. The Board will recall that the REUL bill only provides powers for reform provided that the reform “does not increase the regulatory burden”.

- 3.6 Another key point to note is the timeframe in which significant reform may be expected to be delivered. The Bill as drafted means that its reform powers can only be used until 23rd June 2026. Scottish and Welsh parliamentary elections will take place in May 2026 therefore agreement to any policy change proposed using those powers will have to be achieved by early 2026, which in effect means that there is 2 ½ years to develop and consult upon any proposals before Ministerial agreement can be achieved, and final statutory instruments drafted. This leaves very little in the way of policy resource for consideration of other business as usual/new policy work. Clearly, the on-going risk for FSS is that all three UKG departments decide on regulatory reform at the same or similar time and the resource impact of that could be considerable.

Loss of interpretative provisions

- 3.7 The Bill removes the duty on domestic courts to interpret domestic legislation consistently with provisions of EU law. Whilst this may result in significant changes to the meaning and effect of domestic legislation from 1 January 2024 across other policy areas, our initial assessment is that this is unlikely to prove significant across food law. There is not much domestic case law on the interpretation of EU derived food law. The most routine use of EU interpretation is in the “preamble” (which sets out the context and rationale from an EU perspective for the measure set out) for any given item of REUL. This will not disappear at the end of this year but if there was a conflict between what the preamble says and what a domestic court determines then the preamble is set aside. That “preamble” (known as recitals in the EU context) in practical terms remains a useful resource in terms of understanding how an EU decision came to be made and is a particularly useful record in relation to regulated product determinations (for example).
- 3.8 Should we consider using the restatement and reproducing powers in the Bill to codify the effect of EU law features removed by the Bill, such as consistent interpretation and direct effect, then considerable policy and legal analysis will be required. Initial discussions on their potential use have taken place with FSA – no discussions to date have taken place with Defra and DHSC in our policy areas.

4 Conclusion/Recommendations

- 4.1 The changes made by UK Government are sensible, but work is still required to ensure that there is no inadvertent loss of relevant retained EU law before the end of this year. We will also continue to engage with UK Government on any proposals to restate or maintain any interpretative provisions of EU law should they be considered necessary. We are also likely to see an increase in pressure to reform certain areas of food law, namely regulated products in short order but there may be increased Ministerial pressure placed on UKG departments to be more ambitious and to include other areas for reform.
- 4.2 Given the Executive still has concerns as outlined in this paper, it would be helpful for the Executive for the Board’s view on continuing to raise any concerns with appropriate stakeholders, ministers and Parliamentarians.
- 4.3 The Board is asked to:
- **Note** this update
 - **Agree** that FSS should continue to raise our concerns as appropriate with Ministers, key stakeholders and Parliamentarians.

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