

The Retained EU Law

Created at the end of the Brexit transition period, Retained EU Law is a category of domestic law that consists of EU-derived legislation retained in our domestic legal framework by the European Union (Withdrawal) Act 2018. This was never intended to be a permanent arrangement as parliament promised to deal with retained EU law through the Retained EU Law (Revocation and Reform) Bill (the “Bill”).

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The United Kingdom (UK) was a member of the European Union (the EU) for almost 50 years and consequently was under a Treaty obligation to include EU legislation (EU Law) within domestic law. On 23 June 2016, a referendum was held and over 17 million citizens of the UK and Gibraltar voted to leave the EU. In February 2020 a transition period began while the UK and the EU negotiated the arrangements pending the UK's exit from the EU. Created at the end of the transition period, Retained EU Law is a category of domestic law that consists of EU Law retained in our domestic legal framework by the European Union (Withdrawal) Act 2018. This was never intended to be a permanent arrangement as parliament promised to deal with Retained EU Law through the Retained EU Law (Revocation and Reform) Bill.

The Bill abolishes the supremacy of EU law over UK domestic law. Sponsored by the Department for Business, Energy & Industrial Strategy (BEIS), the purpose of the Bill is to “revoke certain retained EU law; to make provision relating to the interpretation of retained EU law and to its relationship with other law; to make provision relating to powers to modify retained EU law; to enable the restatement, replacement or updating of certain retained EU law”.

The automatic position under the Bill is that Retained EU Law will be “sunsetting” by 31 December 2023. This means that it will be automatically repealed (i.e., it will not be enforced, allowed or followed) unless Ministers decide to maintain it before that date. This is a tight timeline and so should Ministers decide they need longer to review specific pieces of Retained EU Law, the Bill allows an extension of the sunset date to 23 June 2026.

The Bill gives the UK and devolved governments wide powers in determining the future of the pieces of Retained EU Law as they can amend instead of repealing them. Changes are to be brought in by statutory instruments which receive less scrutiny than primary legislation and some would argue that this, along with the short timeframe for review, creates a risk of confusion and inconsistency and that some laws will be overlooked completely. The Scottish and Welsh governments have both expressed their concerns over the Bill. The Scottish government has re-enforced its commitment to aligning regulation in Scotland with EU Regulation and therefore this highlights the potential for divergence in law between the devolved nations because of it.

The Bill will also provide domestic courts with greater discretion to depart from retained case law and will provide new court procedures to intervene in cases regarding retained case law. It is important to note that, even after 31 December 2023, EU principles will continue to apply to Court proceedings that relate to acts or events from before that date.

The scale of this review is substantial given the short timetable available for review. As an example, there are 570 laws relating to the environment alone and these include the habitat regulations and laws covering the release of nitrates and phosphates into rivers which have been operating for the past 30 years. Over 435 of these are yet to be reviewed.

Browne Jacobson advises that clients should ensure they are aware which pieces of retained EU law are crucial to the operation of their businesses, remain updated on any which may be revoked or amended and engage with the relevant government departments at an early stage of their reviews.

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