

Retained EU Law (Revocation and Reform) Bill 2022

FSA 22-12-04 - This paper provides an update to the Board on progress of the UK Government's Retained EU Law (Revocation and Reform) Bill, and the FSA's programme of work until 2026, to support delivery of the Bill and associated reforms.

1 Summary

1.1 This paper provides an update to the Board on progress of the UK Government's Retained EU Law (Revocation and Reform) Bill, and the FSA's programme of work until 2026, to support delivery of the Bill and associated reforms.

1.2 The FSA's mission remains food you can trust - to ensure a food system in which food is safe, food is what it says it is, and food is healthier and more sustainable. That will not change. Although any changes to Retained EU Law (REUL) are decisions for ministers and ultimately for Parliament, in giving our advice we will continue to prioritise public health and will not compromise food and feed safety or standards. We also want to make sure that we continue to protect consumer and trading partner confidence in UK food, and that businesses have the right regulation to enable them to provide safe food, to trade and to grow.

1.3 The Board is asked to:

- **Agree** the guiding principles for the FSA's advice to ministers on retained EU law
- **Agree** the FSA's overall approach to a multi-year programme of work and comment on emerging proposals to preserve and reform different aspects of REUL
- **Note** the FSA's approach to four-country working and working across the UK
- **Note** the key risks for this Programme, and implications for wider FSA work plans

2 Introduction

2.1 Food law in the UK relies upon both domestic origin legislation (such as the Food Safety Act 1990 and the Agriculture Act 1970) and EU derived legislation (for example, legislation which currently has the status of Retained EU Law in England, Wales and Scotland, whether as direct EU legislation or EU-derived subordinate legislation). The two have been closely intertwined for decades, so domestic origin legislation cross-refers to definitions such as 'food' in REUL, for example. The vast majority of the regulatory requirements are set out in REUL. Domestic legislation provides for some level of regulatory oversight (for example a responsibility on food businesses for producing safe food and powers for local authorities to enter food businesses) but for several decades REUL has taken precedence and most changes since 1990 have been made in REUL. We are critically reliant on REUL to both set the high level principles of food safety and much of the detailed operation of the regulatory framework.

2.2 The Retained EU Law (Revocation and Reform) Bill was introduced into the House of Commons on 22 September 2022 and is currently undergoing its Parliamentary stages there, Second Reading was 25 October; Committee Stage should conclude on 29 November; and

Report Stage in December 2023. The Lords stages should begin in January 2023 and the Bill is anticipated to receive Royal Assent in April / May 2023. This Bill allows for the revocation or amendment of REUL and removes the special features REUL has in the UK legal systems (and which had been retained as part of the European Union (Withdrawal) Act 2018).

2.3 In the Bill, as currently drafted, the UK Government has set a timeline to ‘sunset’ all REUL on 31 December 2023. This will in effect remove all REUL from UK legislation, unless action is taken to retain it (either through preserving, reforming or restating it). Another important feature of the Bill is that all REUL will be treated as equivalent to domestic secondary legislation in future, making it significantly easier to undertake reform in the longer term. A more comprehensive explainer of the Bill is attached at Annex 1.

2.4 The FSA has identified 113 individual substantive pieces of REUL covering food and feed safety and standards in England and at least a further 39 pieces of REUL that are specific to our remit in Wales on matters to do with food composition and labelling. In addition, individual retained legislative authorisations, which allow animal feed products (c.500 pieces) and GM products (c.200 pieces) to be sold legally in the UK, are also technically individual pieces of REUL. So, in total, the FSA advises ministers on over 800 pieces of REUL that are subject to review under this Bill.

2.5 EU rules for food and feed will continue to be directly applicable in Northern Ireland under current NI Protocol terms, so food and feed law in Northern Ireland will not be affected in the same way by the Bill. We are undertaking analysis to understand the implications of the Bill on any REUL that exists in Northern Ireland.

2.6 To preserve, reform or restate pieces of REUL, ministers will need to make secondary legislation before the end of 2023, so although the FSA and FSS will need to offer advice, ultimately it will be for ministers in the UK Government, the Welsh Government and the Scottish Government to decide on the approach.

2.7 As well as assessing and advising on each individual piece of legislation, we will need to make sure the body of law continues to work effectively as a whole. We will need to assess the impact of significant changes made by the Bill – removing the supremacy of REUL, EU interpretive effects and case law – on our REUL. There are some pieces of REUL which have effect across multiple other pieces of legislation – such as definitions of key concepts like food or placing food on the market, or the use of concepts such as the precautionary principle, which we currently think will need to be preserved. So, we expect some additional legislation to be needed just to make sure that the body of food and feed law continues to work on a technical level and has the same effect after 2023, even if ministers decided to preserve all the REUL.

3 Guiding Principles for FSA Decisions on REUL

3.1 We propose that our approach, and our recommendations on preserving, restating, or reforming our REUL will be guided by the following core principles. These seek to ensure that the FSA delivers on our statutory objectives to protect public health and otherwise protect the interests of consumers, including through reform where that is safe and appropriate:

- **Protecting public health, food safety and standards:** we should not make changes which reduce the safety or standards of food produced or eaten in the UK,
- **Building consumer and trading partner confidence:** we should not make changes which are likely to reduce consumer or trading partner confidence in UK food, or which are inconsistent with our international trade agreements
- **Supporting innovation and growth:** we should seek to make changes that support innovation, growth and the introduction of new technologies, (including innovation that could help to make food healthier or more sustainable) and remove unnecessary burdens on business.

- **Managing divergence:** we should, as far as possible, seek consistency of approach across GB, in line with common framework commitments. We will consider the impact of divergence on public health and safety and the wider impact for consumers or businesses of having differing rules across the UK.

3.2 There may sometimes be tensions between these principles. For example, reforms might support innovation or reduce burdens on business in some parts of the UK, but in doing so add complexity for businesses due to differing regimes across the UK. We will need to weigh up any trade-offs in offering advice. But there will be areas in which trade-offs should not be made, for example where changes would reduce food safety.

4 Multi-Year Work Programme

4.1 We are taking a two-stage approach to this multi-year programme of work. It is currently too early to provide a definitive assessment of which aspects of REUL we will seek to preserve and reform. We will develop a firmer set of proposals which we will bring back to Board members for review in March 2023. A summary of our current thinking and assumptions for phase 1, is given below:

- **Phase 1 - Prior to December 2023:** Our focus during this phase will be to preserve the vast majority of REUL to ensure that there are no gaps in the regulatory framework through the application of the sunset clause. To deliver this we shall complete an initial triage of REUL and work through the outputs of this with other government departments and DAs; design and deliver (for example, policy analysis, preparatory work, legal drafting) a programme of SIs that will deliver those recommendations via ministers. We currently anticipate laying our SIs in Autumn / Winter 2023; however, we will need to have completed the preparatory work by Summer 2023. As with EU Exit, the Parliamentary Business & Legislation Committee (PBL) will retain control of the overall triage process for SIs, prioritising those where we need to avoid a legislative gap. We will need to prioritise our own SIs to work within any wider process.
- **Phase 2 - January 2024 – June 2026:** We anticipate delivering more material reform during this period, for example streamlining the process for approving regulated products, reform to the Official Controls Regulations and work on the UK Government's Borders Target Operating Model (paragraph 6.1). The amount of preparatory work and analysis required to deliver these reforms, such as detailed policy development, consultation, assessing the risk of divergence or securing parliamentary time, means that it is not feasible to deliver these in phase one. We will need to complete this preparatory work in parallel with phase one activity and will return to the Board for a more detailed discussion on this in 2023.

4.2 To deliver this programme of work by 2026 will require significant cross-FSA effort. Steps that we have already taken to re-prioritise our work plan for 2022/23 is outlined in FSA 22/12/05.

4.3 Within phase one there are a number of options enabled by the Bill that we will consider for our REUL. Although we have not yet fully undertaken our detailed policy analysis, we believe that in phase one we will focus upon:

- **Preserve/Extend:** We expect to advise ministers to preserve (or extend the sunset date for) the vast majority of our REUL before the end of 2023. This will ensure we continue to have a system that maintains the safety and standards of food for consumers, and to comply with international trade requirements. This will give us time to carry out reforms in phase 2. We believe this could be done by listing the pieces of REUL to be preserved or extended in one or more statutory instruments.
- **Restate:** We expect to advise ministers to make secondary legislation restating REUL in a different form in order to preserve its current effect in some areas for the reasons set out in

paragraph.2.6. This is likely to include a restatement of the 'General Food Law' EU law Regulation (EC) 178/2002 ([footnote 1](#)) regulation which is core to protecting public health and consumers' interest in relation to food, and applies to all stages of production, processing and distribution of food and feed.

- **Reform:** The need to preserve or restate a large amount of REUL prior to December 2023, and the very tight timescales, we believe it will not be feasible to undertake a substantive programme of reform by the end of 2023. Unless we identify some targeted and specific reforms that are very simple to deliver and likely to be widely acceptable, including to ministers in Wales and Scotland, we will not be seeking any reform.
- **Sunset:** We have not yet identified any substantive pieces of REUL that we would advise ministers to allow to sunset in their entirety. Any sections of legislation that could sunset, will require alternative arrangements to be put in place (guidance, lists, new processes for example) in order to maintain the regulatory framework. We will seek to address the c.700 individual authorisations permitting feed additives (c.500) and genetically modified foods (c.200) to be placed on the market in GB, (for example, by consolidation or procedural reform) allowing those individual pieces of REUL to sunset or be revoked.

5 Cross-Government and Four-Nation Working

5.1 We remain committed, (in line with common [frameworks](#) ([footnote 2](#))), to working with the devolved administrations across the UK, to seek consensus in the advice we provide to ministers. This Bill is no exception, and we will work closely with officials in Scotland, Wales and Northern Ireland (NI), and with Defra and DHSC in reaching decisions, and developing advice and draft policy proposals.

- We will need to advise Welsh ministers on each of the pieces of REUL that we have identified - those that apply across England and Wales, and the additional pieces where we have policy responsibility in Wales, but the legislation is held by Defra in England.
- We are taking a cross-government working approach to understand and manage any specific implications of REUL for consumers and businesses in Northern Ireland, particularly where divergence may emerge between GB and NI. This will also include consideration of the interplay between REUL work and the Northern Ireland Protocol Bill.
- We are working closely with Food Standards Scotland, through formal common framework arrangements and on individual policy areas to ensure that our thinking and policy development is aligned as far as possible. Working through framework arrangement may lead to changes to our initial REUL proposals as wider considerations are factored in.
- We are working closely with Defra and DHSC on areas where they lead in England on policy responsibility for FSA's devolved areas. We are also liaising closely with the Brexit Opportunities Unit, within BEIS, which helps us to remain informed of wider considerations as we continue to deliver this programme of work.

6 Alignment With Other FSA Priorities

6.1 Our work on REUL is progressing in parallel with the UK Government's Borders Target Operating Model programme (a fundamental review of global import controls). This programme will require legislative change and given the interactions of this work with the REUL Bill we will closely monitor the possibility of using either vehicle for some of the changes required.

6.2 As highlighted in paper FSA 22/12/06, recent engagement with the meat industry has highlighted support for reform but also flagged caution around pursuing legislative change that would result in regulatory divergence for domestic and international food production. This view is broadly consistent with those that we have heard from wider industry. As we consider reforms, it will be vital that we engage with industry and consumer groups to assess the impact of any draft proposals.

7 Key Risks

7.1 Working to current planning assumptions presents several key risks to the Programme, and to the wider work of the FSA.

- **Timeframes:** The timeframes set out in the Government's draft Bill are extremely challenging (including time to consult meaningfully with external stakeholders) and risks constraining our longer-term ambition for reform.
- **Resourcing:** The volume and breadth of REUL being assessed, (and the overall programme of work that the FSA is responsible for within the Government's Bill), is dependent on significant and sustained levels of resourcing. As highlighted in paper FSA 22/12/05 we have undertaken significant re-prioritisation to find sufficient resources for this work and other priorities that we had not anticipated when undertaking this year's business planning. This has a clear and direct impact on our wider work programme for 22/23 and onwards.
- **Engagement and consultation with other government departments and Devolved Administrations:** Successful delivery and maintaining as far as possible a common approach, requires sustained and ongoing engagement across the four nations and with other departments across government. We will need to continue to prioritise working UK wide whilst working at pace to deliver this programme of work.

8 Next Steps

8.1 Following the initial internal triage of REUL we will work through the results with the DAs and begin the work to assess what legislative steps are necessary and to prepare and draft SIs for the UK Government's December 2023 deadline. This will require significant legal expertise, multiple impact assessments, formal consultation, the incorporation of considerations under the UK common frameworks, as well as continued engagement with other government departments (Defra, DHSC), FSS and the Devolved Administrations.

8.2 We will bring an update to the Board in March 2023 setting out our progress with the REUL programme.

9 Conclusions

9.1 The Board is asked to:

- Agree the guiding principles for the FSA's advice to ministers on retained EU law
- Agree the FSA's overall approach to a multi-year programme of work and comment on emerging proposals to preserve and reform different aspects of REUL
- Note the FSA's approach to four-country working and working across the UK
- Note the key risks for this Programme, and implications for wider FSA work plans

Annex 1: Retained EU Law (Revocation and Reform) Bill 2022

Overview

The Retained EU Law (Revocation and Reform) Bill is an enabling Bill to allow for the revocation or amendment of retained EU law (REUL) and to remove the special features REUL has in the UK legal systems (and which had been retained as part of the European Union (Withdrawal) Act 2018).

Powers within the Bill

The Bill automatically revokes all REUL within scope ([footnote 3](#)) at the end of 2023, except where it has been 'preserved' before then (by means of an SI made by a Minister or a devolved authority). This 'sunset' deadline can be extended (but only by a Minister) through an SI, but no later than the end of 23 June 2026 ([footnote 4](#)).

REUL which is not revoked by the sunset clause (end of 2023) becomes known as 'assimilated law'. This means that, in practice the Bill:

- Abolishes the principle of supremacy of EU law (and establishes a new priority rule requiring retained direct EU legislation (RDEUL) to be interpreted and applied consistently with domestic legislation)
- Repeals any remaining directly effective EU law rights and obligations ([footnote 5](#))
- Abolishes general principles of EU law ([footnote 6](#))
- Facilitates domestic courts departing from retained case law (and provides a mechanism for UK government and devolved administration law officers to intervene in cases regarding retained case law, or refer them to an appeal court, where relevant)

The Bill also downgrades the status of RDEUL for the purpose of amending it more easily.

Aside from the two regulation-making powers above, the Bill contains a number of other powers to enable a Minister or a devolved authority to make regulations, which can:

- restate secondary retained EU law or secondary assimilated law, exercisable until the end of 2023, and in so doing can produce effects equivalent to those achieved by the principle of EU law supremacy, retained general principles of EU law, or directly effective EU law rights (cls.12 & 13). This power would likely be used as an alternative to preserving the REUL in question;
- revoke secondary retained EU law without replacement; revoke and replace with provision to achieve the same or similar objectives, or revoke and make 'alternative provision' (provided that it is considered that the overall effect of the changes made does not increase the regulatory burden), exercisable until 23 June 2026 (cl.15).
- modify secondary retained EU law or assimilated law (or provision made under the powers above) to take account of changes in technology or developments in scientific understanding (cl.16). The use of this power is ongoing, and not time limited.

The Bill also repeals the Business Impact Target contained in the Small Business, Enterprise and Employment Act 2015 (cl.18).

Parliamentary Progress and Procedure

The Bill was introduced into the House of Commons on 22 September 2022. Second reading took place on 25 October and committee stage in mid-November. Following passage through the House of Lords, Royal Assent could be expected by Summer 2023.

For regulations made under the restatement/reform powers set out above, the Bill sets out the type of 'sifting' procedure used in the European Union (Withdrawal) Act 2018. In a few cases (for example, where amending primary legislation), regulations are automatically subject to the 'affirmative' procedure (The SI is laid before Parliament after it is made, coming into force at least 21 days later. Apart from this, regulations are generally subject to the negative procedure (The SI must be laid in Parliament in draft, and subject to debate and approval before it can be made). The Minister has final choice on whether the regulations should be negative or affirmative. Similar provisions apply to regulations made by the Welsh Ministers and laid before the Senedd.

Use of this procedure has implications for the FSA's workplans and when draft legislation should be ready, when set against the end-2023 sunset deadline.

1. EU law Regulation (EC) 178/2002
2. Link to provisional Framework; updated Framework is awaiting final Ministerial sign-off
3. Referring to EU-derived subordinate legislation and retained direct EU legislation.
4. A date 10 years on from the referendum on EU membership.
5. Directly effective rights are those provisions of EU treaties which are sufficiently clear, precise and unconditional as to confer rights directly on individuals and which can be relied on in national law without the need for implementing measures (for example Articles in the TFEU on State Aid or non-discrimination on ground of nationality).
6. The general principles of EU law have been developed by the CJEU over time and can be used as an interpretative aid and as a basis for invalidating an act if it does not comply with a general principle of EU law. There is no definitive list of general principles, but they include principles such as proportionality, respect for fundamental rights and legal certainty.