



Will the Retained EU Law Bill undermine Sunak's Windsor deal?

by Anton Spisak, 30 March 2023

In its current form the Retained EU Law Bill is incompatible with the Windsor Framework. Rishi Sunak should make big changes to the REUL bill or scrap it altogether.

After nearly three years of passionate disagreements over the Northern Ireland Protocol – part of the Withdrawal Agreement that took Britain out of the EU – the UK government and the European Union have finally agreed on a way forward. The Windsor Framework, a deal that amends parts of the controversial protocol, promises to eliminate many of the practical difficulties that businesses and individuals in Northern Ireland have experienced since Brexit. But the Retained EU Law (REUL) bill, an extraordinary piece of legislation currently going through Parliament, could undermine this carefully negotiated deal.

The REUL bill, the brainchild of Jacob Rees-Mogg, a former Brexit opportunities minister, would eliminate a special category of law – known as 'retained EU law' – which stems from the EU but which Theresa May's government decided to preserve to ensure legal stability. The proposed bill would require the government to remove all these laws before the end of 2023, unless ministers decided to replace, amend or update them. This means reviewing around 4,000 pieces of legislation – although not even ministers seem to know the true number – ranging from the Working Time Directive to rules governing chemical usage and standards for the environment, in less than a year.

Some elements of retained EU law have already changed. Post-Brexit immigration laws have repealed provisions relating to free movement of people, and EU state aid rules have been removed from domestic law. But government ministers argue that the powers they used to make those changes under the 2018 EU Withdrawal Act have now expired. That is why they are trying to pass a new law that allows them to remove all retained laws, except the bits they wish to salvage. What laws they save, and why they do so, is at their own discretion, and not that of Parliament.

Some of the bill's elements are more problematic than others. While the bill still gives ministers the choice of keeping EU laws or scrapping them altogether, it is more absolutist on three other salient

matters. The first is that the legislation would abolish the principle of ‘supremacy’ of retained EU law, under which retained law takes precedence in instances where retained EU law and domestic law conflict. Second, the REUL bill would also effectively curtail a host of ‘directly effective’ rights for individuals and businesses – such as the right to equal pay – which originated from EU treaties but became part of domestic law after Brexit; the bill would disapply those rights after the end of 2023. Finally, the proposed bill would give British courts more freedom to depart from relevant rulings of the European Court of Justice (ECJ) in cases where retained EU law still applies in the UK.

Enter the Windsor Framework. Under the new deal struck between UK premier Rishi Sunak and European Commission president Ursula von der Leyen, goods moving into Northern Ireland from Great Britain and staying in the region would – travelling through a ‘green lane’ – be exempted from most customs checks and regulatory requirements. For some products such as medicines, the agreement introduces a dual regulatory system, whereby authorisations from both the UK and the EU will be valid in Northern Ireland.

While this arrangement removes most of the practical difficulties in Northern Ireland, not everything will change. Northern Irish businesses will continue to apply EU production standards for goods and a body of EU law will still feature within the amended protocol – albeit subject to a new veto that can be exercised by Stormont, the Northern Ireland Assembly, in certain situations. The ECJ will still have jurisdiction over EU rules applying in Northern Ireland – a position which Brussels successfully defended throughout the negotiations. And UK courts will still be able to make preliminary references to the ECJ when hearing disputes relating to EU laws applying in Northern Ireland.

The problem for UK prime minister is that, as it stands, the REUL bill is incompatible with the Windsor Framework in at least three ways.

First, some laws that would expire under the REUL bill are included within the scope of the amended protocol. True, ‘Northern Ireland specific legislation’ is carved out from the REUL bill. But the bill would nonetheless repeal various UK-wide retained laws that apply to Northern Ireland – there are about 1840 such laws, according to the government’s own dashboard – and are also listed within the amended protocol. Most product standards and equality protections enacted before the end of the Brexit transition period would be caught by the bill and automatically disappear unless ministers actively chose to preserve or ‘restate’ them. A kind interpretation is that this is a mistake of omission. But this mistake alone would put the UK in breach of its obligations under the Withdrawal Agreement and, if the equality protections were to be removed, it would risk undermining parts of the 1998 Good Friday/Belfast Agreement.

Second, the REUL bill would undermine the legal status of some laws that are applied under the amended protocol. Under Article 4 of the Withdrawal Agreement, the UK must apply any EU law provisions in the treaty (including those in the protocol) in a way that is consistent with how the EU and its member-states implement them on EU soil, and the UK does so through Section 7A of the 2018 EU Withdrawal Act, providing that the withdrawal treaty has direct effect in UK law. The Windsor deal does not change that obligation. Removing the mechanism that ensures that UK courts enforced retained EU law in the same way the EU does – as the REUL bill attempts to do – would create ambiguity within UK legal order and especially in Northern Ireland.

The final problem relates to the role of courts. The REUL bill would give British courts more discretion to depart from the case law of the ECJ. Yet, courts are currently bound to follow ECJ case-law for all EU laws

that still apply in the UK under the withdrawal treaty and, where necessary, they can submit preliminary questions on those cases where EU laws apply in Northern Ireland. The bill would undermine that ability.

A practical consequence of all this would be unmanaged divergence, as the REUL bill, if implemented, would deepen the regulatory gulf between Great Britain and Northern Ireland. True, the Windsor Framework helpfully prevents new trade barriers for most GB-based businesses moving products into Northern Ireland under the green lane, or for individuals moving parcels or pets. But the risk is that Northern Irish businesses, which default to EU production rules, could be undercut by lower standards from GB producers. To avoid this, UK ministers would proactively have to 'preserve' all laws that could risk creating such difficulties for the UK's own internal market on the statute book. This defeats the purpose of the REUL bill.

So far, the UK government has avoided saying much about the compatibility of the Windsor deal with the REUL bill. This is understandable; Sunak is still trying to persuade the hardline eurosceptics within his party – many of them in the European Research Group – to support his deal. The European Commission, on the other hand, does not want to rock the boat by raising questions that could spur fresh tensions. Privately, however, EU diplomats are concerned not only about what the bill could do to the Windsor Framework, but also about what it would mean for the direction of the UK's regulatory policy. A dispute could ultimately be brought under the Trade and Co-operation Agreement if the REUL bill is used to undermine level-playing field protections that the two sides have put in place through that trade agreement.

Withdrawing the bill would be the easiest way for Sunak to deal with this headache, but that may not be a politically plausible option. Among Conservative eurosceptics there was some dismay at the Windsor Agreement. The withdrawal of the bill would be used by the hardliners to re-open the old wounds of Brexit. The question for Sunak, therefore, is how to amend the bill in such a way that would deal with the problems, without causing him a serious rebellion on the backbenches.

Several amendments would be necessary to make the bill compatible with the Windsor deal. First, the bill should exclude all legislation insofar as it is effective in Northern Ireland, including any laws that fall within the scope of the Windsor Framework. Second, if the government wishes to remove supremacy of retained EU law within the UK legal order, it should do so without prejudice to any obligations arising from international treaties. Third, the government should clarify the status of EU case law with respect to the laws that are applied under the amended protocol.

But these changes would not be sufficient to deal with far bigger problems that this bill presents. A more fundamental rewrite of the bill is needed because of the very short time that government departments have to review the retained laws, and the extraordinarily wide use of delegated powers that give ministers a free hand to redraft retained laws as they wish. There are also limited opportunities offered to MPs to scrutinise proposed changes to laws.

Sunak could benefit from letting peers in the House of Lords rewrite the bill. Peers across the political spectrum have put forward over 120 amendments, including attempts to reverse the operation of the so-called sunset clause so that the revocation of any legislation would require the prior approval of Parliament; to delay the sunset clause for another three years; and to exclude parts of the statute book from the bill. But peers should feel emboldened to push through more ambitious changes; after all, there is very little support among the general public or the business community for the deregulatory aims of the bill.

The British government argues that the upheaval to the legal and regulatory environment is a small price to realise the opportunities of Brexit. There is nothing wrong with the government asking whether existing regulations are fit for purpose and reviewing them. Improving regulation should be part of what any sensible administration does. But any such efforts need to be based on an informed assessment of whether specific regulations are ineffective and what should replace them – not an ideological attempt to change the nature of UK legal order at the stroke of a pen.

The reality is that the REUL bill is wrong in principle and would be dangerous in practice. Not only would the proposed legislation undermine the principles of good law-making and good governance, but it would also inject fresh uncertainty into the business and regulatory environment at a time when the British economy is already coping with serious difficulties. The prime minister has said that the mission of his government is to restore growth, but this bill will cost businesses and individuals much-prized certainty and predictability, and Whitehall time that could be better spent addressing genuine policy priorities like the energy crisis.

In agreeing the Windsor Framework with the EU, Sunak has discovered the value of compromise in politics. His prize is a deal that benefits Northern Ireland, heralds better relations with Brussels and Washington, and gets “the unfinished business of Brexit done”. He should not put his negotiating success in jeopardy with a bill that lacks any reasonable policy justification. He should once again put pragmatism ahead of ideology. If MPs cannot help him, peers in the upper chamber must do so.

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