

# Does the United Kingdom Need the ‘Brexit Freedoms Bill’?

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## ABSTRACT

On 25 October 2022, the ‘Brexit Freedoms Bill’ was given its second reading in the House of Commons. Here, it was described as ‘the culmination of the Government’s work to untangle the United Kingdom from nearly 50 years of EU membership’. The ideological stance accompanied an earlier practical justification for its introduction. In fact, Lord Frost (2021 Cabinet Office minister for the Brexit Opportunities Unit) had previously described the necessity of removing the special status of ‘retained EU law’ (‘REUL’), a category of UK laws encompassing legislation, case law and EU principles. He defined these as having ‘intrinsically less democratic legitimacy’ than UK-initiated laws. The Brexit Freedoms Bill thus provides a sunset clause to facilitate the automatic expiry of REUL on 31 December 2023, unless these are salvaged by ministers. The Bill’s two processes of adopting a sunset mechanism and facilitating ministerial reform (rather than the conventional route of legislative reform done by Parliament) have stirred debates over the appropriateness of the Bill as it currently stands. More broadly, a question should be asked of whether the Brexit Freedoms Bill represents a *will* rather than a *need* for reform, justifying its contested measures. This inquiry is brought into stark relief by the selective exclusion of the financial services sector from the remit of the Bill. The resolution of such matter will determine whether the controversial provisions should be tolerated as necessary to deliver an exigency for reform, or whether they are to be challenged further to achieve a more suitable bill.

*Keywords:* Brexit, EU Law, EU principles, retained EU law, financial services, MiFID

## I. INTRODUCTION

On 22 September 2022, (former) Business Secretary, Jacob Rees-Mogg, introduced the Retained EU Law (Revocation and Reform) Bill<sup>1</sup>—known as the ‘Brexit

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<sup>1</sup> Retained EU Law (Revocation and Reform) HC Bill (2022–23) [156] (‘Brexit Freedoms Bill’).

Freedoms Bill'—to the House of Commons, where it was given its first reading. A second reading, where MPs had the opportunity to debate the general principles and themes of the Bill, took place on 25 October 2022. Here, Business Under-Secretary, Dean Russell, speaking in lieu of Rees-Mogg, referred to the Brexit Freedoms Bill as 'the culmination of the Government's work to untangle the United Kingdom from nearly 50 years of EU membership'.<sup>2</sup> The reasoning provided has the distinctive ideological overtone of UK emancipation, to be sublimated through legal sovereignty. Yet, although ideology might represent a necessary condition for the introduction of the Bill, it is an insufficient condition per se. A more relevant criterion for its introduction should be whether the changes contemplated by the Bill meet a real reforming requirement in the UK statute book.

The Brexit Freedoms Bill's intention (as stated in the Explanatory Notes accompanying the Bill) is to 'provide the Government with all the required provisions that allow for the amendment of retained EU law (REUL) and remove the special features it has in the UK legal system'.<sup>3</sup> In assessing this objective, one should focus on both the 'special features' that REUL is said to possess in the UK statute book; and on the effects of granting 'all the required provisions' that would create a suite of powers for ministers either to revoke or assimilate REUL. Defining REUL contextualises the changes the Bill is seeking to create: its details will thus be discussed below.

The concurrent focus on REUL's 'special features' and on the provisions empowering ministers will firstly provide insight into the legitimacy of the measures in the Bill; and secondly, it will highlight whether the Bill is merely enforcing an ideological ambition for change or whether it is implementing necessary legal reform.

Indeed, a tension appears to be at play when considering the Bill's purpose. On the face of it, Brexit requires a reform of the UK statute book to purge it of redundant EU references and principles. Yet, this article suggests that, upon reflection, the tactical exclusion of a pivotal sector (that of financial services) from the reforms contemplated in the Bill reveals that the proposed changes are more of a 'will' than a 'need'. In other words, swift reforms are presented as a necessity until they touch on an inconvenient sphere.

Desire for vis-à-vis necessity of reform will impact the appropriateness of the Bill as it currently stands, especially given its time-sensitive sunset clause, surveyed below. In fact, the more urgent the Bill is, the higher the level of tolerance one can have towards divisive measures it might contain. That is, if reforming the UK statute book is truly a pressing issue, then the Bill's controversial measures could be reframed as meeting a genuine exigency. Conversely, if the Bill merely seeks to buttress the Brexit ideology, then its contested processes will need to be

<sup>2</sup> HC Deb 25 October 2022, vol 721, col 183.

<sup>3</sup> Explanatory Notes to the Retained EU Law (Revocation and Reform) Bill, para 1.

recast in the public arena to assess whether possible damaging provisions need to be rejected.

Following this introduction, five main sections advance the discussion. Section II traces the background to REUL's existence as a category of laws, considering its hybrid position as both reflective of the EU legal order it crystallises and of the legislative emancipation of a post-Brexit UK. A breakdown of the sub-categories of REUL is further offered in this section, highlighting the complexity of this body of laws. Section III then examines how the Bill nullifies the principle of supremacy of EU law through new interpretative principles foregrounding domestic laws. From there, Section IV critically analyses the mechanics of the Brexit Freedoms Bill, firstly by reviewing the operation of its sunset clause and contrasting this with a previous use of this expiry technique; and secondly, by discussing the controversy behind ministerial powers. A scrutiny of the Bill's impact on the financial services sector is then presented in Section V, with a brief overview of potential reverberations in the sensitive sectors of data protection, employment, and environmental law, as highlighted by the Public Law Project. Finally, concluding thoughts are offered in Section VI, with remarks on how a change in premiership has not led to a deprioritisation of the Bill, and with assessments of solutions to the two problems of vagueness and parliamentary scrutiny surrounding the Bill.

## II. RETAINED EU LAW

### A. A WATERSHED DATE

To explain how REUL as a category of laws came to be, a key date—31 December 2020 (referred to as 'Implementation period (IP) completion day')<sup>4</sup>—has to be borne in mind. This marked the end of transitional arrangements arising from UK-EU Brexit negotiations.<sup>5</sup> Such negotiations had determined that, despite not being a member of the EU's political institutions (and thus having no voting rights), the UK would still be subject to EU rules and remain part of the single market and of customs union until the IP completion day.<sup>6</sup>

Following the IP completion day, the UK opted to continue to provide legal continuity and certainty to businesses and individuals by ensuring a gradual progression between the pre-Brexit legal order and what was to come. This resulted in a decision to take a 'snapshot' of all EU legislation on IP completion day, carrying the legislation over into the UK statute book and rebranding it as 'retained EU

<sup>4</sup> European Union (Withdrawal Agreement) Act 2020 ('EUWAA 2020') s 39(1).

<sup>5</sup> LexisNexis Family Expert, 'Implementation Period (IP) Completion Day Definition' (*LexisNexis*) <[www.lexisnexis.co.uk/legal/glossary/implementation-period-ip-completion-day](http://www.lexisnexis.co.uk/legal/glossary/implementation-period-ip-completion-day)> accessed 21 November 2022.

<sup>6</sup> Georgina Wright and Haydon Etherington, 'Brexit Transition Period' (*Institute for Government*, 2 December 2020) <[www.instituteforgovernment.org.uk/explainers/brexit-transition-period](http://www.instituteforgovernment.org.uk/explainers/brexit-transition-period)> accessed 21 November 2022.

law' or 'REUL'.<sup>7</sup> This category of laws, currently in force, occupies a hybrid position.<sup>8</sup> On the one hand, REUL reflects the EU order from which it derives, as it maintains some EU law principles (with examples of general EU principles being supremacy of EU law, legal certainty, proportionality, equal treatment and subsidiarity).<sup>9</sup> On the other, REUL is a foretaste of the legislative freedom that Brexit will accord the UK once it has achieved full autonomy from EU laws. The results of the latter dimension of REUL are twofold. Firstly, legislative changes made at EU-level after IP completion day are not reflected in REUL,<sup>10</sup> meaning that REUL does not dynamically change with EU changes. Secondly, post-IP completion day, Parliament can pass domestic legislation to remove any undesired effect of EU legislation.<sup>11</sup> Yet, this means effecting change at a slow pace, in accordance with law-making timelines.<sup>12</sup> Besides that, in the two years preceding IP completion day, over 600 pieces of UK secondary legislation made around 80,000<sup>13</sup> amendments to REUL.<sup>14</sup> Such amendments, however, were mostly of a technical nature: their function was to ensure the clarity and operability of laws that would apply 'purely in a UK domestic context'.<sup>15</sup>

In summary, REUL maintains a special status in its liminality: it ensures legal continuity (and consequently business certainty) by retaining ties to EU law, whilst offering a glimpse into the legislative independence Brexit offers.

## B. TURNING TO NUMBERS AND SUBTYPES

The REUL catalogue reported by the UK Government initially counted 2,417 pieces of legislation spanning across 21 sectors of the UK economy, with the top three being Agriculture, Forestry and Fishing; Transportation and Storage;

<sup>7</sup> Catherine Barnard, 'Commentary: REUL (Retained EU Law) And Lord Frost' (*UK in A Changing Europe*, 17 December 2021) <<https://ukandeu.ac.uk/reul-lord-frost/>> accessed 21 November 2022.

<sup>8</sup> Catherine Barnard, 'Retained EU Law in the UK Legal Orders: Continuity Between the Old and the New' (2021) University of Cambridge Faculty of Law Research Paper 27/2021 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3947215](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3947215)> accessed 21 November 2022.

<sup>9</sup> 'General principles of EU law' (*Thomson Reuters Practical Law*) <[https://uk.practicallaw.thomsonreuters.com/w-018-9132?contextData=\(sc.Default\)&transitionType=Default&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-018-9132?contextData=(sc.Default)&transitionType=Default&firstPage=true)> accessed 21 November 2022.

<sup>10</sup> David Thorneloe, 'Retained EU Law in the UK after Brexit' (*Pinsent Masons*, 5 January 2021) <[www.pinsentmasons.com/out-law/guides/retained-eu-law-uk-after-brexit](http://www.pinsentmasons.com/out-law/guides/retained-eu-law-uk-after-brexit)> accessed 21 November 2022.

<sup>11</sup> Barnard (n 8) 1.

<sup>12</sup> *ibid.*

<sup>13</sup> This figure varies: the Cabinet Office reports in a Memorandum to the Delegated Powers and Regulatory Reform Committee that 'more than 1,000 statutory instruments [were] made by the UK and devolved governments', estimating 'more than 100,000 amendments' to REUL. Cabinet Office, 'Retained EU Law (Revocation and Reform) Bill: Memorandum from the Cabinet Office to The Delegated Powers and Regulatory Reform Committee' (*UK Parliament*, 22 September 2022) <<https://bills.parliament.uk/bills/3340/publications#collapse-publication-delegated-powers-memorandum>> accessed 21 November 2022.

<sup>14</sup> Thorneloe (n 10).

<sup>15</sup> *ibid.*

and Financial and Insurance Activities (Table II.1).<sup>16</sup> On 8 November 2022 a further 1,400 pieces of REUL emerged from the research of The National Archives.<sup>17</sup> The latest calculation by the Government on 30 January 2023 brings the total count to over 3,700 pieces of legislation, concentrated over 400 unique policy areas.<sup>18</sup> This figure is to be updated on a quarterly basis, with government departments working to identify further REUL.<sup>19</sup>

TABLE II.1

Top Sectors Retained EU Law Fall Under	
<i>Sector</i>	<i>Number of REUL</i>
Agriculture, Forestry and Fishing	493
Transportation and Storage	482
Financial and Insurance Activities	365
Manufacturing	347
Public Administration and Defence; Compulsory Social Security	133

Source: Government Reporting

Although this figure provides an overall picture of the scale of reform the Brexit Freedoms Bill is concerned with, it offers only a narrow view of what the REUL category actually includes. A more suitable overview is offered by understanding REUL as a heading nesting three types of laws: (a) REUL *stricto sensu*; (b) retained EU case law; and (c) general REUL principles.<sup>20</sup>

(i) *REUL Stricto Sensu*

REUL *stricto sensu* is simply legislation: both EU legislation incorporated into UK law before IP completion day (‘EU *derived* or *preserved* legislation’);<sup>21</sup> and EU legislation directly applicable or directly effective but which had not been

<sup>16</sup> Cabinet Office, ‘Retained EU Law – Public Dashboard’ (*Tableau Public*) <<https://public.tableau.com/app/profile/governmentreporting/viz/UKGovernment-RetainedEULawDashboard/Guidance>> accessed 9 November 2022.

<sup>17</sup> George Parker, ‘UK Plan to Scrap All EU Laws Suffers New Setback’ *Financial Times* (London, 8 November 2022) <[www.ft.com/content/0c0593a3-19f1-45fe-aad1-2ed25e30b5f8](http://www.ft.com/content/0c0593a3-19f1-45fe-aad1-2ed25e30b5f8)> accessed 9 November 2022.

<sup>18</sup> Department for Business and Trade, Department for Business, Energy & Industrial Strategy and Grant Shapps, ‘Research and Analysis: Retained EU Law Dashboard’ (*Gov.uk*, 22 June 2022, last updated 30 January 2023) <[www.gov.uk/government/publications/retained-eu-law-dashboard](http://www.gov.uk/government/publications/retained-eu-law-dashboard)> accessed 1 February 2023.

<sup>19</sup> *ibid.*

<sup>20</sup> Barnard (n 8) 3.

<sup>21</sup> European Union (Withdrawal) Act 2018 (‘EUWA 2018’) s 2.

specifically implemented into UK law before IP completion day ('EU converted legislation').<sup>22</sup>

(ii) *Retained EU Case Law and General REUL Principles*

Post-IP completion day, UK courts and tribunals are no longer bound by principles or decisions from the European Court of Justice ('ECJ'), nor can they refer matters to it.<sup>23</sup> In line with the notion of legal continuity that underlies REUL, European decisions pre-IP completion day—together with the EU's interpretative methods—are also retained (unless modified after IP completion day). Additionally, an extension is made for the Court of Appeal to depart from retained EU case law (a power previously granted only to the UK's highest court, the Supreme Court).<sup>24</sup> When presented with the opportunity, the Court of Appeal, however, refused to do so, noting that this power was to be exercised cautiously.<sup>25</sup> This demonstrated adherence to EU-level decisions and deference to their influence over the UK context: further evidence of REUL being perceived as tied to the pre-Brexit order.

### C. REPLACING THE PLACEHOLDER

The three categories, only presented in headline form above,<sup>26</sup> might give some indication of the complexity of REUL. Complexity does not, however, mean finality: REUL is only a placeholder, only part of a process towards the restoration of the UK's legislative sovereignty. In the words of Lord Frost, finalising this process would mean 'to remove the special status of retained EU law so that it is no longer a distinct category of UK domestic law, but normalised within [the UK's] law, with a clear legislative status'.<sup>27</sup>

Lord Frost was the 2021 Cabinet Office minister for the Brexit Opportunities Unit, succeeded in 2022 by (former) Business Secretary, Rees-Mogg (who is now a backbencher under Rishi Sunak's premiership). Lord Frost explained that the rationale for the intended overhaul of REUL was that 'laws agreed elsewhere have intrinsically less democratic legitimacy than laws initiated by the Government of this country'.<sup>28</sup> Besides the birthplace of laws, the influence of EU principles, still present through REUL as illustrated above, have compounded the desire to

<sup>22</sup> Barnard (n 8) 7–15. Barnard provides EU Directives as examples of 'EU derived or preserved legislation' and EU Treaty provisions, EU Regulations, and EU Decision as examples of 'EU converted legislation'.

<sup>23</sup> EUWA 2018 (n 21) s 6(1).

<sup>24</sup> EU (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, SI 2020/1525.

<sup>25</sup> *TameIn Inc v Warner Music UK Ltd* [2021] EWCA Civ 441, [2021] Bus LR 1119 [73]–[89] (Arnold LJ).

<sup>26</sup> For a more detailed analysis of the subtypes of REUL, see Barnard (n 8).

<sup>27</sup> Lord Frost, 'Lord Frost Statement to The House of Lords: 16 September 2021' (House of Lords, London, 16 September 2021) <[www.gov.uk/government/speeches/lord-frost-statement-to-the-house-of-lords-16-september-2021](http://www.gov.uk/government/speeches/lord-frost-statement-to-the-house-of-lords-16-september-2021)> accessed 21 November 2022.

<sup>28</sup> *ibid.*

reform REUL, in a post-Brexit UK.<sup>29</sup> Epitomising such influence is the so called 'Marleasing principle',<sup>30</sup> which established that courts of EU member states have a duty to interpret national law in a way that gives effect to EU law. Therefore, reforming REUL is seen as a step in the direction of recovering the separate identity of UK law.

With this vision, the Brexit Freedoms Bill aims to operate on two fronts, firstly by nullifying the principle of supremacy of EU law and other interpretative principles of EU law, and secondly by imposing a sunset deadline to the revocation of REUL within which ministers are empowered to restate REUL as UK law or allow the lapsing of REUL. These two aspects will be examined in turn.

### III. SUPREMACY OF DOMESTIC LAW

A significant consequence of the Bill passing into law would be the abolition of the supremacy of EU law<sup>31</sup> and of general principles of EU law.<sup>32</sup>

Clause 4(1)(A2) of the Brexit Freedoms Bill provides a new interpretative instruction: that REUL provisions be read and implemented in a way that is compatible with domestic enactments. This is re-emphasised in clause 4(1)(A2)(b) which states that any provision of REUL that is incompatible with domestic laws is subject to such domestic laws.

This clause of the Brexit Freedoms Bill is a clear departure from REUL's distinction between pre and post IP completion day. Now the message becomes that irrespective of when a law was passed, it need not show deference to EU law.

A similar reasoning is applied to general EU principles and ECJ judgments. EU principles no longer affect the interpretation of the UK statute book, and even the name 'REUL' is changed to 'assimilated law' to remove references to the EU source. With regards to the development of domestic case law, the Bill enables UK courts' divergence from retained EU case law and allows them to go one step further by making an 'incompatibility order'<sup>33</sup> in case of discrepancy between REUL and any domestic enactment.<sup>34</sup>

All these changes are time-bound, with an imminent deadline provided through the operation of a sunset clause. In the set timeframe, courts are not the

<sup>29</sup> Graeme Cowie and Ali Shalchi, 'Research Briefing: Retained EU Law (Revocation and Reform) Bill 2022-23' (*House of Commons Library*, 17 October 2022) <<https://commonslibrary.parliament.uk/research-briefings/cbp-9638/>> accessed 21 November 2022.

<sup>30</sup> Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135.

<sup>31</sup> Brexit Freedoms Bill (n 1) cl 4.

<sup>32</sup> *ibid* cl 5.

<sup>33</sup> The Bill does not offer thorough details of how the incompatibility order would work. Possibly, this could be similar to a 'declaration of incompatibility', a current UK constitutional law feature that enables UK judges to declare that a statute is incompatible with the European Convention of Human Rights. This is a simple declaration that acts as a signal to Parliament to eventually intervene to remove the incompatibility.

<sup>34</sup> Brexit Freedoms Bill (n 1) cl 9.

only domestic institution to be empowered: ministers are authorised to revoke, reaffirm or replace REUL. This is reviewed below.

#### IV. SUNSET CLAUSE AND MINISTERIAL POWERS

##### A. SUNSET CLAUSE

The revocation of REUL will take place through a sunset clause (clause 1 of the Brexit Freedoms Bill) capturing both EU-derived subordinate legislation<sup>35</sup> and retained direct EU legislation<sup>36</sup>. The automatic expiry of REUL will take effect on 31 December 2023 unless the retained EU laws are preserved by ministers.<sup>37</sup> The Explanatory Notes of the Bill posit that the logic behind the use of a sunset clause is on the one hand, the acceleration of reform to the benefit of businesses and consumers; and on the other, the increase of business certainty about when a ‘new domestic statute book’ will come into effect.<sup>38</sup> This formal justification for the sunset clause-method of legally breaking ties with EU law thus emphasises practical benefits, fortifying the layer of ideological benefits advanced to introduce the Bill as a whole.

The use of a sunset provision is certainly not new to the Government, with the emergency Coronavirus Act 2020 having made use of a two-year sunset clause to impose a time limit on most of ministers’ emergency provisions.<sup>39</sup> The Government’s ability to extraordinarily exercise its powers through emergency arrangements, however, was tempered by clause 98 of the Act which provided a six-month parliamentary review mechanism. Through this, insofar as it was practicable to do so, ministers had to arrange the debate and vote of their motions in the House of Commons within seven days of the end of each six-month interval.<sup>40</sup> If the motions were rejected by the House of Commons, ministers had 21 days within which to ensure the expiry of the relevant temporary provisions.<sup>41</sup>

Returning to the Brexit Freedoms Bill, a noteworthy point must be raised. Clause 2 of the Bill allows ministers to extend the 31 December 2023 sunset deadline to a time no later than 23 June 2026 (the decenary of the Brexit Referendum). A further parallelism can be drawn with the Coronavirus Act 2020: this Act reined in ministerial powers, as intermediate scrutiny by the House of Commons effectively reduced the arc of a two-year sunset period into six-month blocks. Conversely, the expansionary provision in clause 2 of the Brexit Freedoms Bill achieves the opposite of constraining ministerial powers: it lengthens the

<sup>35</sup> Brexit Freedoms Bill (n 1) cl 1(1)(a).

<sup>36</sup> *ibid* cl 1(1)(b).

<sup>37</sup> *ibid* cl 1(2).

<sup>38</sup> Explanatory Notes (n 3) para 18.

<sup>39</sup> Coronavirus Act 2020, s 89(1).

<sup>40</sup> *ibid* s 98(3).

<sup>41</sup> *ibid* s 98(1).



exercise of such powers from an initial one-year period to a four-year period, without specifying how Parliament will oversee the use of such powers.

Therefore, the possible deadline extension appears to exacerbate what might already be considered a democratic deficit in the Brexit Freedoms Bill. In fact, according to the prevalent opinion of witnesses at the Committee stage of the Bill,<sup>42</sup> the ministerial power to amend REUL undermines parliamentary sovereignty, the paramount UK constitutional principle<sup>43</sup> that holds Parliament to be the supreme law-making authority in the country. This point is reemphasised in the third reading of the Bill, where Michael Amesbury, an opposition Labour Party MP, notes that parliamentary sovereignty consists of giving control to Members of Parliament rather than the Executive or Whitehall bureaucrats.<sup>44</sup>

This is not, however, a universally accepted interpretation of the principle. A minority opinion advanced by Sir Stephen Laws KC<sup>45</sup> (First Parliamentary Counsel<sup>46</sup> from 2006 to 2012) holds that the tenet of parliamentary sovereignty is a 'myth' and rather defines Parliament as a 'political filter for legislation'. In light of this, Government can still be made accountable to Parliament through the latter's scrutiny of the 'politically salient' aspects of legislation.<sup>47</sup> According to this view, Parliamentary oversight of the 'mainly technical',<sup>48</sup> bureaucratic task of removing 'legally inoperable' EU legislation would be an unnecessary complexity that contravenes good governance.<sup>49</sup>

The issue then becomes whether the Bill itself should better define the limits of mere ministerial review by indicating the cases in which Members of Parliament should be allowed to step in, and consult on or challenge political aspects of critical importance to the electorate.

## B. CLAUSE 15 MINISTERIAL POWERS

The crux of the revocation and reform powers contained in the Bill can be found in clause 15, a reading of which raises the question of the extent to which such powers are fundamentally an 'executive power-grab'.<sup>50</sup>

<sup>42</sup> PBC Deb (Bill 156) 8 November 2022, cols 15–16, 28, 30–31, 34.

<sup>43</sup> A principle emphasised in EUWAA 2020 (n 4) s 38.

<sup>44</sup> PBC Deb (Bill 156) 18 January 2023, col 398.

<sup>45</sup> Current Senior Research Fellow at Policy Exchange, a British conservative think tank based in London; Sir Stephen Laws KC appeared as the first witness at the PBC Deb (Bill 156) 8 November 2022, see col 5.

<sup>46</sup> First Parliamentary Counsel is the head of the Office of Parliamentary Counsel, a group of government lawyers who draft government legislation introduced to Parliament.

<sup>47</sup> PBC Deb (Bill 156) 8 November 2022, cols 5–6.

<sup>48</sup> PBC Deb (Bill 156) 18 January 2023, col 433.

<sup>49</sup> *ibid* col 397.

<sup>50</sup> Lord Anderson of Ipswich, 'Retained EU Law (Revocation and Reform) Bill: Notes for Remarks' (Speech before the Bar European Group, Matrix Chambers, London, 19 October 2022) para 4 <[www.daqc.co.uk/wp-content/uploads/sites/22/2022/10/RETAINED-EU-LAW.pdf](http://www.daqc.co.uk/wp-content/uploads/sites/22/2022/10/RETAINED-EU-LAW.pdf)> accessed 7 November 2022.

According to clause 15, a minister can either revoke ‘secondary’ REUL without replacement<sup>51</sup> (causing a legislative gap); or replace the revoked law with a provision the minister considers appropriate and with<sup>52</sup> or without<sup>53</sup> the requirement that it have ‘the same or similar objectives’ to the replaced law. This clause remains ambiguous in its failure to articulate when the replacement option must pursue similar objectives and when it can ignore this requirement.

Additionally, opacity is found in the terminological choice. As noted by the national legal charity, the Public Law Project (PLP),<sup>54</sup> the term ‘secondary’ REUL adopted in clause 15 misleadingly suggests that the laws that might be changed are technical in nature, rather than including substantive rights. This is on account of a ‘category error’ that equates EU secondary legislation (called ‘secondary’ only to distinguish them at EU level from treaties, which are called ‘primary’) to UK secondary legislation (which is law known as a statutory instrument created by ministers).<sup>55</sup> Calling the REUL in clause 15 ‘secondary’ is thus a *misnomer* that gives the illusion of ministers operating within their usual mandate of passing statutory instruments.

## V. IMPACT ON FINANCIAL SERVICES

An exceptional point of the Brexit Freedoms Bill is clause 22(5) which excludes the application of the sunset clause to specific financial services legislation, namely:

1. Anything referred to in Schedule 1 to the Financial Services and Markets Act 2022;<sup>56</sup>
2. Rules made by the Financial Conduct Authority (FCA), the Prudential Regulation Authority (PRA) or the Bank of England (BoE);<sup>57</sup> and
3. Requirements or directions imposed by the Payment Systems Regulator.<sup>58</sup>

An analysis by practitioners in financial regulation services<sup>59</sup> indicates that this exclusion is because of the publication of the Financial Services and Markets

<sup>51</sup> Brexit Freedoms Bill (n 1) cl 15(1).

<sup>52</sup> *ibid* cl 15(2).

<sup>53</sup> *ibid* cl 15(3).

<sup>54</sup> Samuel Willis, ‘Retained EU Law (Revocation and Reform) Bill Second Reading Briefing: Recommendations on Ensuring Unconstrained Legislative Powers are Not Transferred to Ministers’ (*Public Law Project*, 24 October 2022) para 13 <<https://publiclawproject.org.uk/resources/retained-eu-law-revocation-and-reform-bill-second-reading-briefing>> accessed 7 November 2022.

<sup>55</sup> *ibid*.

<sup>56</sup> Brexit Freedoms Bill (n 1) cl 22(5)(a).

<sup>57</sup> *ibid* cl 22(5)(b).

<sup>58</sup> *ibid* cl 22(5)(c).

<sup>59</sup> I am grateful to Caroline Dawson (Partner) and Paul Lenihan (Senior Associate) at Clifford Chance for their helpful comments. All errors remain mine.

(‘FSM’) Bill before the Brexit Freedoms Bill.<sup>60</sup> In fact, the FSM Bill contains provisions conferring powers on HM Treasury to make secondary legislation, and on the regulators to make rules, which replace REUL relating to financial services. Including financial services legislation in the scope of the Brexit Freedoms Bill would have been thus, at best redundant and at worst in conflict with a more specific regime. Furthermore, the FSM distinguishes itself from the Brexit Freedoms Bill in a way that makes it more suitable to reform the body of financial services REUL. Firstly, the FSM Bill does not include any sunset mechanism: this avoids ministerial haste in the review process. Secondly, the FSM Bill contains a finite list of laws to be reviewed, specified in the annexed Schedule 1.

The approach under the FSM Bill has been described, in antithesis to that of the Brexit Freedoms Bill, as ‘responsible and measured’.<sup>61</sup> Yet, risk is not completely eliminated from the FSM Bill, as it also provides a sweep-up provision enabling the repeal of all EU-derived legislation (excluding primary legislation) relating to financial services which is not captured in Schedule 1.<sup>62</sup> This signals that even purportedly well-drafted future legislation (such as the FSM Bill) cannot guarantee a total identification of all REUL to be reviewed. Perhaps this note could be a useful reminder to adopt a more clement perspective on the Brexit Freedoms Bill and focus on what this Bill could ultimately achieve. To this end, appeals have been made<sup>63</sup> to use the reforming objective of the Brexit Freedoms Bill, and specifically its provisions displacing EU law supremacy with UK law supremacy, to correct the so-called ‘MiFID override’.

## A. MIFID OVERRIDE

The Markets in Financial Instruments Directive (‘MiFID’) override is a legislative fix contained in Article 4(4) of the Regulated Activities Order 2001 (‘RAO’)<sup>64</sup> that creates the *paradox* (in a post-Brexit UK) of holding EU financial services regulations to be superior to UK legislation in case of discrepancy; and the *inconvenience* for firms and investors having to review constantly both the RAO and definitions and exemptions in MiFID II.

The RAO sets out what activities and instruments are regulated in the UK, covering the same subject matter of the EU equivalent investment-business

<sup>60</sup> The FSM Bill had its first reading on 20 July 2022, whilst the Brexit Freedoms Bill had its first reading on 22 September 2022.

<sup>61</sup> Words by Mark Fenhalls, (then) Chair of the Bar Council and witness at the PBC Deb (Bill 156) 8 November 2022, col 28.

<sup>62</sup> Financial Services and Markets HC Bill (2022-2023) [146] (‘FSM Bill’) cl 1(5).

<sup>63</sup> Barnabas Reynolds, Thomas Donegan and Sandy Collins, ‘The Brexit Freedoms Bill and the MiFID Override for Financial Services Regulation’ (*Shearman & Sterling*, 24 October 2022) <[www.shearman.com/en/perspectives/2022/10/the-brexit-freedoms-bill-and-the-mifid-override-for-financial-services-regulation#page=1](http://www.shearman.com/en/perspectives/2022/10/the-brexit-freedoms-bill-and-the-mifid-override-for-financial-services-regulation#page=1)> accessed 7 November 2022.

<sup>64</sup> A statutory instrument made under the Financial Services and Markets Act 2000.

directives, MiFID I<sup>65</sup> and MiFID II<sup>66</sup>. Yet, there is not perfect congruity between the RAO and the MiFID framework, specifically with respects to regulatory exemptions. This issue has been addressed by allowing the two frameworks to co-exist in the UK and requiring, under the MiFID override, a concurrent look at the frameworks and a prevailing of the narrower MiFID exemptions over the broader RAO exemptions. Practitioners have confirmed the inconvenience of this parallel scrutiny,<sup>67</sup> drawing from their experience of advising clients moving from an existing unregulated business in the UK to an activity touching on the regulated sphere. In these cases, such clients would need to know the extent to which they can rely on exemptions to prove that they do not fall under the regulated market. A double reference text increases the complexity of ascertaining this.

Such call from the world of practice therefore holds that the Brexit Freedoms Bill could be used in its explicit reneging of EU authority to incentivise the creation of a single UK source, clearly defining regulations and exemptions. This assumes that some financial services areas will escape the list in the FSM Bill, and thus inevitably fall under the purview of the Brexit Freedoms Bill (unless explicitly exempt under it).

## B. PRAGMATISM PREVAILING?

Besides some practitioners' desire to see a direct impact of the Bill in the MiFID area, wider questions emerge from the pre-emptive exclusion of the financial services sector from the remit of the Brexit Freedoms Bill.

The decision to shield financial services from sunseting indicates the dominance of pragmatic calculations over the ideological stance of the Bill. That is, so long as business needs favour the application of EU laws, these can remain. At the same time, this position then betrays the actual necessity of reform of the UK statute book as a whole. The notion of disapplying EU laws as an urgent priority underscored the idea of accelerating reform through a sunset clause. Yet, this was easily cast aside when it proved to be inexpedient. One might conclude that the reform justification of the Brexit Freedoms Bill veils a desire to advance the Brexit political outcome to the next legal stage. The application of a sunset over other sectors is however still of consequence to the business world: this is briefly addressed next.

<sup>65</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [2004] OJ L145/1.

<sup>66</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L173/349.

<sup>67</sup> See n 59.

### C. IMPACT ON OTHER SECTORS

Although the exclusion of financial services from the purview of the Brexit Freedoms Bill might ensure continuity for businesses planning future activities, the reality is that businesses are affected by legal changes in other economic sectors.

The PLP's compilation of the scope of rights and protections currently guaranteed under REUL in the areas of data protection, employment and environmental law (Table V.1) reveals the breadth of these sensitive fields.<sup>68</sup> One can immediately comprehend the good business sense that comes from proper information handling under the General Data Protection Regulation's ('GDPR')<sup>69</sup> extensive regime of principles, rights and obligations. Similarly, businesses with employees will have to confront the intricate web of labour law protections afforded to such employees. These cover matters ranging from maximum working hours, length of night work and annual leave entitlements;<sup>70</sup> to the protection of employees from dismissal for mere transfer reasons;<sup>71</sup> or the favourable treatment of fixed-term<sup>72</sup> or agency workers<sup>73</sup>. Moving then to environmental considerations: businesses providing development projects<sup>74</sup> or public plans<sup>75</sup> are currently subject to assessments of their environmental impact, demonstrating the deemed necessity of external legal requirements to further environment protection objectives.

Therefore, changes to the three areas of data protection, employment, and environmental law may also benefit from a pondered review, a type of deliberation that might only occur when not rushing towards an imminent deadline.

The issue with sunseting legislation in these fields is not only to be seen in the legal uncertainty that might loom over businesses, but in the behavioural disincentives that legislative voids (even if the voids are only short-lived) risk creating. On this point, Professor Catherine Barnard<sup>76</sup> observed at the Committee stage of the Brexit Freedoms Bill that, in the absence of legislation mandating prescribed actions, businesses seeking to cut costs will not necessarily comply with high standards.

<sup>68</sup> Willis (n 54).

<sup>69</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ('General Data Protection Regulation') [2016] OJ L119/1.

<sup>70</sup> Working Time Regulations 1998, SI 198/1833.

<sup>71</sup> Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246.

<sup>72</sup> Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, SI 2002/2034.

<sup>73</sup> Agency Workers Regulations 2010, SI 2010/93.

<sup>74</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2011] OJ L26/1.

<sup>75</sup> Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30.

<sup>76</sup> Professor of European and Employment Law at the University of Cambridge and witness at the PBC Deb (Bill 156) 8 November 2022, see col 11.

TABLE V.1

Examples of Rights and Protections Potentially Affected by Augmented Powers		
<i>Sector</i>	<i>REUL</i>	<i>Description</i>
Data Protection	General Data Protection Regulation (GDPR)	Source of important data protection rights (for instance, right to be informed, right of access, right to rectification, right to erasure)
	Working Time Regulations 1998 (SI 198/1833)	Maximum weekly working time and right to holiday pay (including case law on formula for calculating holiday pay)
	Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (TUPE)	Protects the rights of workers whose jobs are outsourced or transferred to another business
Employment	Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551)	Protects part-time workers from being treated less favourably than full-time workers just because they are part-time
	Information and Consultation of Employees Regulations 2004 (SI 2004/3426)	Requires employers to establish arrangements for informing and consulting their employees
	Health and Safety (Consultation with Employees) Regulations 1996 (SI 1996/1513)	Employers have a duty to consult their employees, or their representatives, on health and safety matters
	Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034)	Protects fixed-term workers from being treated less favourably than full-time workers just because they are fixed-term
	Agency Workers Regulations 2010 (SI 2010/93)	Agency workers are entitled to the same or no less favourable treatment for basic employment/working conditions
	Environment	Habitats Directive 92/43/EEC (and implementing regulations)
Environmental Impact Assessment Directive 2011/92/EU (and implementing regulations)		Development projects that are likely to have a significant environmental impact must be identified and have their environmental impact assessed
Strategic Environmental Assessment Directive 2001/42/EU (and implementing regulations)		Public plans and projects are subject to an assessment of environmental impact

Source: The Public Law Project

## VI. CONCLUSIONS

Looking back to 2016 when the Brexit Referendum (that is, the trigger of the UK's divorce from the EU) took place, one cannot help but reflect on the UK having had six years to consider what laws to retain and what laws to do away with. Still,

we must be reminded that these six years have been far from ordinary:<sup>77</sup> five premierships, two monarchies and two global crises. This is the background to the Brexit Freedoms Bill's scrutiny.

## A. RECENT POLITICAL DEVELOPMENTS

The most recent change in premiership might be of consequence to the Bill's future. On 20 October 2022, prime minister Liz Truss, successor to Boris Johnson in heading the Conservative Party, announced her resignation a mere 44 days after taking office. The vacant role was occupied on 25 October 2022, by Rishi Sunak, Chancellor of the Exchequer in Boris Johnson's cabinet who had resigned from his role following the Pincher scandal. Sunak's new cabinet featured a replacement of Rees-Mogg with Grant Shapps as Business Secretary, leading to speculations of a possible deprioritisation of the Bill. Yet, Sunak himself had been a promoter of a systematic review of REUL during his campaign in the Conservative Leadership contest against Truss.<sup>78</sup> With reference to REUL, his promotional message indicated that he would review 'all 2400 of them' within the first 100 days of his premiership.<sup>79</sup> With the recent resurfacing of additional laws that bring the current total to over 3,700, the concern of whether there is sufficient capacity in governmental departments to conduct the review becomes of true relevance. This might be the most pragmatic consideration on which to reflect; it is not, however, the most severe feature that has attracted criticisms and suggestions of corrective measures.

## B. POSSIBLE SOLUTIONS

Two main problems can be identified at the centre of major denunciations of the Bill. First, the indefinite number of REUL that could be the subject of reform. The Government's new exercise of updating its catalogue of REUL on a quarterly basis offers only a partial solution: a periodic update in fact is simply an 'open-ended expansion of the list of EU laws'<sup>80</sup> that fails to correct the present uncertainty. Such vagueness will likely prove uninviting for entities who might otherwise be interested in conducting business in the UK. Moreover, if further unanticipated REUL were to emerge between now and the December 2023 deadline (a scenario that is predicted by the Government)<sup>81</sup>, these would burden the

<sup>77</sup> Alison Young, Sir David Williams Professor of Public Law at the University of Cambridge and witness at the PBC Deb (Bill 156) 8 November 2022, see col 12.

<sup>78</sup> Rishi Sunak (*Twitter*, 8 August 2022) <<https://twitter.com/RishiSunak/status/1556590394170818560?s=20&t=2sh3l43Fc6NgcK7qQeSxiA>> accessed 30 November 2022.

<sup>79</sup> *ibid.*

<sup>80</sup> Peter Foster and George Parker, 'UK Review of EU Laws Expanded After 1,000 Pieces of Legislation Added' *Financial Times* (London, 30 January 2023) <[www.ft.com/content/060b957b-97e8-4580-ad48-a538fcc423fd](http://www.ft.com/content/060b957b-97e8-4580-ad48-a538fcc423fd)> accessed 1 February 2023.

<sup>81</sup> See n 18.

load and planning of an already encumbered civil service. A solution might be to set a deadline to the sunset only once a definitive list of the legislation to be modified has been conclusively identified. Thus, replication of the FSM Bill's template has been welcomed by consultees in Parliament,<sup>82</sup> with the added suggestion of imposing different sunset deadlines on regulations of differing magnitude and urgency.<sup>83</sup> On this point, Mark Fenhalls KC<sup>84</sup> further indicates that a list would be the basis for a 'proper ministerial division of responsibility as to who is doing what'.<sup>85</sup> As the Bill is currently proceeding in the House of Lords, such marshalled list of REUL could be requested by the Lords themselves.

The second problem is the contended lack of sufficient democratic input by Parliament. The mechanics of how parliamentary scrutiny should work are a glaring omission in the Bill. Sir Stephen Laws has indicated that provisions about parliamentary procedure need not be set in legislation;<sup>86</sup> however, he fails to offer a solution as to where these should be placed. A more tenable course of action would be that proposed by the Bar Council: requiring a consultation and allowing sufficient time for Parliament to debate any REUL that is restated or revoked.<sup>87</sup> It appears that this endeavour would imply that questions of timing and sunseting addressed as the first major problem would be coming full circle.

Overall, the Brexit Freedoms Bill would indeed represent the legal crowning of the Brexit vote, as it aims to expedite the independence of the UK's statute book from the influence of EU laws. The selective exclusion of the financial services sector from the sunseting mechanism contemplated in the Bill, however, is revelatory of a strategic disdain for EU-initiated laws. Despite the Bill being presented as a necessary step, this single act might downgrade its urgency, leading one to suggest that wider consensus be reached before it becomes an Act in its current form.

<sup>82</sup> PBC Deb (Bill 156) 8 November 2022, cols 12; 32–34.

<sup>83</sup> *ibid* col 12.

<sup>84</sup> See n 61.

<sup>85</sup> PBC Deb (Bill 156) 8 November 2022, cols 32–34.

<sup>86</sup> Text to n 47.

<sup>87</sup> Text to n 50.