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To: All Peers

8 March 2023

My Lords,

RETAINED EU LAW (REVOCATION AND REFORM) BILL: COMMITTEE STAGE DAY 4

I am very grateful to noble Lords for all their contributions during the fourth day of Committee Stage for the Retained EU Law (Revocation and Reform) Bill. This letter responds to points about which I committed to providing a written answer.

Methodology of identifying retained EU law

Lord Thomas of Cwmgiedd asked that the Government should set out the methodology that was used to ensure that every retained EU law instrument has been identified.

Officials including colleagues at The National Archives, have been identifying retained EU law by assessing every piece of legislation in their policy area. The Brexit Opportunities Unit, then in the Cabinet Office, began this review in October 2021. This was followed by a detailed commission sent out in January 2022 which provided standardised guidance to all departments. This included definitions of retained EU law, what needed to be documented, and the legal definitions to assist with this work. The purpose of this review was to identify every piece of legislation related to, made, or relied upon to give effect to the UK's membership of the EU. However, the internal methodology for identifying such retained EU law was for each department to decide, given their expertise and institutional knowledge.

Regarding identification of secondary legislation made or operating for an EU obligation, the UK did not solely rely on section 2(2) of the European Communities Act 1972 to implement EU obligations. Indeed, where other domestic powers were available, it was government policy at times to use such powers instead of section 2(2). There has never been a consolidated or comprehensive list to show SIs made under other domestic powers to implement EU obligations. As it is primarily the body of secondary legislation that is affected by the Retained EU Law (Revocation and Reform) Bill, in the context of the sunset, departments have been assessing the relevant legislation and deciding which instruments or provisions were made or operated for the purpose of implementing an EU obligation.

Complexity arises in pieces of legislation that were made under a variety of delegated powers, and in instances where provisions in single instruments may have been made for a variety of purposes and not just to implement EU obligations. However, departments have

been instructed to err on the side of caution when considering whether something is retained EU law falling within the scope of the sunset provision because of the very wide definition provided in the EU Withdrawal Act.

In addition to these departmental reviews, The National Archives has used several standard data analytic techniques to assist in identifying retained EU law. This includes but is not limited to searches through the text of legislation published on legislation.gov.uk using key search terms to achieve this. The terms were identified by reviewing the most commonly occurring words in the explanatory notes and preambles of retained EU law. Candidate legislation from these searches which was classified as still being legally in force was then reviewed by relevant departmental lawyers to confirm that it was retained EU law. Ministers have then been asked to sign off on the retained EU law that is in their departments.

This extensive, cross-Government process has undergone extensive quality assurance by policy and legal officials across Government to ensure all relevant legislation is represented accurately within each Department. The output of this work with departments was the catalogue of retained EU law, which was published on gov.uk in June 2022, and updated in January 2023. It lists the name of each piece of retained EU law held by departments, but also, on the retained EU law explorer tab, sets out retained EU law by department and by type.

There is some retained EU law that has been 'orphaned' due to machinery of Government changes. This orphaned retained EU law can be identified from data held by The National Archives. The National Archives have created a list of this legislation and the Brexit Opportunities Unit has been assigning pieces of this legislation to the relevant department. This ensures that each is reviewed and if applicable added to the retained EU law list.

This ongoing project of identifying all retained EU law is nearing completion. As discussed at Committee Stage, under the European Union (Withdrawal) Act 2018, retained EU law is subject to EU interpretative principles and is afforded supremacy over UK law. We need laws that are clear and accessible and it is unhelpful to have a distinct category of law, which is complicated to identify remaining indefinitely on the UK Statute Book.

Safeguards around Clause 15

The noble Baroness, Lady Thornton asked about the safeguards in place on the power under Clause 15. Firstly, the power is time limited so that it cannot be exercised beyond 23 June 2026. The power is also implicitly limited to one usage per legislation. Once a new provision has replaced the retained EU law or assimilated law as domestic legislation, the power can then not be used on that domestic legislation. The power is therefore in effect a 'one shot' power. This ensures that the Bill does not contain an endless power for the Government. Instead it is a time limited delegated power which will enable the Government to reform the body of retained EU law we have inherited from the EU producing a body of domestic legislation that is tailored to the needs of the UK. Any further changes would need to be enacted by primary legislation unless there were other relevant domestic powers on the statute book.

In addition to this, the individual limbs of the power are also restricted. Subsection (2) is limited such that any replacement legislation must be appropriate and must fulfil same or similar objectives as the retained EU law or assimilated law that it is replacing. This limits the functionality of this limb of the power to essentially adjusting policy to better fit the UK context, rather than radically departing or introducing legislation in ways that are controversially different from the existing legislation.

While subsection (3) does not have such a limitation, it may still only provide appropriate “alternative” provision to the retained EU law or assimilated law being replaced. Any replacement legislation must therefore cover similar ground to the retained EU law or assimilated law being replaced, although it may seek to achieve different objectives considered appropriate by relevant national authorities. This means that the power cannot be used to create new regulations in wholly unrelated policy areas.

Where legislation is made under subsection (2) and either replicates a delegated power or a criminal offence existing in the retained EU law being replaced, the draft affirmative procedure must be used. Furthermore, the criminal offences must correspond to or be similar to those which the revoked provisions provided. In that sense, the power does not provide the licence to create wholly new offences, but instead - in effect - only allows like-for-like replacement of offences that already exist.

The draft affirmative procedure must also be used where legislation is made under subsection (3). This will ensure that any changes to policy objectives must be actively approved by Parliament. In cases where the negative procedure is chosen under subsections (1) and (2), the sifting procedure will apply. This affords additional scrutiny for Parliament to consider whether the negative procedure is appropriate, whilst recognising that many of the regulations under this power will make changes for which the affirmative procedure would not usually be considered necessary.

The power in Clause 15 is also limited by the requirement that the new provision cannot add to the overall regulatory burden for that particular subject area, as was discussed at length in the House. In addition to this, the use of any of the powers in the Bill is also limited, at common law, by the requirement that they be exercised “reasonably”.

I hope noble Lords find these responses useful. I look forward to continuing to work with you all to deliver this important legislation and to discussing these critical issues as the Bill moves through Parliament.

Warm regards

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