1. We are instructed by Client Earth, the Royal Society for the Protection of Birds, and WWF-UK ("Instructing Organisations"). Each of the Instructing Organisations has significant concerns about the implications of the Retained EU Law (Revocation and Reform) Bill¹ ("the Bill") for the United Kingdom’s constitutional order generally and environmental law forming part of retained EU law under the EU (Withdrawal) Act 2018 ("EUWA") specifically. They are accordingly seeking that the Bill either be withdrawn entirely or amended significantly during the legislative process now taking place.

2. We have been asked to identify and advise on the constitutional implications of certain core aspects of the Bill, namely: (i) the ‘sunset’ provisions in clauses 1 to 3 (see section III below), and (ii) the ministerial powers in clauses 12 to 16, 19 and 22 (see section IV below). We have also been asked to advise on whether section 29 of the EU (Future Relationship) Act 2020 ("EUFRA"), combined the UK-EU Trade and Cooperation Agreement ("TCA"), is, in principle, capable of altering the content and application of the Bill, if and once enacted (see section V below).

3. In advising on these constitutional issues we take no position on matters of substantive policy (which is ultimately for Parliament, Ministers, and the devolved authorities) as to whether any particular aspect of retained EU law ought to be retained, revoked, restated (whether as modified or unmodified), or replaced (and, if so, in what substantive form). Thus, we express no views whatsoever on the merits of any substantive decision as to the status quo ante or divergence from (retained) EU law.

¹ As it presently stands House of Lords second reading stage: HL Bill 89 as brought from the House of Commons on 19 January 2023.
I. SUMMARY OF CONCLUSIONS

4. The UK does not have a constitution that is codified in any single document. Its governance, however, rests largely on settled constitutional principles, including parliamentary sovereignty (which includes the accountability of the executive to Parliament), the separation of powers, and the rule of law. This Bill, if passed in its current form, would violate a number of such principles. Its core purpose is claimed to be to “firmly re-establish our Parliament as the principal source of law in the UK”. However, that claim is belied by the fact that the Bill seeks fundamentally to undermine parliamentary supremacy and the separation of powers by transferring Parliament’s essential role, law-making, into the hands of government ministers. The making (or unmaking) of these laws will be virtually free of the effective scrutiny of either the electorate or of other members of Parliament (or the devolved legislatures).

5. It is true that some degree of ‘delegated’ or ‘subordinate’ legislation must, in any complex society, be carried out by the executive because Parliament simply does not have the time to attend to every detail of a piece of legislation. However, this Bill is a striking example of what has been referred to as a ‘skeleton bill’, which has become increasingly employed over recent years, despite the trend being deplored by various official bodies. The extent of delegation of power to the executive in this Bill is however exceptional, as it intends to do so in wholesale fashion, in effect relinquishing Parliament’s key responsibility to make policy in the public interest. This is by virtue of (i) the scale of the retained EU law affected over which the executive is conferred the power to retain, revoke or amend within an unreasonable time-frame thousands of existing laws and principles which govern important areas of public and private life,

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2 Cabinet Office, Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee, 20 September 2022, p.1. Likewise, the Impact Assessment states that the Bill "will firmly reestablish [sic] our Parliament as the principal source of law in the UK": Cabinet Office/BEIS, Impact Assessment, 26 September 2022, p.1.

3 Indeed, the Delegated Powers and Regulatory Reform Committee, 25th Report of Session 2022-23, Retained EU Law (Revocation and Reform) Bill (and others), 2 February 2023, ¶¶4, 9 and 63 describes it as “hyper-skeletal” since it is sufficiently lacking in substance. We agree: in such circumstances, this Bill cannot fairly be described as a ‘framework’ Bill, since its default effect is the automatic revocation of thousands of laws and principles without substantive policy direction or effect controls set by the UK Parliament.

and (ii) the procedures for review, repeal and modification which threaten to subvert the constitutional balance between Parliament and the UK government and between the devolved administrations and Westminster.

6. The claim that the Bill promotes parliamentary supremacy is thus blatantly hollow, as the Bill seeks instead to undermine that very principle. It also offends the hallowed constitutional principle of the separation of powers, which requires law-making power to reside with Parliament and which confines the executive role to the implementation of those laws. Insofar as the Bill may be justified by the fact that some procedures will be in place in certain circumstances for the scrutiny of Statutory Instruments by Parliament by means of negative or affirmative parliamentary resolutions, that rings equally hollow, since those procedures provide no opportunity to amend the secondary legislation and in practice have rarely been effective in halting its passage.

7. Other constitutional principles which the Bill, if enacted in its present form, would violate include the rule of law, particularly in its sense of legal certainty, particularly because it is impossible to predict which laws will be retained, revoked or amended, or how the process for doing so will unfold. The rule of law is also offended by the opportunity that the Bill provides for arbitrary decision-making by means of its conferment of over-broad discretionary powers to UK Government Ministers and devolved authorities in respect of the vital interests of UK citizens. Moreover, the Bill disregards established methods of public participation and, in general, negates the kinds of transparency and accountability of the executive to the UK Parliament and devolved legislatures that is inherent and necessary in any democratic society.

8. The Bill also threatens non-compliance with the UK’s international obligations. Of particular note is the UK’s compliance with the TCA and a range of environmental standards incorporated directly or indirectly in that Agreement. Divergence from the level-playing field commitments set out in the TCA risks triggering the dispute resolution mechanisms and, ultimately, leading to the potential suspension of certain obligations within the Agreement and retaliatory measures. That said, in principle, the application of section 29 EUFRA may modify or supplement the effect of the Bill’s provisions (once enacted).
II. CONTEXT

9. The United Kingdom departed from the European Union on 31 January 2020.\textsuperscript{5} EU law has largely ceased to apply to and within the United Kingdom since 31 December 2020,\textsuperscript{6} following the completion of the implementation period. From this date, the EUWA: (i) incorporated into domestic law much EU law that previously applied to and within the United Kingdom and (ii) saved / re-categorised certain pre-existing domestic law (together, now referred to as “retained EU law”).\textsuperscript{7} It also gave Ministers and devolved authorities significant powers to repeal that retained EU law, or amend it so that it continued to function for domestic purposes (e.g. by the correction of so-called “deficiencies”, such as removal of references to EU institutions). The UK Government has estimated that “several Acts of Parliament and more than 1,000 statutory instruments made by the UK and devolved governments were made, amending or repealing provisions of [retained EU law]”.\textsuperscript{8} Most of these powers (e.g. under section 8 EUWA) have expired since 31 December 2022.

10. The Bill was introduced in the House of Commons and received its first reading on 22 September 2022.\textsuperscript{9} It received its second reading on 25 October 2022, and was considered across four days in the House of Commons Public Bill Committee on 8, 22, 24 and 29 November 2022.\textsuperscript{10} Some 15 UK Government drafting amendments of a technical nature were accepted.\textsuperscript{11} No opposition amendments were successful. The Bill was subject to the report stage and received its third reading on 18 January 2023. Some UK Government drafting amendments of a technical nature were accepted. No

\textsuperscript{5} So-called “Exit Day”: section 20(1) EUWA.
\textsuperscript{6} So-called “IP Completion Day”: section 39(1) of the EU (Withdrawal Agreement) Act 2020. Certain EU law continues to apply after this date as “relevant separation agreement law” pursuant to the UK-EU Withdrawal Agreement and Ireland / Northern-Ireland Protocol [2019] OJ C384 I/1 and sections 7A-7C EUWA.
\textsuperscript{7} See sections 2-6 and 20 EUWA, as amended by the EU (Withdrawal Agreement) Act 2020. Broadly speaking, there are three overarching categories of retained EU law: (i) EU-derived domestic legislation (domestic law implementing or related to former EU law obligations); (ii) Direct EU legislation (EU legislation which was directly applicable in the UK without requiring implementing measures); and (iii) Directly Effective rights (certain rights (etc.) contained within the EU Treaties, Directives and case law, including general principles).
\textsuperscript{8} Cabinet Office, Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee, 20 September 2022, p.7
\textsuperscript{9} See, also, UK Government, The benefits of Brexit: how the UK is taking advantage of leaving the EU, January 2022, which sets out the UK Government’s intention behind the Bill.
\textsuperscript{10} For full disclosure, one of the present authors, Jack Williams, gave oral evidence to the Public Bill Committee on 8 November 2022 (second sitting, afternoon session) and Jeffrey Jowell adopted a critical approach to the Bill in the annual Rothschild/ Foster Human Rights Lecture on 2 November 2022.
\textsuperscript{11} These are well-summarised by House of the Commons Library Research Briefing Paper (Graeme Cowie), Progress of the Retained EU Law (Revocation and Reform) Bill 2022-23, 9 January 2023.
opposition amendments were successful. It was introduced into the House of Lords and received its first reading on 19 January 2023. It received its second reading on 6 February 2023 and is due to start Committee stage on 23 February 2023.

11. Relevantly for the purposes of this Opinion, the effect of the Bill is to:

   a. automatically ‘sunset’ (i.e. revoke) large portions of retained EU law at the end of 2023, unless Ministers act to remove or delay (or devolved authorities act to remove) the revocation for specific pieces of retained EU law. See, further, ¶¶19 to 20 below.

   b. provide Ministers and devolved authorities significant powers to modify any secondary retained EU law that remains. These powers go significantly further than those provided for in the EUWA, since they permit substantive policy amendments going well beyond correcting “deficiencies”. See, further, ¶¶46 to 53 below.

   c. downgrade the status of retained EU law, making it easier to amend by secondary legislation using the new and other pre-existing powers and making it subject to fewer procedural requirements prior to modification. See, further, ¶¶54 to 55 below.

12. As the UK Government’s own Impact Assessment for the Bill accepts, there is a “large amount and very broad range of REUL” that will be subject to the Bill. The UK Government’s Dashboard, first published in June 2022 (“Dashboard”), originally identified over 2,400 distinct pieces of retained EU law of which, it has been reported,

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\(^{13}\) Specifically “EU-derived subordinate legislation” (see clause 1(4)) and “retained direct EU legislation” (see section 3 EUWA).

\(^{14}\) The power to remove a piece of relevant retained EU law from the effect of the automatic sunset is available to devolved authorities (see clause 1(2)), whereas the power to delay the sunset is not (see clause 2).

\(^{15}\) More specifically, the Bill contains powers to retain, revoke, restate, replace and update retained EU law. We use the term “modify” (and variations) as a ‘catch-all’ term for simplification.

\(^{16}\) This term is defined in clause 12(2). It is a wider category of retained EU law than covered by the sunset provision in clause 1, since it includes all retained EU law that is not primary legislation (cf. clause 1(4) and (5)) and also includes parts of primary legislation that have been inserted by subordinate legislation (cf. clause 1(3)).

\(^{17}\) Cabinet Office/BEIS, Impact Assessment, 26 September 2022, p.12.

around 2,000 had remained unchanged, around 180 had been amended, almost 200 had been repealed, and around 30 had been replaced under powers pre-dating the Bill.¹⁹

13. Thereafter, the National Archives reportedly identified an additional 1,400 pieces of retained EU law which had been omitted from the original version of Dashboard.²⁰ During the report stage in the House of Commons, the Minister for Science and Investment Security stated that, in fact, the UK Government had, at that stage, “identified and verified” 3,200 pieces of retained EU law in total, and is “expecting” that it will reach c. 4,000.²¹

14. On 30 January 2023, the UK Government updated the Dashboard.²² It identifies 3,745 distinct pieces of retained EU law of which, it has been reported, over 3,000 remain unchanged, around 350 have been amended, almost 300 have been repealed, and around 30 have been replaced or expired. It is noted that, as with the original version of the Dashboard, these numbers do not include any secondary legislation of the devolved authorities. It is unknown how many such regulations exist, or whether they will be included. It should be noted that the Dashboard is based on the definitions of retained EU law in the EUWA and does not provide a definitive list of either retained EU law generally, or that which falls within the scope of the Bill specifically.

15. The Department for the Environment, Food and Rural Affairs (“DEFRA”) is responsible for over 1,750 pieces of retained EU in the updated version of the Dashboard, which is by far the most by any UK Government department (by over 1,000 pieces of retained EU law).²³ We are instructed that the true number is likely to be higher. It has been reported that DEFRA is one of three UK Government departments which, allegedly, is seeking to extend the sunset deadlines in the Bill.²⁴

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¹⁹ House of the Commons Library Research Briefing Paper (Graeme Cowie), Progress of the Retained EU Law (Revocation and Reform) Bill 2022-23, 9 January 2023, p.29. Not all of the retained EU law will subject to the Bill’s provisions, however: see fns. 14-16 above.
²⁰ Financial Times, UK plan to scrap all EU laws suffers new setback: Discovery of 1,400 more pieces of legislation makes huge bureaucratic task even harder, 8 November 2022.
²² In a written answer dated 12 January 2023, the Department for Business, Energy and Industrial Strategy stated that the UK Government plans to update the Dashboard “on a “quarterly basis throughout 2023”.
²⁴ The Times, Lords will delay Rishi Sunak’s bonfire of EU laws, 2 January 2023.
16. We are instructed that the devolved administrations were not involved in the creation of the Dashboard, nor were they asked to contribute to the recent update. Although they are gathering information about their own retained EU law, there are no published lists or information currently available, but it is believed that, for example, Northern Ireland’s Department for Agriculture, Environment and Rural Affairs has identified at least 600 instruments falling within the scope of the Bill.

17. On 22 November 2022, the UK Government published its Impact Assessment (dated 26 September 2022) in connection with the Bill. The Regulatory Policy Committee has rated the Impact Assessment as “not fit for purpose”, since, inter alia, the UK Government had “not sufficiently considered, or sought to quantify, the full impacts of the Bill” and it “needs to strengthen its consideration of… the impacts across the devolved administrations”.

18. The Scottish and the Welsh Governments have both published legislative consent memorandums recommending that the Scottish Parliament and the Senedd Cymru, respectively, withhold consent for the Bill. On 29 November 2022, the Scottish Parliament approved a motion stating that it “agrees that the [Bill] threatens vital environmental and health standards and protections built up over 47 years of EU membership, creates enormous uncertainty for workers and businesses, and undermines devolution, and should, therefore, be scrapped by the UK Government”.

26 Regulatory Policy Committee, Opinion on Retained EU Law (Revocation & Reform) Bill Impact Assessment, 18 November 2022.
III. THE ‘SUNSET’ PROVISIONS: CLAUSES 1 TO 3

(a) Overview

19. Clause 1 automatically ‘sunsets’ (i.e. revokes) certain “EU-derived subordinate legislation” and “retained direct EU legislation”29 (both of which are domestic law30) at the “end of 2023”, 31 unless either (a) Ministers and/or devolved authorities act to remove a relevant piece of retained EU law (clause 1(2)), or (b) Ministers delay the sunset for a time no later than the end of 23 June 2026 (clause 2). The latter power is not available to devolved authorities.

20. Clause 3 repeals section 4 EUWA. The effect of this clause32 is to ‘sunset’ automatically those retained EU rights, powers, liabilities, obligations, restrictions, remedies and procedures which were incorporated into domestic law by section 4 EUWA. This category of rights (etc.) includes those emanating from: EU Treaty Articles; certain provisions of EU Directives;33 general principles of EU law;34 and CJEU case law. There are no powers akin to those to clauses 1(2) or 2 to remove a relevant piece of retained EU law for this purpose, or delay this sunset. There are, however, powers to restate an effect which is equivalent to those rights (etc.) which are automatically sunsetted by clause 3 (see, for example, clause 13(6)-(8)).

29 Defined in clause 1(4) of the Bill and section 3 EUWA, respectively. Exceptions to the sunset include: primary legislation (see clauses 1((3)-(5) and 21(1)); Northern Ireland legislation (see clause 1(5)); and financial services legislation (see clause 22(5)).
30 This is for two reasons: first, all retained EU law is so categorised pursuant to a domestic Act of Parliament, EUWA; and second, EU-derived subordinate legislation is domestic subordinate legislation which pre-dated Brexit and the operation of EUWA.
31 The Bill uses the term “end of 2023”, which is unnecessarily vague and uncertain. However, the Cabinet Office, Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee, 20 September 2022, p.7 suggests that the intended meaning is 11.59 p.m. on 31 December 2023.
32 Read, also, with clause 5, which amends sections 5 and 6 EUWA to clarify that retained general principles of EU law are abolished.
34 See Lipton and anor v BA City Flyer Ltd [2021] EWCA Civ 454, [64]; Adferiad Recovery Ltd v Aneurin Bevan University Health Board [2021] EWHC 3049 (TCC), [117]; and Jersey Choice Limited v Her Majesty’s Treasury [2021] EWCA Civ 1941, [22]-[24]. For discussion, see: Jack Williams, General principles as retained EU law and accrued EU law, EU Relations Law Blog, 2 November 2022.
(b) Analysis

21. **Clauses 1 to 3 infringe the constitutional principle of the rule of law.** One crucial aspect of the rule of law, as explained by Lord Bingham, is that “the law must be accessible and, so far as possible, intelligible, clear and predictable”. Legal certainty is important so that people and businesses can plan with relative certainty about the law and its possible consequences in terms of penalties and enforcement. Of course, law can be changed, but only after fair warning and specificity about the kind of change that is contemplated. Clauses 1 to 3 do not meet this central feature of the rule of law for the following reasons.

22. **First,** there is neither any identification of the retained EU laws subject to the clauses 1 and 3 sunsets, nor any requirement for such laws to ever be identified. The sunsets apply automatically regardless. There is, for instance, no limitation on the sunsets’ operation to only that retained EU law identified within a definitive schedule to the Bill, or the UK Government’s Dashboard.

23. Indeed, no authoritative index currently exists (or is obliged under the Bill ever to exist). As explained at ¶¶12 to 16 above, the Dashboard (for which there is no legislative obligation to update or render complete) may have material (both in number and substance) omissions. Indeed, the Office for Environmental Protection stated in respect of the original version of the Dashboard that it “exclude[d] significant environmental [retained EU law] on air quality, water quality, and biodiversity”.

For example, we note that the following laws concerned with environmental protection (which would fall within the scope of clause 1) were identified as missing from the original version of the Dashboard: (i) Conservation of Habitats and Species Regulations 2017 (S.I. 2017/1012); (ii) Marine Strategy Regulations 2010 (S.I. 2010/1627); Electricity Works (Environmental Impact Assessment) (England and Wales) Regulations 2017

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36 Office for Environmental Protection, *Written Evidence to the House of Commons Public Bill Committee for the Retained EU Law (Revocation and Reform) Bill*, 14 November 2022, ¶4.4.
(S.I. 2017/580);\textsuperscript{39} Water Resources (Environmental Impact Assessment) (England and Wales) Regulations (S.I. 2003/164);\textsuperscript{40} Conservation of Offshore Marine Habitats and Species Regulations 2017 (S.I. 2017/1013);\textsuperscript{41} Environmental Damage (Prevention and Remediation) (England) Regulations 2015 (S.I. 2015/810);\textsuperscript{42} and REACH Enforcement Regulations 2008 (S.I. 2008/2852).\textsuperscript{43} These omissions, although now corrected in the latest version of the Dashboard, highlight the worrying dangers of not identifying the laws that are subject to the sunset. As the Bar Council has aptly put it, “\textit{{it is not a good idea to legislate when you have no idea what the consequences will be.”}\textsuperscript{44}

24. The Dashboard (even the updated version) fares even worse when it comes to identifying the EU rights, powers, liabilities, obligations, restrictions, remedies and procedures which were incorporated into domestic law by section 4 EUWA and which are subject to the sunset in clause 3. Indeed, we note that the updated version of the Dashboard appears to include only 28 entries for retained EU law falling within section 4 EUWA. For example, to the best of our knowledge, there has been no attempt to identify publicly:

a. all the rights (etc.) arising under EU directives which were transposed into domestic law as they are “\textit{{of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before IP completion day (whether or not as an essential part of the decision in the case)}.}”\textsuperscript{45} Although the interpretation of that wording has been disputed,\textsuperscript{46} the important point for present purposes is that an exercise needs to be conducted which identifies the relevant, directly effective provisions of EU directives that fall within the scope of retained EU law and thus subject to the automatic sunset. This is not an academic point: although most directives have likely been fully implemented into domestic law,

\textsuperscript{39} The Planning & Environment Bar Association, \textit{Response to the House of Commons Public Bill Committee call for written evidence}, 14 November 2022, ¶11.
\textsuperscript{40} The Planning & Environment Bar Association, \textit{Response to the House of Commons Public Bill Committee call for written evidence}, 14 November 2022, ¶11.
\textsuperscript{41} Marine Conservation Society, \textit{Analysis: the Retained EU Law Bill}, 11 October 2022 referred to by Justin Madders MP, Public Bill Committee on 22 November 2022 (third sitting, morning session).
\textsuperscript{42} \textit{Ibid}.
\textsuperscript{43} \textit{Ibid}.
\textsuperscript{44} Bar Council, \textit{Briefing for Peers}, dated February 2023.
\textsuperscript{45} Section 4(2)(b) EUWA.
\textsuperscript{46} See: Jack Williams, \textit{When do directives form part of Retained EU Law? Case comment}, EU Relations Law Blog, 13 September 2022.
there remain instances for which that is not the case. See, for a recent example, *Harris v Environment Agency* [2022] EWHC 2264 (Admin), [89]-[94] where the Court held that article 6(2) of the Habitats Directive 92/43/EEC remained part of domestic law and was breached.

b. all the rights (etc.) arising under CJEU case law and general principles of EU law, including, importantly for the purposes of environmental protection, the precautionary principle. The impact of removing the interpretive principles for laws which are not sunsetted under clause 1 is therefore unclear and uncertain. There is a risk that substantive changes to the settled meaning and effect of certain retained EU laws, as judicially determined, are altered by a sidestep, or at least subject to the likelihood of fresh litigation^47. Moreover, without a list of relevant cases, it means that Ministers and devolved authorities are in no suitable position to decide whether and if so how, if at all, to replicate the effects of those cases under their powers in the Bill e.g. to ensure that the present, settled judicial application of the law is retained or altered.

25. The second infringement of the rule of law in the sense of legal certainty relates to the date by which such unidentified laws will be sunsetted. As we explained at fn. 31 above, the default “end of 2023” date for the sunset is unnecessarily vague and uncertain. Moreover, Ministers and/or devolved authorities can act to remove any relevant piece of retained EU law from the sunset in clause 1 entirely (clause 1(2)), and Ministers can delay that sunset of any particular law for a time no later than the end of 23 June 2026 (clause 2). This risks potential divergence and unpredictability on the application of the sunsets for the purposes of clause 1.

26. Thirdly, legal certainty is infringed in respect of the processes and timescales by which: (a) laws subject to the sunsets in clauses 1 and 3 are identified, if at all; (b) Ministers and/or devolved authorities decide to remove a piece of retained EU law from the scope

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47 As noted by the Bar Council: “Removing those principles [of interpretation] is likely to generate both uncertainty and unintended consequences, particularly when it is remembered that many of the instruments that will be affected have been the subject of considerable case-law at EU level in which those principles have been applied, the removal of which will generate uncertainty. Indeed, the Government has not explained what the consequences of the removal of those principles will be on the various rules and protections concerned. It is not a good idea to legislate when you have no idea what the consequences will be.” (Bar Council, *Briefing for Peers*, dated February 2023).
of the sunset; and (c) Ministers decide to delay the sunset’s application. All these are entirely unexplored and unconstrained by any provisions in the Bill.

27. Indeed, the UK Government’s own Impact Assessment accepts that there is a:

“high degree of uncertainty about the exact policy changes that the secondary powers and sunsetting parts of the Bill enables, as departments have largely not yet undertaken detailed reform work. Departments need time to assess their stock of REUL and to decide what they want to update, restate, repeal, revoke or replace via the secondary powers in the Bill and what they want to sunset. At present Government does not have a list of which REUL will be kept as they are, which will be repealed completely and which will be retained but in an amended form. Nor is there any way of knowing, at this stage, how pieces of REUL that departments decide to amend will change.”

28. The laws falling within the scope of the sunset provisions are therefore not “accessible”, “clear” or “predictable” as the rule of law requires. Nor is the implementation of those sunsets. The timing of changes is unknown and unknowable: the Bill provides no protections against Ministers waiting unto the 11th hour to identify whether and, if so, when any change to the default effect of the clause 1 sunset may take place. Likewise it is silent as to any processes for engagement concerning whether to exempt any measure, or delay its sunsetting. The state and content of the ‘rulebook’ on 1 January 2024 is therefore entirely unpredictable.

29. In these circumstances, there is no reasonable justification in constitutional terms for not listing the particular pieces of retained EU law subject to the automatic sunsets, particularly that found in clause 1 of the Bill.

30. Clauses 1 to 3 infringe the constitutional principle that the executive is responsible to Parliament. As a full and unanimous Supreme Court held in \( R (\text{Miller}) \text{ v The Prime Minister and Cherry v Advocate General for Scotland} \) [2019] UKSC 41 (“\text{Miller II}”), [47] and [55], Parliamentary accountability is a “fundamental constitutional principle”:

“Let us remind ourselves of the foundations of our constitution. We live in a representative democracy. The House of Commons exists because the people have elected its members. The Government is not directly elected by the people (unlike the position in some other democracies). The Government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that. This means that it is accountable to the House of Commons - and indeed to the House of Lords - for its actions, remembering always that the actual task of governing is for
the executive and not for Parliament or the courts. The first question, therefore, is whether the Prime Minister’s action had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account.”

31. Clauses 1 to 3 of the Bill do not, in our view, respect this constitutional principle. Instead, in conjunction with the effect of clauses 12 – 16 (discussed below), they risk subverting the well-established and required constitutional balance between Parliament and the UK Government, and the devolved legislatures and their respective Governments.

32. The effect of clauses 1 and 3 is to create cliff-edges whereby the retained EU law within the scope of those clauses drops off the UK rulebook automatically and by default, unless the executive decides to take any action. This is the default effect of the clauses regardless of when the sunset occurs i.e. if delayed in the case of clause 1.48 Without a Minister or devolved authority proactively removing the retained EU law from the scope of clause 1 (clause 1(2)), or choosing to exercise any of the powers in clauses 12-16 to retain and modify it, there is thus no parliamentary scrutiny of the individual law falling to be sunsettled. There is no procedure in the Bill for any further parliamentary involvement, or any opportunity for the UK legislature or devolved legislatures to intervene to save any law.

33. This follows since, as explained above, there is no duty on Ministers or the devolved authorities to identify the retained EU law due to be sunsettled, or, indeed, any duty to take any action in respect of it whatsoever (whether that be to review it at all, save it, or take any particular course of action pursuant to the powers in clauses 12 to 16). There are also no procedural requirements established prior to, or as a condition precedent for, the sunsetting to take place, such as a duty to justify, consult, or produce an impact assessment for the sunsetting of the individual retained EU law,49 or any confirmatory

48 The operation of clause 3 cannot be delayed (cf. clause 2) and there is also no power to exempt rights (etc.) from this sunset (cf. clause 1(2)).

49 We note that the Secondary Legislation Committee’s Report, Losing Control?: The Implications for Parliament of the Retained EU Law (Revocation and Reform) Bill, ¶64 records that: “In evidence to us, Lord Callanan confirmed that instruments laid under the REUL Bill which make significant policy changes will be accompanied by an impact assessment.69 He said: “If we produce substantial policy changes, of course there will be an impact assessment of that ….” We welcome the Minister’s commitment but reiterate—to all departments—that instruments laid under the REUL Bill must be accompanied by complete and comprehensive impact information and that that information should be available when the instrument is laid so that it can be taken into account when it is being scrutinised by the Houses.”
votes in the UK or devolved legislatures. Nor are there any deadlines established by which Ministers or devolved authorities must make clear to Parliament or devolved legislatures their intentions for each piece of retained EU law.

34. This means that Parliament and the devolved legislatures have no powers under the Bill to prevent the sunsetting even if (a) the UK, devolved governments, Parliament and/or the devolved legislatures are entirely unaware of the retained EU law, or (b) if Ministers or devolved authorities pay no attention to it even where known, or (c) if Parliament or a devolved legislature disagrees with the sunsetting of an individual law. The law will be sunsetting without any opportunity for further parliamentary scrutiny, or democratic oversight.

35. This position applies regardless of the importance or scale of the substantive legal and policy effects that the revocation would have. There are no constraints on the types or importance of laws or rights (etc.) that automatically disappear. Thus, in the field of environmental protection, there is no express provision in the Bill to prevent the automatic revocation of retained EU laws which could affect the meeting of the United Kingdom’s long term domestic targets for air quality, water, biodiversity, resource efficiency, waste reduction, species abundance, and halting the decline in nature by 2030 as set out in and under the Environment Act 2021.

36. These stark consequences of the Bill, which essentially side-line Parliament and the established and necessary mechanisms for democratic accountability of Ministers, are exacerbated by three further circumstances.

37. First, the default time periods for the operation of the sunset clauses creates what has been described, we believe fairly, as an “artificial emergency”. The default time provided in the Bill, at the “end of 2023”, will likely give Ministers and devolved authorities only months from enactment to the date of the sunsets, which in the case of clause 3 cannot be extended or from which rights (etc.) cannot be exempted. Indeed,
the independent Office for Environmental Protection has said that its “main concern” is the “short timescales for the automatic revocation”.

38. This extraordinarily short period gives rise to a ‘ticking timebomb’. Ministers and devolved authorities would be put under severe time pressure to perform at least the following exercises: (i) identify each piece of retained EU law within the scope of the sunset clauses; (ii) identify and assess the impacts and consequences of revocation in substantive and policy terms, as well as legal terms (e.g. the knock-on consequences for other domestic law and the satisfaction of international law commitments); (iii) decide whether they want to exempt certain retained EU law from the scope of the clause 1 sunset; (iv) decide whether to extend the clause 1 sunset; (v) decide whether and, if so how, they want to modify or replicate the effect of the would-be sunsettled measure under their powers under clauses 12-16 of the Bill or other powers; (vi) coordinate with other departments and other UK-nations to ensure consistency and lack of duplication; (vii) decide whether to and, if so conduct, any consultation, expert engagement, or validation processes; and (viii) react to any parliamentary vote under the negative or affirmative procedures.

39. This is, both materially and in scope, a much larger exercise than the EU Exit Statutory Instrument programme under, for example, section 8 EUWA. That process took over two years. As the UK Government’s Impact Assessment puts it, the process will “involve a significant programme of secondary legislation. It is likely that c.1,000 SIs will be required between Royal Assent and the sunset date in order to effectively transition to a post-REUL statute book. This is a larger programme of work than EU Exit transitional SIs (c. 800 SIs)”. It is therefore by no means an exaggeration to describe the short period of time as inevitably resulting in arbitrary decision-making, insofar as it will inevitably result in choices that are insufficiently considered and reasoned. Arbitrariness is also a feature of the rule of law which this Bill also threatens. It also violates the essential principle of rationality as required in our administrative

corrections necessary, it is quite clear that this quart is not going to fit into the pint pot and there will be very considerable spillage.” Hansard, Vol 827 Col 1000 (6 February 2023).

52 Office for Environmental Protection, Written Evidence to the House of Commons Public Bill Committee for the Retained EU Law (Revocation and Reform) Bill, 14 November 2022, p.1.

law, thus opening the possibility of multiple challenges, once the Bill is enacted, to the Ministers’ decisions, by way of judicial review.

40. **Second**, there is no parliamentary safety net or “drain catcher”. Once the law has been sunsetted, there is no provision within the Bill for Parliament to ‘resurrect’ that law, or any parliamentary oversight mechanism for any ministerial process or decision for saving what has been sunset. As the UK Government's own Impact Assessment admits that “[d]ue to the constraints on department and parliamentary time and resources, there is a potential risk of unintended harmful consequences if pieces of REUL are amended or sunset without proper review”. Laws therefore risk falling off the cliff edge by accident rather than design. They can only be saved by Ministers.

41. This is of particular concern given the complexity of the exercises to be undertaken and the short default time period envisaged under the Bill for doing so. Entirely innocent mistakes can and do happen. For example, Stella Creasy MP identified an example of DEFRA initially stating, in response to a written parliamentary question, that the Avian Influenza and Influenza of Avian Origin in Mammals (England) (No 2) Order did not fall within scope of the sunset provision in the Bill, only to correct that position later.

If this type of error were to be noticed only after the end of 2023, there would be no mechanism under the Bill by which Parliament could insist on saving that measure.

42. **Third**, there are risks of unintended knock-on consequences for pieces of domestic primary legislation that are dependent on or refer to retained EU law. If, in such circumstances, the relevant retained EU law is sunsetted, that may hollow out the effect of the primary legislation – and it would do so without any specific parliamentary scrutiny, or executive accountability. It might also erode the integrity of statutes,

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54 Bingham Centre for the Rule of Law, *Joint written evidence submission to the House of Commons Public Bill Committee on the Retained EU Law (Revocation and Reform Bill) 2022*, 16 November 2022, ¶22.

55 There are, however, powers for Ministers and/or devolved authorities to restate an effect which is equivalent to those rights (etc.) which are automatically sunsetted by clause 3. See: (a) clause 13(6)-(8), as to which see, further, fn. 65 below; and (b) clause 22(4)(c). There is also a ministerial power in clause 22(4)(b) for a Minister (but not a devolved authority) to make saving provision for the “revocation of anything” by clause 1. No rationale is provided for why clause 13(6)-(8) is drafted so as to only operate with respect to matters falling within the scope of clause 3, not clause 1, or why only Ministers, not devolved authorities, have the saving power for clause 1 matters. This could mean, for instance, that a piece of retained EU law falling within devolved competence is sunsetted invertedly, yet only a UK Minister can, at their discretion, save it.


57 See fn. 55 above.

58 Public Bill Committee on 8 November 2022 (second sitting, afternoon session).
leaving them with redundant or ineffective provisions extant, again contrary to the requirement of legal certainty inherent in the rule of law. For example, in the field of environmental protection, our Instructing Organisations have brought to our attention section 123 of the Marine and Coastal Access Act 2009 as an example which might be rendered ineffective or redundant by dint of the clause 1 sunset. Section 123(1) of that Act requires the appropriate authority to designate marine conservation zones. In complying with that duty, it “must have regard to any retained EU obligations or obligations under international law that relate to the conservation or improvement of the marine environment” (section 125(5)).

43. **Clauses 1 to 3 could risk compliance with the United Kingdom’s international commitments.** Clauses 1 and 3 do not provide any express protection for pieces of retained EU law which are necessary for the implementation of, or compliance with, the United Kingdom’s international obligations, including those connected with the environment. The Instructing Organisations have informed us that the UK’s (at times) wholesale reliance on EU directives to fulfil those international obligations makes potential transposition gaps even more concerning in light of the default effect of clause 3. The effect of the automatic and default sunsets in clauses 1 and 3 therefore could mean the loss of such laws (subject only to executive discretion to use powers in clauses 12 to 16 to save them), thus putting the United Kingdom in breach of its international commitments regarding environmental protection, including (but not limited to) with respect to:

a. international conventions, such as: the UNECE Convention on access to information, public participation in decision making and access to justice in environmental matters (Aarhus, 25 June 1998) (“**Aarhus Convention**”); the Council of Europe's Convention on the Conservation of European Wildlife and Natural Habitats (Bern, 1979) (“**Bern Convention**”); the UN Convention on Biological Diversity (Rio, 1992) (“**Rio Convention**”); the Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 1979) (the “**Bonn Convention**”); the Convention for the Protection of the Marine Environment of the North-East Atlantic (1992) (“**OSPAR Convention**”); and the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar, 1971) (“**RAMSAR Convention**”); and
b. the TCA, including non-regression commitments and the so-called ‘level playing field’ commitments under Title XI. See Annex 1 to this Opinion for a list of, and extracts from, the relevant provisions of the TCA. We note that, in this context, the European Union has specifically raised concerns with the UK Government about the impact of the Bill on environmental protection. Breach of these commitments, which are clearly being monitored, could result in the operation of the TCA’s retaliation provisions, thus jeopardising trade and relations between the United Kingdom and the European Union.

44. We note that various UK Government ministers have committed to ensure that the operation of the Bill does not jeopardise the United Kingdom’s international commitments. However, as the Supreme Court confirmed in R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5 (“Miller I”), ministers’ intentions are not law, and the courts cannot proceed on the assumption that they will necessarily become law. As a matter of law, therefore, these statements provide no assurances or protections. Parliament has set in motion a process whereby, save by the grace of executive action under the powers (not duties) found in the Bill to keep them, all retained EU law (including those in connection with the upholding of international obligations) will, by default, be sunsetting.

59 Joint Minutes, The second Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development under the UK-EU Trade and Cooperation, 12 October 2022. The UK explained that it would maintain the overall levels of environmental protection in the UK.

60 See: (i) Nus Ghani MP (Minister for Science and Investment Security), Hansard, Vol 726, Col 402 (18 January 2023): “...we accept that some retained EU law in scope of the sunset is required to continue to operate our international obligations, including the trade and co-operation agreement, the withdrawal agreement and the Northern Ireland protocol. Therefore, I am happy to make a commitment here today that the Government will, as a priority, take the action required to ensure that the necessary legislation is in place to uphold the UK’s international obligations”; (ii) Nus Ghani MP, Hansard, Vol 726, Col 394 (18 January 2023): “The UK Government are committed to ensuring that the necessary legislation is in place to uphold the UK’s international obligations, including the Northern Ireland protocol and the trade and co-operation agreement after the sunset date.”; (iii) Nus Ghani MP, Public Bill Committee on 22 November 2022 (third sitting, morning session): “The UK Government are committed to ensuring that the necessary legislation is in place to uphold the UK’s international obligations, including the Northern Ireland protocol and the trade and co-operation agreement after the sunset date.”; (iv) Dean Russell MP (former Parliamentary Under-Secretary to BEIS), Hansard, Vol 721, Col 189 (25 October 2022): “I accept, however, that some retained EU law in the scope of the sunset is required to continue to operate our international obligations, including the trade and co-operation agreement, the withdrawal agreement and the Northern Ireland protocol. Therefore, I am very happy to make a commitment today that the Government will, as a priority, take the necessary action to safeguard the substance of any retained EU law and legal effects required to operate international obligations within domestic law.”; and (v) Graham Stuart MP, Hansard, Vol 721, Col 253 (25 October 2022 (Minister for Energy and Climate): “I reassure the House that we will stand by our international commitments. We will preserve, restate or reform retained EU law to uphold those international obligations”.

61 Miller I, [35], referring to Lord Browne-Wilkinson in R v Secretary of State for the Home Department, Ex p Fire Brigades Union [1995] 2 AC 513, 552.
Finally, we have been specifically asked to comment on whether clauses 1 and 3, once enacted, would constitute a breach by the United Kingdom of Article 8 (entitled “public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments”) of the Aarhus Convention. We do not consider that clauses 1 and 3 of the Bill, once enacted, themselves constitute a breach since, as primary legislative provisions, they do not fall within the material scope of Article 8. That Article applies only to “executive regulations” or “other generally applicable legally binding rules”. However, the preparation and drafting of clauses 1 and 3 of the Bill by the UK Government is a stage that arguably does fall within the scope of Article 8. Whether this has been breached in practice will depend on the terms and nature of any informal involvement and consultation. We are not aware of any public or formal participation as envisaged by Article 8. In any event, even if breached as a matter of international law, to the best of our knowledge, Article 8 of the Convention has not been incorporated into domestic law and so is not domestically reviewable, or capable of preventing the Bill’s enactment or the clauses’ operation.

IV. MINISTERIAL POWERS: CLAUSES 12 TO 16, 19 AND 22

(a) Overview

We make three general observations about the operation of clauses 12 to 16, 19 and 22.
47. First, clauses 12 to 16 provide Ministers and devolved authorities with significant new powers to modify any “secondary retained EU law” – this is a wider category of retained EU law than covered by the sunset provision in clause 1, since it includes all retained EU law that is not primary legislation (cf. clause 1(4) and (5)) and also includes parts of primary legislation that have been inserted by subordinate legislation (cf. clause 1(3)): see clause 12(2).

48. Clause 12 provides Ministers and/or devolved authorities a power to “restate” any secondary retained EU law. A restatement may make any “change” which a Minister and/or devolved authority considers “appropriate” for specified purposes only, namely: “resolving ambiguities”, “removing doubts or anomalies”, and/or “facilitating improvement in the clarity or accessibility of the law” (clause 14). This power can only be used before the end of 2023.

49. Clause 13 provides Ministers and/or devolved authorities two powers: firstly, power to “restate” any secondary assimilated law, and, secondly, power to “reproduce” the effect of anything that was retained EU law by virtue of sections 4 or 6(3) or (6) EUWA “but for sections 3 to 5 of this Act” (i.e. regardless of the clause 3 sunset or the prima facie abolition of the principles of supremacy and general principles of EU law\(^{65}\)). Like clause 12, which a Minister and/or devolved authority may make any changes to the restatement or reproduction that it considers “appropriate” for the specified purposes in clause 14 only. These powers can only be used before or on 23 June 2026.

50. Clause 15 provides Ministers and/or devolved authorities powers to “revoke” any secondary retained EU law or secondary assimilated law either (a) “without replacing it” at all (i.e. effectively an additional, optional sunset for anything not already sunsetted or abolished by clauses 1, 3, 4 or 5), or (b) with “replacing it with such provision as the [Minister and/or devolved authority] considers to be appropriate and to achieve the same or similar objectives”, or by making “such alternative provision as the relevant

\(^{65}\) As discussed above at fn. 55, this provides a safety net for the clause 3 sunset, but not the clause 1 sunset. We do not read the prohibition of codifying or reproducing the principle of the supremacy of EU law or a retained general principle of EU in clause 14(5) as preventing the reproduction of “the effect” of those principles for any individual restatement pursuant to clause 13(8), since otherwise the reference to clauses 3 to 5 of the Act in clause 13(8) would be redundant. It must, therefore, mean that such principles themselves cannot be produced (as opposed to their “effects”), or reproduced on a general, wholesale basis for the purposes of all retained EU law or assimilated law.
national authority as the relevant national authority considers appropriate”. The exercise of the two powers of replacing / making alternative provision set out in (b) in the previous sentence:

a. can be used to modify any secondary retained EU law or secondary assimilated law (clause 15(7)), which also includes parts of primary legislation that have been inserted by subordinate legislation (clause 12(2)); this power “to modify” is defined by clause 21(1) broadly to include the power to amend, repeal, or revoke.

b. but can only be used where the Minister and/or devolved authority “considers” that the “overall effect” of the changes made does “not increase the regulatory burden”. The term “regulatory burden” is defined broadly to include: financial costs; administrative inconvenience; obstacles to trade, innovation, efficiency, productivity or profitability; and sanctions.

51. The powers in clause 15 can only be used before or on 23 June 2026.

52. Clause 16 provides Ministers and/or devolved authorities powers to “update” any (a) secondary retained EU law, (b) secondary assimilated law, and (c) any provision made by virtue of the powers in clauses 12, 13 or 15, by making any “modifications” as the Minister or devolved authority “considers appropriate” to take account of “changes in technology” or “developments in scientific understanding”. The use of the term “modification” means, on account of the broad definition in clause 21(1), that this power includes the ability to amend, repeal, or revoke (i.e. it effectively provides an additional, optional sunset for anything not already sunsetted or abolished by clauses 1, 3, 4 or 5, or not revoked without replacement by clause 15). There is no time limit to this power; it can be used by Ministers and/or devolved authorities indefinitely.

53. Clause 19 provides Ministers the power to make consequential provisions that the Minister “considers appropriate”, including amending any Act (including the Bill itself). Clause 22 provides Ministers the powers to make transitional, transitory or saving provisions as the Minister “considers appropriate” in connection with the coming into force of any provision of the Bill, the revocation of anything by the clause 1 sunset, or anything ceasing to be recognised or available in domestic law as a result.
of the clause 3 sunset. These powers are widely-drawn, without express limitations, and are subject to insufficient parliamentary scrutiny.

54. **Second,** the Bill also expands pre-existing powers so that they can be used to amend retained EU law and assimilated law. For example, clause 10 removes restrictions found in Schedule 8 to EUWA, thus expanding the scope of other statutory powers to amend retained EU law, and clause 17 amends the Legislative and Regulatory Reform Act 2006 to allow legislative reform orders to be used to amend any retained direct EU legislation.

55. **Third,** the creation of new powers and the extension of pre-existing ones is combined with the removal or downgrading of existing forms of parliamentary scrutiny of secondary legislation when they would modify or revoke retained EU law: see, for example clauses 10 and 11 and schedule 1 to the Bill, which modify schedule 8 to the EUWA. In summary, these remove pre-legislative consultation periods and downgrade use of the affirmative procedure to the negative procedure.

**(b) Analysis**

56. The wide-ranging powers for the creation of delegated legislation under clauses 12 to 16, 19 and 22, combined with the reduction in parliamentary oversight on account of clauses 10 to 11 and schedule 1, produce serious concerns from a constitutional perspective. These are additional to, and separate from, the concerns generated by the sunset provisions: even if a particular piece of retained EU law is not sunsetted, the range and depth of policy decision-making and law-making powers transferred to the executive to modify these laws is substantial.

57. **Clauses 12 to 16 infringe the constitutional principle of the rule of law.** We refer to ¶21 above where the rule of law’s requirement of legal certainty is explored. Another “ingredient” of the rule of law (as Lord Bingham explained it), is that discretionary power should be limited and confined as far as possible. As he put it;

> “questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion... the broader and more loosely-textured a discretion is, whether conferred on an official or a judge, the greater the scope for
subjectivity and hence for arbitrariness, which is the antithesis of the rule of law. This sub-rule requires that a discretion should ordinarily be narrowly defined and its exercise capable of reasoned justification.”

58. Dicey had also considered unconstrained discretionary power as a pathway for the “arbitrary” exercise of power, which the rule of law forbade. As Dicey put it: “The rule of law also ... excludes the existence of arbitrariness of prerogative, or even of wide discretionary authority on the part of the government.”

59. The terms of the powers in clauses 12 to 13 to make technical changes to retained EU law or assimilated law are themselves largely unobjectionable in respect of the rule of law. This is due to the restrictions for which the powers can be used e.g. resolving ambiguities and facilitating clarity and accessibility of the law, rather than making substantive changes: clause 14(3). This aids the rule of law. That said, the ‘devil will be in the detail’: what amounts to resolving “ambiguities” or “anomalies” (clause 14(3)) is ripe for (accidental) misuse if stretched too far, e.g. by making policy or substantive changes, or if a contestable interpretation of general principles or case law is adopted in any ‘restatement’. Litigation is likely to follow in such circumstances.

60. The real issue with clauses 12 to 13, however, comes in combination with the sunset provisions, since they provide the executive with virtually unfettered discretion to decide whether to act under those provisions so as to restate or reproduce the retained EU law in the first place (i.e. prior to making any changes), or instead allow the retained EU law to be sunned. As explained above, Parliament plays no effective, proactive supervisory role in that regard: whether a Minister and/or devolved authority uses the restatement and reproduction powers in clauses 12 to 13 is entirely within its gift. Without any action, retained EU law within the scope of clauses 1 and 3 is automatically sunned.

61. The powers in clauses 15 and 16 as presently drafted, are, however more problematic from a rule of law perspective. To put it in the terms used by Bingham and Dicey, they permit “wide discretion” with a broad “scope for subjectivity and hence for arbitrariness”. Both also give rise to considerable legal uncertainty, since it is

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67 Dicey, Introduction to the Study of the Law of the Constitution (1885) (8th ed.), p. 120.
impossible for citizens and businesses to predict whether and, if so, how such wide powers will be exercised. The state of the law from the end of 2023 is thus entirely unpredictable, as is the process for reaching that endpoint. We address each clause in turn.

62. Clause 15 has been described by the Hansard Society as a “do anything we want” power for Ministers and the devolved authorities. We agree. Unlike the powers found in clauses 12 and 13 and those found in section 8 EUWA, they permit policy and substantive amendments going well beyond correcting technical deficiencies. They do so in broad terms:

a. Minsters and/or devolved authorities can decide whether to revoke any secondary retained EU law or secondary assimilated law entirely without replacing it. This applies to laws that were not sunsetted, or were not subject to the sunset. There is no process or timescales (before 23 June 2026) by which Ministers must decide to do.

b. If they decide to revoke it, Ministers and/or the devolved authorities can decide whether to either (a) “replace it with such provision as the [Minister and/or devolved authority] considers to be appropriate and to achieve the same or similar objectives”, or (b) make “such alternative provision as the relevant national authority as the relevant national authority considers appropriate”. These are open-ended powers. First, on their own terms, they permit wide and subjective discretion e.g. whether the Minister and/or devolved authority “considers” it “appropriate” (rather than “reasonably considers” it “necessary”); “similar” objectives (rather than only the “same”); and “alternative” provision (rather than specifying any limits on that). No definitions have been included to guide usage. Second, these powers can be used to modify any secondary retained EU law or secondary assimilated law (clause 15(7)), which is a power defined broadly by

68 Hansard Society, Written evidence submitted to the House of Commons Public Bill Committee on the Retained EU Law (Revocation and Reform) Bill, 9 November 2022, ¶16.
69 See, further, ¶¶9 and 11 above.
70 The UK Government’s Delegated memorandum suggests that the use of “the same or similar objectives” in clause 15(2) “limits the functionality of this limb of the power to essentially adjusting existing policy to better fit the UK context, rather than radically departing from the existing legislation”: The Cabinet Office, Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee, 20 September 2022, p.27.
clause 21(1) to include the powers to amend, repeal, or revoke. Third, it is difficult to see how the much-wider power in clause 15(3) (the “alternative provision” limb) does not, in effect, empty clause 15(2) (the “similar objectives” replacement limb) of any real limitation on the breadth or depth of the overall discretion provided by clause 15. 71

63. The exercise of replacing / making alternative provision for any revoked law pursuant to clause 15 is, moreover, subject only to one material, express limitation, namely that the powers can only be used where the Minister and/or devolved authority “considers” that the “overall effect” of the changes made does “not increase the regulatory burden”. Given how broadly the term “regulatory burden” is defined, as discussed at ¶50(b) above, this risks effectively precluding the powers being used to increase or strengthen the overall levels of protection, for instance, in an environmental context, to meet the targets set by and under the Environment Act 2021. Thus, if environmental protection in current law is deemed deficient, there are risks in using the clause 15 powers to improve it. 72 Instead, combined with the lack of any non-regression clauses in the Bill, 73 the effect of this provision risks being broadly de-regulatory in nature. The UK Government has itself admitted that the “repeal and replacement powers would be broadly deregulatory in ambition”. 74

64. Despite the Minister for Science and Investment Security stating that “Retained EU law reforms will not come at the expense of our high environmental standards” 75 and “we will be maintaining and enhancing environment standards” 76 in the Environment Act 2021, such statements are not law and provide no legal protections against the wide, largely unfettered operation of the clause: see ¶44 above. There is nothing in the Bill itself to require the maintenance of existing levels of protection, and clause 15’s

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71 The explanatory notes to the Bill provide no guidance on, or explanation of, the interaction between the two sub-clauses. The only additional limitation on clause 15(3) is that it, unlike clause 15(2) is subject to the draft affirmative procedure.

72 Since exercise of the power in clause 15 is by means of delegated legislation, such legislation is, however, subject to judicial review. This works in both directions. First, for the reasons given, there is a risk of challenge against any exercise of the power which increases the protection for the environment which can be considered as increasing the overall burdens. Second, however, if the powers are used to reduce environmental protections, that may still subject to judicial review.

73 See ¶71 below.

74 Cabinet Office/BEIS, Impact Assessment, 26 September 2022, p.2.

75 Public Bill Committee on 22 November 2022 (fourth sitting, afternoon session).

limitation on “overall” burdens in fact risks inhibiting the increase of such environmental protection levels.

65. Clause 16 is an open-ended power, without an expiry date, to “update” secondary retained EU law, secondary assimilated law and any provision made by virtue of the powers in clauses 12, 13 or 15. This power includes the ability to amend, repeal, or revoke such laws, where it is considered “appropriate”. The effect of this is to transfer a wide, discretionary and subjective power to modify a significant and substantial body of law on an ongoing basis. The only limitation is that the changes have to be considered (by the Minister or devolved authority) as “appropriate” to “take account of” any “changes in technology” or “developments in scientific understanding”. These broad terms are undefined and open to wide, subjective interpretation and application.

66. Clauses 12 to 16, particularly clauses 15 and 16, infringe the constitutional principles of the separation of powers and the accountability of the executive to a democratically elected Parliament. As we have already noted, the Supreme Court held in Miller II, parliamentary sovereignty is “the foundational principle of our constitution” ([42]). In R (Miller) v Secretary for State of Exiting the European Union [2017] UKSC 5 (“Miller I”), the Supreme Court additionally noted at [81] that:

“It would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone. All the more so when the source in question was brought into existence by Parliament through primary legislation, which gave that source an overriding supremacy in the hierarchy of domestic law sources.”

67. Parliamentary accountability is also a fundamental principle (see Miller II, [47] and [55], as cited above). Further:

“As Lord Bingham of Cornhill said in the case of Bobb v Manning [2006] UKPC 22, para 13, “the conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy”. Ministers are accountable to Parliament through such mechanisms as their duty to answer Parliamentary questions and to appear before Parliamentary committees, and through Parliamentary scrutiny of the delegated legislation which ministers make. By these means, the policies of the executive are subjected to consideration by the representatives of the electorate, the executive is required to
report, explain and defend its actions, and citizens are protected from the arbitrary exercise of executive power.”

68. In accordance with these principles and the separation of powers, the executive is “constitutionally forbidden to make law except with the express authority of Parliament”. It is common, however, for Parliament to confer, by delegation of legislative competence, such power on the executive for narrow and specified purposes, normally of a technical or minor nature to ‘flesh out’ or implement policy set by Parliament, and then subject to parliamentary oversight and scrutiny. In recent years, however, mostly notably connected with Brexit and the Covid-19 pandemic, such powers have become increasingly common and more substantial. This has led to justified criticism, especially where the legislation itself is of a ‘skeletal’ nature: see ¶5 above.

69. In consequence of, in particular, the discretion whether to use powers in clauses 12 and 13 to save measures set for the sunsets and the powers granted by clauses 15 and 16, this Bill is a remarkably extreme example of a skeleton Bill. We agree with Lord Anderson of Ipswich KBE KC’s assessment that the Bill provides the executive with what can be described fairly as a “blank cheque”, and also the Bar Council’s assessment that there is an “anti-democratic” air to the process which risks law-making by “Ministerial fiat”. This cannot fairly be described as a ‘framework’ Bill. It essentially reverses the normal constitutional and legislative order. This is for three reasons.

70. First, the powers in clauses 15 and 16 go beyond granting law-making powers for technical, minor details. They permit (largely unfettered) discretion for major substantive policy changes. They go well beyond the “deficiency-correcting” powers that were found in section 8 EUWA, which were assessed critically at the time by the House of Lords Constitution Committee:

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77 Miller II, [46].
78 Secretary of State for the Home Department v Pankina [2010] EWCA Civ 719, [19] per Sedley LJ.
79 Lord Anderson of Ipswich KBE KC, Notes for Remarks on the Retained EU Law (Revocation and Reform) Bill at the Bar European Group, 19 October 2022, ¶4.
80 Bar Council, Written Evidence and proposed / planned amendments for the Public Bill Committee, November 2022.
“The number, range and overlapping nature of the broad delegated powers would create what is, in effect, an unprecedented and extraordinary portmanteau of effectively unlimited powers upon which the Government could draw. They would fundamentally challenge the constitutional balance of powers between Parliament and Government and would represent a significant—and unacceptable—transfer of legal competence. We stress the need for an appropriate balance between the urgency required to ensure legal continuity and stability, and meaningful parliamentary scrutiny and control of the executive.”

71. These concerns apply to an even greater extent to the wider provisions in this Bill, which concern a very large number of laws governing important areas of public and private life, yet permit substantive changes without material limitations. As we have discussed, the very broad discretions conferred in clauses 15 and 16 mean that how Ministers and/or devolved authorities decide to modify the relevant retained EU law is largely within the gift of the executive. Ministers and/or devolved authorities can modify or update this large category of law, with or without replacement, and such modifications that they consider are “appropriate” are permitted, albeit with a de-regulatory tilt. No non-regression clauses are provided. The Bill itself is silent as to the standards to be applied in the exercise of the discretion. In the case of clause 16, it is an open-ended power.

72. We are of the view, therefore, that it is no exaggeration to claim that this is a Bill which “has the potential to sideline Parliament over great swathes of policy, and to entrench executive dominance over the enactment of policy to an unprecedented extent.” The UK Government has stated that a core purpose of the Bill is to “firmly re-establish our Parliament as the principal source of law in the UK”. In that, it fails: these significant quantities of law (in wide-ranging areas such as environmental protections, employment, consumer protection) will be made by secondary legislation.

82 Section 8(2), (3) and (7) EUWA had defined substantive restrictions and limitations; however, clause 15, in particular, essentially gives free license in terms of the nature and scope of the modifications, save that they cannot increase the overall burden, impose taxation or establish a public authority. This is a considerably narrower list of limitations that those found in section 8 EUWA.
83 Lord Anderson of Ipswich KBE KC, Notes for Remarks on the Retained EU Law (Revocation and Reform) Bill at the Bar European Group, 19 October 2022, ¶13.
84 Cabinet Office, Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee, 20 September 2022, p.1. Likewise, the Impact Assessment states that the Bill “will firmly reestablish [sic] our Parliament as the principal source of law in the UK”: Cabinet Office/BEIS, Impact Assessment, 26 September 2022, p.1.
73. Second, the Bill transfers these vast quantities of legislative powers to the executive with either no or only minimal parliamentary oversight, scrutiny or control. Much of what we said in relation to the lack of oversight with respect to clauses 1 to 3 applies equally here. Essentially, Parliament risks being “used as a rubber-stamp”\(^{85}\) since:

a. there is no process for Parliament or the devolved legislatures to amend the proposed regulations. Instead, minimal scrutiny is afforded by the negative and affirmative resolution procedures in schedule 3 for clauses 12 to 16. These do not provide sufficient parliamentary involvement since they do not permit amendments. While the negative procedure gives Parliament a theoretical veto, in reality it is rarely used. The last time that the House of Commons prayed against secondary legislation was in 1979. Although the affirmative procedure gives Parliament a greater say over secondary legislation, the last time the House of Commons failed to pass an affirmative instrument was in 1978

b. further, the minimal scrutiny afforded by the procedures amounts to a ‘take it or leave’ choice for Parliament in the particular circumstances of this Bill. This is exacerbated by the backdrop of the automatic, default sunsets, which may not provide sufficient time for scrutiny from Parliament or Ministerial reaction to parliamentary concerns raised during the negative or affirmative resolution procedures. Parliament may well end up be confronted with the alternatives of agreeing replacements to retained EU law which it regards as unsatisfactory or letting the relevant retained EU law fall completely. We agree with the Hansard Society’s concern that this risks leaving Parliament “in the dark” and “facing a glut of Statutory Instruments in Autumn 2023 and leav[ing] little time for planning and preparation by affected bodies to ensure implementation and compliance with any resulting regulatory changes”\(^{86}\)

c. there are also no procedural requirements established in the Bill prior to, or as a condition precedent for, the modifications, such as a duty to justify, consult, or

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85 Lord Anderson of Ipswich KBE KC, Notes for Remarks on the Retained EU Law (Revocation and Reform) Bill at the Bar European Group, 19 October 2022, ¶11.
86 Hansard Society, Written evidence submitted to the House of Commons Public Bill Committee on the Retained EU Law (Revocation and Reform) Bill, 9 November 2022, ¶¶10-11.
produce an impact assessment for the amendments or revocations of the individual retained EU law, or any confirmatory votes in the UK or devolved legislatures. Nor is there any deadlines established by which Ministers or devolved authorities must make clear to the UK or devolved legislatures their intentions for each piece of retained EU law. No information on processes that will be applied by Ministers and devolved authorities is provided.

d. the Parliamentary sifting procedure\textsuperscript{87} found in paragraph 7 of schedule 3 to the Bill applies only for clauses 12, 13 and 15, but not clause 16 (the wide, ongoing power to “update”). No parliamentary procedure is subscribed to the delegated powers under clause 22.

74. Although it is true that the European Statutory Instruments Committee and the Delegated Powers and Regulatory Reform Committee may well play some role in assessing certain proposed implementations of clauses 12 to 16 and 22, there is no requirement in law to follow any recommendations made.

75. This lack of engagement goes beyond a lack of parliamentary consultation; there is also no requirement within the Bill to consult experts, or allow public participation prior to the exercise of the powers granted by the Bill. This does not aid parliamentary accountability or democracy. The concern is heightened considering the lack of time before the end of 2023. This is especially problematic in a field such as environmental protection. As the Office for Environmental Protection has stated in connection with its concerns about the Bill:

“\textit{Good environmental law making requires time to gather evidence of environmental problems and to consider how they can best be solved. This requires scientific evidence, analysis, consultation, and scrutiny including from Parliament. Rushed law-making is not conducive to addressing environmental problems that are difficult, complex,}

\textsuperscript{87} The Cabinet Office, \textit{Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee}, 20 September 2022, p.10 describes this as follows: “Under this procedure, instruments which are proposed to be subject to the negative procedure, must be laid in draft alongside a memorandum from the relevant Minister stating that in their view the negative procedure is the appropriate procedure and giving the reasons for that opinion. A Minister will then not be able to make the instrument until both the relevant committees of the Lords and the Commons make recommendations on the appropriate procedure or when the time limit for the committees making recommendations has expired. Where either committee recommends that the instrument should follow the draft affirmative procedure, the Minister must either follow that recommendation or publish a written statement as to why they don’t agree with the committee’s recommendations. If 10 sitting days pass after the instrument has been laid and no recommendations are received from the committees, then the Minister may proceed to make the instrument via the chosen procedure.”
interconnected and long-term. It runs the risk of compounding, rather than addressing, environmental problems and in doing so undermining the UK Government’s own environmental ambitions and international standing. It risks mistakes being made.”

76. **Third**, the Bill reduces the procedural requirements for enacting changes to environmental law by enabling the circumvention of processes that would otherwise apply. For example:

a. there is no obligation in the Bill for Ministers and/or devolved authorities to observe the same oversight provisions that were previously required with respect to the amendment of retained EU law (etc.) that is being sunsetted or modified. For example, sections 112 and 113 of the Environment Act 2021 allow the Secretary of State to make regulations amending the Conservation of Habitats and Species Regulations 2017 (S.I. 2017/1012), but subject to substantive and procedural safeguards. First, the new regulations can be made “only” if the Secretary of State is satisfied that they “do not reduce the level of environmental protection provided by the Habitats Regulations” (sections 112(7) and 113(3)). Second, before making regulations the Secretary of State “must lay before Parliament and publish a statement explaining why the Secretary of State is satisfied” and “must consult such persons as the Secretary of State considers appropriate” (sections 112(8)-(9) and 113(4)-(5)). Third, the Secretary of State “must have regard to the particular importance of furthering the conservation and enhancement of biodiversity” (section 112(6)). No such equivalent provisions are provided in the Bill. Since the Habitats Regulations are retained EU law, they fall to be automatically sunsetted by clause 1 and are capable of modification under clauses 15 and 16, without being subject to those or similar protections.

b. there is no obligation in the Bill for Ministers and/or devolved authorities to observe the same oversight provisions that were previously required with respect to introduction of new legislation. For example, under section 20 of the Environment Act 2021, for any new Bill which contains provision which, if

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88 Office for Environmental Protection, Written Evidence to the House of Commons Public Bill Committee for the Retained EU Law (Revocation and Reform) Bill, 14 November 2022, ¶2.3.
89 The Planning & Environment Bar Association, Response to the House of Commons Public Bill Committee call for written evidence, 14 November 2022, ¶¶29-31.
enacted, would be environmental law, the relevant Minister “must” make a statement “to the effect that in the Minister’s view the Bill will not have the effect of reducing the level of environmental protection provided for by any existing environmental law” (section 20(3)). No such equivalent provision is required in the Bill with respect to the operation of the sunset clauses before they are automatically sunsetted by default. Moreover, the requirement for these section 20 statements do not apply to secondary legislation, including those made under the Bill, like they would if the same or similar substantive changes were proposed to be made by way of primary legislation. Yet, as discussed above, the wide breadth of the clause 15 and 16 powers enable Ministers and/or devolved authorities enable policy and substantive changes that would be suitable to be made by way of primary legislation.

77. These are effectively examples of side-stepping, by means of secondary legislation, the levels of scrutiny and accountability that would usually be expected, without similar protections being hardwired into the Bill (which they could be). They may also subvert or distort existing law which has previously gained legitimacy through public consultation if the law is altered without any further public participation.

78. **The Bill risks unsettling the devolved settlements.** Devolution is a fundamental feature of the UK constitutional arrangement. We have been asked to comment, in brief, on any additional constitutional challenges likely to arise specifically or the devolved administrations. There are, at least three, key difficulties with the approach taken in the Bill from that devolved perspective.

79. **First,** many retained EU laws fall within devolved competence, including matters connected with the environment.⁹⁰ Yet, the powers in clauses 15, 16 and 19⁹¹ can be exercised by UK Ministers, on a UK-wide basis, without consultation with or consent from the devolved authorities or legislatures. The lack of any consultation requirement contrasts with the position taken in, for example, section 6(7)-(9) of the Internal Market Act 2020 where, before making regulations, the Minister “must seek the consent” of the

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⁹⁰ See, for example, fn. 92.
⁹¹ Clause 19 (consequential amendments) is not given to devolved authorities for devolved matters.
devolved authorities. This at least facilitates dialogue with and forewarns the devolved legislatures. No such equivalent is set out in the Bill.

80. Second, it is possible that Ministers and devolved authorities will, where competences overlap, take different substantive positions on the sunsetting and/or modification of retained EU law.\(^92\) This may create unwelcome uncertainties and divergences for businesses having to consider the decisions of both Ministers and the devolved authorities, and ultimately comply with at least two sets of regulations. Nonetheless, from a devolved perspective, the effect of the market access principles in Part 1 of the Internal Market Act 2020 risks greater *de facto* centralisation of power to Westminster in practice, since, broadly speaking, traders lawfully supplying goods/services in one part of the United Kingdom can lawfully supply goods/services into another part of the United Kingdom even where stricter requirements apply in that latter part. On account of the size of England, the economic reality may be that whatever standard is set in England will be followed in the other parts of the United Kingdom to prevent traders in those nations being at a competitive disadvantage.

81. Third, we note that the power under clause 2 to delay the application of the clause 1 sunset is available only for UK Ministers and not the devolved authorities. This means that, unless they exercise the power to exempt identified pieces of retained EU law from the effect of the sunset entirely (clause 1(2)) or UK Ministers extend the sunset, the logistical burdens and timing issues placed on the devolved authorities are even greater. They essentially risk being placed under greater pressures to consider whether and, if so how, to utilise the powers available to them under clauses 12 to 16. The inherent risks of mistakes or poor-law making are thereby increased.

82. **Clauses 15 and 16 could risk compliance with the United Kingdom’s international obligations.** Like clauses 1 and 3 (as discussed above at ¶¶43-45 above), clauses 15 and 16 do not provide any express protection for pieces of retained EU law which are necessary for the implementation of, or compliance with, the United Kingdom’s international obligations, including those connected with the environment. The effect

\(^{92}\) Section 1 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 permits Scottish Ministers to make regulations to align with EU law. Section 2 of that Act specifically states that the purpose of those powers includes contributing towards maintaining and advancing standards in relation to environmental protection.
of clauses 15 and 16 therefore could, as a matter of law, mean the loss or reduction of protections and obligations regarding the environment found in international treaties and conventions to which the United Kingdom has subscribed, thus risking putting it in breach of its international obligations, including those referred to at ¶43 above. As discussed above, ministerial commitments enjoy no legal status and may be subject to change.

83. We have been asked specifically to comment on whether the exercise of the powers under clauses 15 and 16, once enacted, are required to be compliant with Article 8 (entitled “public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments”) of the Aarhus Convention. That Article states:

“Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. To this end, the following steps should be taken:

(a) Time-frames sufficient for effective participation should be fixed;
(b) Draft rules should be published or otherwise made publicly available; and
(c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

The result of the public participation shall be taken into account as far as possible.”

84. In our opinion, as a matter of international law, Ministers and/or devolved authorities are required to “strive” to ensure that the process for the making of any regulations under clauses 15 and 16 that “may have a significant effect on the environment” may meet these procedural conditions. Secondary law falls within the definition of “executive regulations and other generally applicable legally binding rules”.93 In any event, even if breached as a matter of international law, to the best of our knowledge Article 8 of the Convention has not been incorporated into domestic law and so is not domestically reviewable, or capable of preventing the making of regulations under domestic law unless the Bill were modified to take account of Article 8.

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93 See fn. 63 above.
V. THE TCA AND THE EUFRA

85. Essentially, we have been asked to imagine that the Bill, as presently drafted, is enacted and, in those circumstances, whether any of the contents of the TCA can, in principle, be ‘read into’ the (then) Act through section 29 of the EUFRA, thereby, in principle, being capable of modifying and/or supplementing Act’s provisions. We have not been asked to, and do not, opine on the nature or content of any specific international environmental laws or whether they could operate in practice.

a. Legal background

86. The TCA. The relevant Articles of the TCA are set out in Annex 1 to this Opinion. We note that there are two types of provision contained within those Articles:

a. First, there are substantive commitments, which (whether directly or indirectly by reference to other international norms) commit the parties to achieve certain results or implement certain provisions e.g. Articles 391(2) and 393(1) TCA.

b. Second, there are procedural commitments, which (whether directly or indirectly by reference to other international norms) commit the parties to taking certain processes before making policies and evaluating impacts of activities on the environment: e.g. Article 393(1)(a), (2) and (3).

87. EUFRA. Section 29(1) EUFRA provides that:

“Existing domestic law has effect on and after the relevant day with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement or the Security of Classified Information Agreement so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.”
88. Commenting on the broad implications of section 29(1) EUFRA, the Court of Appeal has held:\(^94\)

“The section transposes the TCA onto domestic law, expressly and mechanistically changing it in the process. Following section 29 domestic law on an issue means what the TCA says.... The phrase ‘has effect’ is important. Parliament has mandated a test based upon the result or effect. The phrase ‘has’ makes clear that this process of modification is automatic ie it operates without the need for further legislative intervention. The concept of modification is interpreted broadly in section 37(1) to ‘include’ (and therefore is not limited to) amendment, repeal or revocation. Section 29 is capable of achieving any one or more of these effects.”

89. The Court of Appeal has also held that section 29 EUFRA “ensures that the construction of domestic law which best secures compliance by the United Kingdom with its international law obligations is to be applied”, and that if “there is inconsistency, daylight or a lacuna then the inconsistent or incomplete [domestic] provision is amended or replaced, and the gap is plugged”.\(^95\)

b. Analysis

90. In principle, there are two ways in which the obligations that we have identified in Annex 1 to this Opinion could modify or supplement the then-Act’s provisions:

a. Substantive restrictions could be ‘read into’ the sunsets (clauses 1 and 3) and the ministerial powers (clauses 15, 16, 19 and 22) to prevent the automatic sunsetting of certain environmental retained EU law or restrict the exercise of ministerial discretion to the extent that that is required to ensure compliance with the contents of the TCA. For example, clauses 15 and 16 could be read as being subject to: (i) a prohibition on the weakening or reduction of environmental levels of protection or climate change in a manner which would affect trade or investment between the

\(^94\) Heathrow Airport Ltd v HM Treasury [2021] EWCA Civ 783, [2021] STC 1203, [228] per Green LJ and Lipton v BA City Flyer [2021] EWCA Civ 454, [2021] 1 WLR 2545, [78] per Green LJ.

\(^95\) Lipton v BA City Flyer [2021] EWCA Civ 454, [2021] 1 WLR 2545, [80], [82] per Green LJ. However, it should be noted that section 29(4) EU(FR)A, provides that ‘modifications’ does not include any modifications of the kind which would result in a public bill in Parliament containing them being treated as a hybrid bill. In obiter dicta, Fordham J in Badea v Romanian Judicial Authority [2022] EWHC 1025, [24] and [40] – [41] accepted (should the question have arisen) that the principle of compatible interpretation found in section 29 EU(FR)A would have warranted a modified approach to the domestic application of Article 8 ECHR through section 21 Extradition Act 2003.
United Kingdom and the European Union (*pace* Article 391(2)), or (ii) a restriction on utilising those powers in ways which would affect the polluter pays principle (*pace* e.g. Article 393(1)(e)).

b. Procedural restrictions could likewise be ‘read into’ the sunsets (clauses 1 and 3) and the ministerial powers (clauses 15, 16, 19 and 22) to prevent the automatic sunsetting of certain environmental retained EU law or restrict the exercise of ministerial discretion by preconditioning those consequences / use of powers on prior steps such as impact assessments, public participation, and consultation (*pace* e.g. Articles 346-347 and 393(1)(a) and (3)).

91. In our view, it is arguable as a matter of principle that section 29 EUFRA, read with the relevant provisions of the TCA, could be used to achieve these outcomes in light of the *dicta* in *Lipton* and *Heathrow*.96 In order to achieve these outcomes in practice, it would have to be demonstrated that:

a. the international law in question (i.e. a provision of the TCA itself, or a provision of another international norm incorporated into the TCA) contained a substantive or procedural requirement, the sort of which was capable of achieving, on its own terms, the above effects or similar;

b. any modification to domestic law is “required” for the purposes of implementing the TCA into domestic law and that it is “necessary” for the purposes of complying with the United Kingdom’s obligations under the TCA. For instance, (i) the requirement must be the sort capable of being incorporated into domestic law, rather than being inherently limited to the international plane and concerned with state-to-state rights and obligations; and (ii) it must be sufficiently ‘hard-edged’

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96 Broadly speaking, we believe that it is more likely that amendments conditioning the exercise of ministerial powers under (then) sections 15, 16, 19 and 22 will be made by any court, relative to amendments conditioning the default and automatic exercise of primary legislation under (then) sections 1 and 3. This is on account of: (a) the implications for parliamentary sovereignty; and (b) the availability of additional arguments to bolster the case regarding ministerial powers e.g. building on *R (Public Law Project) v the Lord Chancellor* [2016] UKSC 39, *Miller I* and *Miller II*: although there is, in our view, nothing in the Bill (or pre-legislative history to date) which evinces a Parliamentary intention to repeal impliedly the application of section 29 EUFRA at all, there is even less justification for reading into the conferral of delegated legislative powers a power to act inconsistently with whatever section 29 EUFRA requires.
e.g. not being caveated to such an extent that it permits untrammelled exercise of domestic legislative discretion,97 and

c. the requirement must not otherwise be implemented in domestic law already, since otherwise section 29 EUFRA is inapplicable.

VI. CONCLUSION

92. Our conclusions are summarised in ¶¶4 to 8 above.

SIR JEFFREY JOWELL KCMG KC
Blackstone Chambers
JACK WILLIAMS
Monckton Chambers
17 February 2023

97 We note that, while the TCA often reaffirms the right of each part to set its policies and priorities, determine the levels of environment protection it deems appropriate, and to adopt or modify its law accordingly, this is expressly subject to being “in a manner consistent with each Party's international commitments, including those under this Chapter [7]”: Article 391(1) TCA. In principle, therefore, the obligations in the TCA are sufficiently hard-edged in our view.
ANNEX 1: PROVISIONS FROM THE TCA

1. Recitals:

“…
7. RECOGNISING the Parties’ respective autonomy and rights to regulate within their territories in order to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, animal welfare, privacy and data protection and the promotion and protection of cultural diversity, while striving to improve their respective high levels of protection,

8. BELIEVING in the benefits of a predictable commercial environment that fosters trade and investment between the Parties and prevents the distortion of trade and unfair competitive advantages, in a manner conducive to sustainable development in its economic, social and environmental dimensions,

9. RECOGNISING the need for an ambitious, wide-ranging and balanced economic partnership to be underpinned by a level playing field for open and fair competition and sustainable development, through effective and robust frameworks for subsidies and competition and a commitment to uphold their respective high levels of protection in the areas of labour and social standards, environment, the fight against climate change, and taxation”

2. Article 123 (entitled “Objective and scope”):

“…
2. The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as: the protection of public health; social services; public education; safety; the environment, including climate change; public morals; social or consumer protection; privacy and data protection or the promotion and protection of cultural diversity.”

3. Article 346(1) (entitled “Public consultation”).

“When preparing a major regulatory measure, each Party, in accordance with its respective rules and procedures, shall ensure that its regulatory authority:

(a) publishes either the draft regulatory measure or consultation documents providing sufficient details about the regulatory measure under preparation to allow any

98 See, similarly, Articles 198, 302, 340 and 447.
99 See Article 342 for the relevant material scope of this Article and Article 347.
100 Article 341 defines “regulatory measures” as including both primary and secondary legislation. Note 51 defines “major regulatory measures” as “significant regulatory measures in accordance with the definition of such measures in the United Kingdom’s rules and procedures”.
person to assess whether and how that person's interests might be significantly affected;

(b) offers, on a non-discriminatory basis, reasonable opportunities for any person to provide comments; and

(c) considers the comments received.

4. Article 347 (entitled “Impact assessment”):

“1. Each Party affirms its intention to ensure that its regulatory authority carries out, in accordance with its respective rules and procedures, impact assessments for any major regulatory measures it prepares. Such rules and procedures may provide for exceptions.

2. When carrying out an impact assessment, each Party shall ensure that its regulatory authority has processes and mechanisms in place that promote the consideration of the following factors:

(a) the need for the regulatory measure, including the nature and the significance of the problem that the regulatory measure intends to address;

(b) any feasible and appropriate regulatory or non-regulatory options that would achieve the Party's public policy objectives, including the option of not regulating;

(c) to the extent possible and relevant, the potential social, economic and environmental impact of those options, including the impact on international trade and investment and, in accordance with its respective rules and procedures, the impact on small and medium-sized enterprises; and

(d) where appropriate, how the options under consideration relate to relevant international standards, including the reasons for any divergence.

3. With respect to an impact assessment that a regulatory authority has conducted for a regulatory measure, each Party shall ensure that its regulatory authority prepares a final report detailing the factors it considered in its assessment and its relevant findings. To the extent possible, each Party shall make such reports publicly available no later than when the proposal for a regulatory measure as referred to in point (b)(i)(A) or (b)(ii)(A) of Article 341 or a regulatory measure as referred to in point (b)(i)(B) or (b)(ii)(B) of that Article has been made publicly available.”

5. Article 356 (entitled “Right to regulate, precautionary approach and scientific and technical information”):

“1. The Parties affirm the right of each Party to set its policies and priorities in the areas covered by this Title, to determine the levels of protection it deems appropriate
and to adopt or modify its law and policies in a manner consistent with each Party's international commitments, including its commitments under this Title.

2. The Parties acknowledge that, in accordance with the precautionary approach, where there are reasonable grounds for concern that there are potential threats of serious or irreversible damage to the environment or human health, the lack of full scientific certainty shall not be used as a reason for preventing a Party from adopting appropriate measures to prevent such damage.

3. When preparing or implementing measures aimed at protecting the environment or labour conditions that may affect trade or investment, each Party shall take into account relevant and available scientific and technical information, international standards, guidelines and recommendations.”

6. Article 390(1) of the TCA defines "environmental levels of protection" for the purposes of Chapter 7 of Title XI “Level playing field for open and fair competition and sustainable development” (Articles 390 to 395) of the TCA as: “the levels of protection provided overall in a Party's law which have the purpose of protecting the environment, including the prevention of a danger to human life or health from environmental impacts…”.

7. Article 390(3) of the TCA defines “climate level of protection” for the purposes of Chapter 7 of Title XI of the TCA as: “the level of protection with respect to emissions and removals of greenhouse gases and the phase-out of ozone depleting substances…”

8. Article 391 (entitled “Non-regression from levels of protection”):

“I. The Parties affirm the right of each Party to set its policies and priorities in the areas covered by this Chapter, to determine the environmental levels of protection and climate level of protection it deems appropriate and to adopt or modify its law and policies in a manner consistent with each Party's international commitments, including those under this Chapter.

2. A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period, including by failing to effectively enforce its environmental law or climate level of protection.”

9. Article 393 (entitled “Environmental and climate principles”):
“1. ... each Party commits to respecting the internationally recognised environmental principles to which it has committed, such as in the Rio Declaration on Environment and Development, adopted at Rio de Janeiro on 14 June 1992 (the "1992 Rio Declaration on Environment and Development") and in multilateral environmental agreements, including in the United Nations Framework Convention on Climate Change, done at New York on 9 May 1992 ("UNFCCC") and the Convention on Biological Diversity, done at Rio de Janeiro on 5 June 1992 (the "Convention on Biological Diversity"), in particular:

(a) the principle that environmental protection should be integrated into the making of policies, including through impact assessments;
(b) the principle of preventative action to avert environmental damage;
(c) the precautionary approach referred to in Article 356(2);
(d) the principle that environmental damage should as a priority be rectified at source; and
(e) the polluter pays principle.

2. The Parties reaffirm their respective commitments to procedures for evaluating the likely impact of a proposed activity on the environment, and where specified projects, plans and programmes are likely to have significant environmental, including health, effects, this includes an environmental impact assessment or a strategic environmental assessment, as appropriate.

3. These procedures shall comprise, where appropriate and in accordance with a Party's laws, the determination of the scope of an environmental report and its preparation, the carrying out of public participation and consultations and the taking into account of the environmental report and the results of the public participation and consultations in the consented project, or adopted plan or programme.

10. Article 394 states that, “for the purposes of enforcement as referred to in Article 391, each Party shall, in accordance with its law” ensure that certain procedures, proceedings, remedies, relief and sanctions are available in domestic law.

11. Article 400 (entitled “Multilateral environmental agreements” and found in Chapter 8):

“1. The Parties recognise the importance of the UN Environment Assembly of the UN Environment Programme and of multilateral environmental governance and agreements as a response of the international community to global or regional environmental challenges and stress the need to enhance the mutual supportiveness between trade and environment policies, rules and measures.

2. In light of paragraph 1, each Party commits to effectively implementing the multilateral environmental agreements, protocols and amendments that it has ratified in its law and practices.

...
4. The Parties reaffirm the right of each Party to adopt or maintain measures to further the objectives of multilateral environmental agreements to which it is party. The Parties recall that measures adopted or enforced to implement such multilateral environmental agreements may be justified under Article 412.

12. Article 401 (entitled “Trade and climate change”):

“1. The Parties recognise the importance of taking urgent action to combat climate change and its impacts, and the role of trade and investment in pursuing that objective, in line with the UNFCCC, with the purpose and goals of the Paris Agreement adopted at Paris on 12 December 2015 by the Conference of the Parties to the United Nations Framework Convention on Climate Change at its 21st session (the "Paris Agreement"), and with other multilateral environmental agreements and multilateral instruments in the area of climate change.

2. In light of paragraph 1, each Party:

(a) commits to effectively implementing the UNFCCC, and the Paris Agreement of which one principal aim is strengthening the global response to climate change and holding the increase in the global average temperature to well below 2 oC above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 oC above pre-industrial levels;

(b) shall promote the mutual supportiveness of trade and climate policies and measures thereby contributing to the transition to a low greenhouse gas emission, resource-efficient economy and to climate-resilient development; and

(c) shall facilitate the removal of obstacles to trade and investment in goods and services of particular relevance for climate change mitigation and adaptation, such as renewable energy, energy efficient products and services, for instance through addressing tariff and non-tariff barriers or through the adoption of policy frameworks conducive to the deployment of the best available solutions.”

13. Article 402 (entitled “Trade and biological diversity”):

“1. The Parties recognise the importance of conserving and sustainably using biological diversity and the role of trade in pursuing these objectives, including by promoting sustainable trade or controlling or restricting trade in endangered species, in line with the relevant multilateral environmental agreements to which they are party, and the decisions adopted thereunder, notably the Convention on Biological Diversity and its protocols, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington D.C. on 3 March 1973 ("CITES").

2. In light of paragraph 1, each Party shall:

(a) implement effective measures to combat illegal wildlife trade, including with respect to third countries, as appropriate;
(b) promote the use of CITES as an instrument for conservation and sustainable management of biodiversity, including through the inclusion of animal and plant species in the Appendices to CITES where the conservation status of that species is considered at risk because of international trade;

(c) encourage trade in products derived from a sustainable use of biological resources and contributing to the conservation of biodiversity; and

(d) continue to take measures to conserve biological diversity when it is subject to pressures linked to trade and investment, in particular through measures to prevent the spread of invasive alien species.”

14. Article 403 (entitled “Trade and forests”):

“1. The Parties recognise the importance of conservation and sustainable forest management for providing environmental functions and economic and social opportunities for present and future generations, and the role of trade in pursuing that objective.

2. In light of paragraph 1 and in a manner consistent with its international obligations, each Party shall:

(a) continue to implement measures to combat illegal logging and related trade, including with respect to third countries, as appropriate, and to promote trade in legally harvested forest products;

…”

15. Article 404 (entitled: “Trade and sustainable management of marine biological resources and aquaculture”)

“1. The Parties recognise the importance of conserving and sustainably managing marine biological resources and ecosystems as well as of promoting responsible and sustainable aquaculture, and the role of trade in pursuing those objectives.

2. In light of paragraph 1, each Party:

(a) commits to acting consistently and complying, as appropriate, with the relevant UN and Food and Agriculture Organization ("FAO") agreements, the United Nations Convention on the Law of the Sea, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, done at New York on 4 August 1995, the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, done at Rome on 24 November 1993, the FAO Code of Conduct for Responsible Fisheries and the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal,
Unreported and Unregulated ("IUU") fishing, approved at Rome on 22 November 2009 at the 36th Session of the FAO Conference, and to participating in the FAO's initiative on the Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels;

(b) shall promote sustainable fisheries and good fisheries governance by participating actively in the work of relevant international organisations or bodies to which they are members, observers, or cooperating non-contracting parties, including the Regional Fisheries Management Organizations (RFMOs) by means of, where applicable, effective monitoring, control or enforcement of the RFMOs' resolutions, recommendations or measures; the implementation of their catch documentation or certification schemes, and port state measures;

(c) shall adopt and maintain their respective effective tools to combat IUU fishing, including measures to exclude the products of IUU fishing from trade flows, and cooperate to that end; and

(d) shall promote the development of sustainable and responsible aquaculture, including with regard to the implementation of the objectives and principles contained in the FAO Code of Conduct for Responsible Fisheries, as appropriate.”

16. Article 494 (entitled “objectives and principles”):

“...

3. The Parties shall have regard to the following principles:

(a) applying the precautionary approach to fisheries management;

(b) promoting the long-term sustainability (environmental, social and economic) and optimum utilisation of shared stocks;

(c) basing conservation and management decisions for fisheries on the best available scientific advice, principally that provided by the International Council for the Exploration of the Sea (ICES);

(d) ensuring selectivity in fisheries to protect juvenile fish and spawning aggregations of fish, and to avoid and reduce unwanted bycatch;

(e) taking due account of and minimising harmful impacts of fishing on the marine ecosystem and taking due account of the need to preserve marine biological diversity;

(f) applying proportionate and non-discriminatory measures for the conservation of marine living resources and the management of fisheries resources, while preserving the regulatory autonomy of the Parties;

(g) ensuring the collection and timely sharing of complete and accurate data relevant for the conservation of shared stocks and for the management of fisheries;
(h) ensuring compliance with fisheries conservation and management measures, and combating illegal, unreported and unregulated fishing; and

(i) ensuring the timely implementation of any agreed measures into the Parties’ regulatory frameworks.”