

Retained EU Law (Reform and Revocation) Act in Action



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STRUCTURE

- Introduction from Stephen Tromans KC
- Professor Alison Young: an overview of the Act and how it operates
- Steph David:
 - International constraints on the Act and
 - The impact on environmental protection
- Ruth Keating:
 - Additional factors for the courts to take account of when considering whether to depart from retained EU case law;
 - Divergence between the Act and EU legislation – chemicals regulation and ESG and sustainability reporting
- Q&A

Retained EU Law (Revocation and Reform) Act 2023

ALISON L YOUNG



Overview of the Act



SUNSET PROVISIONS – AND THE CHANGE TO
'ASSIMILATED' LAW

RESTATEMENT, REVOCATION AND REPLACEMENT OF
REUL

NEW RULES FOR RESOLVING CONFLICTS BETWEEN
ASSIMILATED LAW WITH UK LAW

NEW WAYS OF INTERPRETING ASSIMILATED LAW

Sunset Provisions

Section 1 –and Schedule 1

- Lists EU-derived delegated legislation and retained direct EU legislation that will be revoked 'at the end of 2023'
- UNLESS this has been 'rescued' by 31 October 2023
- Goods news – at least there has been a change to list the law that is revoked, rather than to revoke everything unless it is rescued
- Bad news – we still have the vague date of 'end of 2023'

Section 2

- Sunset of directly effective provisions of EU law

Section 3

- Abolition of supremacy of EU law

Section 4

- Abolition of general principles of EU law

Restatement

Section 11

Ministerial power to 'restate, to any extent' secondary retained EU law
Once restated in delegated legislation this is no longer REUL but is domestic law
The power to restate does not extend beyond 'the end of 2023'
Granted to Westminster and devolved administrations

Section 12

Ministerial power to 'restate, to any extent' secondary assimilated law
Once restated this is no longer assimilated law but domestic law
Granted to Westminster and devolved administrations
This power does not extend beyond 23 June 2026

Restatement

- ▶ Section 13 – all is not as it seems!
- ▶ Restatements may
 - ▶ ‘use words or concepts different from those in the law being restated’ (13(2)).
 - ▶ Make changes to
 - ▶ Resolve ambiguities
 - ▶ Remove doubts or anomalies
 - ▶ Facilitate ‘improvement in the clarity or accessibility of the law (including omitting anything which is legally unnecessary)’.
- ▶ Issues
 - ▶ Challenge to the vires of any ‘restatement’ that makes too many changes?
 - ▶ How to deal with possible ‘changes’ which are meant to merely restate REUL or assimilated law.



Revocation and replacement

- ▶ Section 14
 - ▶ Westminster and devolved administrations may revoke secondary retained EU law and
 - ▶ Not replace it
 - ▶ Replace it with 'such provision as the relevant national authority considers to be appropriate and to achieve the same or similar objectives.'
 - ▶ 'make such alternative provision as the relevant national authority considers appropriate.'
 - ▶ BUT any regulation 'may not increase the regulatory burden'
 - ▶ Financial cost;
 - ▶ administrative inconvenience;
 - ▶ an obstacle to trade or innovation;
 - ▶ an obstacle to efficiency, productivity or profitability;
 - ▶ a sanction (criminal or otherwise) which affects the carrying on of any lawful activity
 - ▶ Regulations may not be made after 23 June 2026

Revocation and replacement

Section 15

- Westminster and devolved administrations may 'make such modifications of any secondary retained EU law' or any restatements or replacements, 'as the relevant national authority considers appropriate' to take account of changes in technology or developments in scientific understanding.

Section 16

- Ability to use the order-making powers in the Legislative and Regulatory Reform Act 2006 to modify retained EU law to reduce burdens found in retained direct EU legislation.

Conflicts between REUL/assimilated law and domestic law

Prior to the end of 2023

- Preservation of supremacy of REUL over domestic provisions enacted prior to 31 December 2020

Post the end of 2023

- Removal of supremacy of EU law from the end of 2023 (section 5(A2) EU(W)A 2018)
- THEREFORE to the extent that domestic law conflicts with assimilated law, domestic law prevails
 - Assimilated law 'is subject to all domestic enactments, so far as it is incompatible with them' (section 5(A2)(b) EU(W)A 2018).
- UNLESS – restatements or replacements of REUL or assimilated law specifically reproduce an effect similar to the supremacy of EU law
 - Courts have to make incompatibility orders which may
 - Set out the effect of that provision and its application to the case
 - Delay bringing the order into effect
 - Remove or limit the effect of the provision before the order comes into force
 - The order may also be subject to conditions

Interpretation of REUL and assimilated law

Prior to the end of 2023

- Retained EU law is interpreted in line with case law from the CJEU and principles of EU law, subject to the CA and the S Ct being able to depart from precedent

Post the end of 2023

- Assimilated law 'must, so far as possible, be read and given effect in a way which is compatible with all domestic enactments' (section A2(a) EU(W)A 2018).
- Easier for courts to depart from retained EU case law
 - Decisions taken by a 'foreign court' or extent to which a domestic court was influenced by retained EU case law from which the court has departed or would depart
 - Changes in circumstances
 - Extent to which this 'restricts the proper development of domestic law' (new section 6(5) EU(W)A 2018).

Interpretation of REUL/assimilated law

References to higher court: (section 6A EU(W)A 2018)

- Courts who do not have the power to depart from retained EU case law may make a reference to the higher court of their own volition, or on the application of the parties

References by law officers (section 6B EU(W)A 2018)

- May refer a point of law relevant to the proceedings that arises on retained case law
- Within 6 months of the last day on which an appeal could have been made from a concluded case, or the day on which an appeal was finally dealt with
- A court must accept the reference and decide the point of law
- This does not affect the outcome in the proceedings
- This may be appealed to the S Ct with their permission

Intervention power of law officers on retained EU case law (section 6C EU(W)A 2018)

- Entitled to notice of proceedings and to intervene when parties are arguing for departure from retained EU case law

Trade and Cooperation Agreement – Non-regression (1)

- Entered into force on 1 May 2021: European Union (Future Relationship) Act 2020
- Recital and Articles 123, 198, 302, 340 – *“respective autonomy and rights to regulate with their territory” – “the environment including climate change”*
- Chapter 7 – Environment and Climate Change
- Article 390 “environmental levels of protection” and “climate levels of protection”
- KEY: Article 391: Non-regression from levels of protection
“ 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.”

Trade and Cooperation Agreement – Non-regression (2)

- Art 394 – Enforcement
 - (a) domestic authorities competent to enforce the relevant law with regard to environment and climate give due consideration to alleged violations of such law that come to their attention; those authorities shall have adequate and effective remedies available to them, including injunctive relief as well as proportionate and dissuasive sanctions, if appropriate; and
 - (b) national administrative or judicial proceedings are available to natural and legal persons with a sufficient interest to bring actions against violations of such law and to seek effective remedies, including injunctive relief, and that the proceedings are not prohibitively costly and are conducted in a fair, equitable and transparent way.
- Art 395 – cooperation on monitoring and enforcement.
- Art 396 – dispute settlement; Arts 408-410.

Amendments in the House of Lords – Attempts 1 and 2

“Environmental protection and food standards

- (1) Regulations may not be made by a relevant national authority under section 12, 13, 15 or 16 unless the relevant national authority is satisfied that the regulations do not—*
- (a) reduce the level of environmental protection arising from the EU retained law to which the provision relates; [...]*
 - (c) conflict with any relevant international environmental agreements to which the United Kingdom is party.*
- (2) Prior to making any provision to which this section applies, the relevant national authority must—*
- (a) seek advice from persons who are independent of the authority and have relevant expertise,*
 - (b) seek advice from, as appropriate, the Office for Environmental Protection, Environmental Standards Scotland, a devolved environmental governance body or another person exercising similar functions, the Food Standards Agency and Food Standards Scotland, and*
 - (c) publish a report setting out—*
 - (i) how the provision does not reduce the level of environmental or consumer protection in accordance with subsection (1), and*
 - (ii) how the authority has taken into account the advice from the persons referred to in paragraphs (a) and (b) of this subsection.”*

Amendments in the House of Lords – Attempts 1 and 2

Environmental protection

- (1) Regulations may be made by a relevant national authority under section 12, 13, 15 or 16 only if the relevant national authority is satisfied that the regulations do not reduce the level of environmental protection arising from the EU retained law to which the provision relates.
- (2) Prior to making any provision to which this section applies, the relevant national authority must seek advice from persons who are independent of the authority and have relevant expertise.

See also the Lords' attempt to amend the Act so that there is greater parliamentary scrutiny.

Rejected... Where does that leave us?

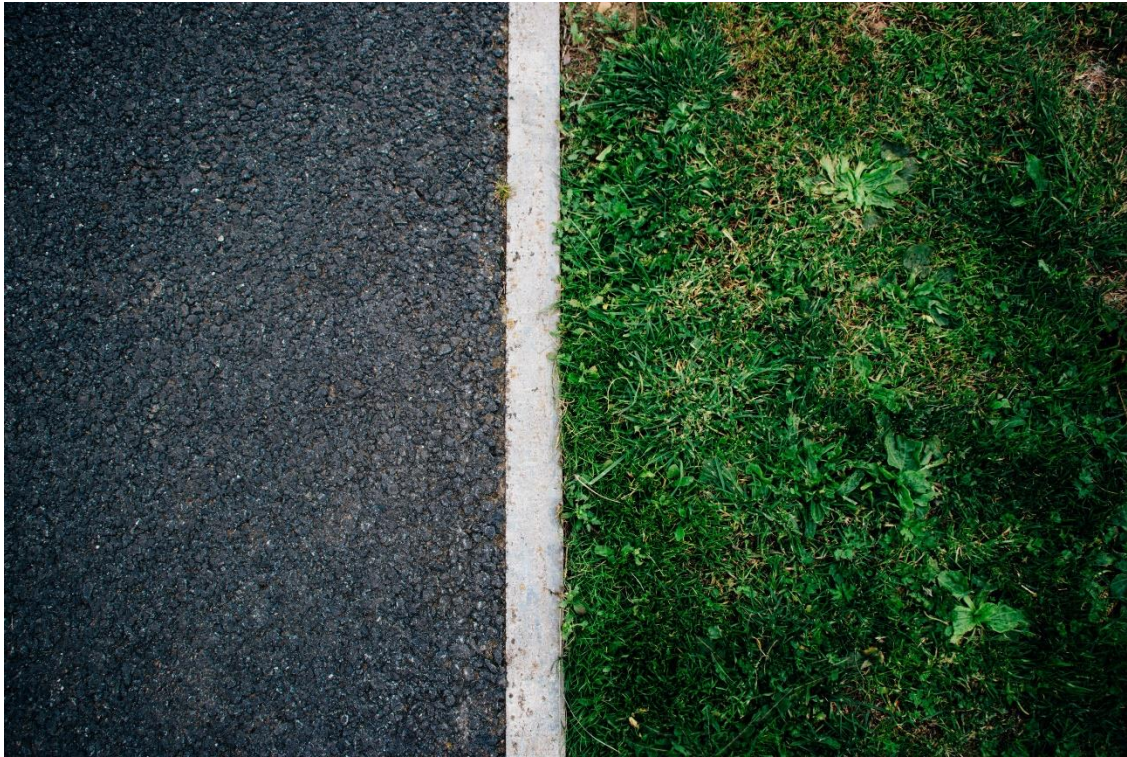
- 1) Regulations and ministerial power of “restatement” or “replacement” – non-regression?
- 2) Legislation revoked as set out in s 1 includes (schedule 1):
 - a) Specific habitats regulations (e.g. salt marsh)
 - b) National Emission Ceilings Regulations 2018, regs 9 and 10 (national air pollution control regime)
 - c) Renewable Transport Fuels and Greenhouse Gas Emissions Regulations 2018/374
 - d) EU regulations on requirements for fishing in certain waters; imports of tuna from Cambodia, Equatorial Guinea, Sierra Leone; recovery plan for bluefin tuna
 - e) Commission decision on carbon leakage risks
- 3) Interpretation of environmental law
 - 1) EIA regulations – EU case law
 - 2) Environmental and climate principles – Art 393 TCA
 - 3) Environment Act 2021 – disconnect AND powers under the Act (e.g. s 112 – Habitats regulations)

“[...] We have been clear throughout the passage of the Bill that the Government will not row back on our world-leading environmental protections. In reviewing our retained EU law, we want environmental law to be fit for purpose for the UK’s unique environment and able to drive improved environmental outcomes, as we have set out in our Environment Act targets, while that regulators can act efficiently. Any changes to environmental regulations across government will be driven with those goals in mind. [...]

“The fundamental problem is that nobody know what non-regression actually means. We all think we do, but putting it in primary legislation invites every change to environmental regulations to be challenged, as they inevitably would be, in the courts. The courts would then be asked to take a view on whether a particular change was regression or not. In effect, we would be transferring the legislative process from Parliament to the courts, on every individual regulation. Although we are content to say that we will not row back on environmental protections, that is the reason we are unwilling to see such a phrase placed in primary legislation.” [emphasis added] Lord Callanan

Concerns

Factors for departing



Divergence



Section 6 Role of the Courts

- Rulings of the CJEU binding made on or before 11 pm on 31 December 2020.
- Section 6 of the European Union (Withdrawal) Act 2018 (interpretation of retained EU law) is amended by section 6 of the 2023 Act.
- References to the CA and UKSC.
- Test of “*general public importance*”.



Section 6 Role of the Courts

- Subsection 5 (2018 Act): “*In deciding whether to depart from any retained EU case law [by virtue of subsection (4)(a) or (b)], the Supreme Court or the High Court of Justiciary must apply the same test as it would apply in deciding whether to depart from its own case law.*”
- Subsection 3 (2023 Act): the higher court concerned must (among other things) have regard to (a) the fact that decisions of a foreign court are not (unless otherwise provided) binding; (b) any changes of circumstances which are relevant to the retained EU case law; (c) the extent to which the retained EU case law restricts the proper development of domestic law.
- Explanatory Notes – these reflect some of the factors which the CA took into account in deciding whether to depart from retained EU case law in the case of *TunelIn Inc v Warner Music UK Ltd & Anor* [2021] EWCA Civ 441.
- No appeal on a decision: (a) to make, or not to make, a reference, or (b) to accept or refuse a reference.



Divergence

Chemicals Regulation

- EU's REACH Regulation.
- New EU developments.
- Up to 12,000 new restrictions.



ESG and sustainability reporting

- Diverging environmental, social and governance (KPMG Regulatory Barometer).
- Corporate Sustainability Reporting Directive.
- International Financial Reporting Standards.

