

Retained EU Law (Revocation and Reform) Act 2023: a Potted History

Abstract: In this article **Anne O'Connor** and **Joanna Morris** of Thomson Reuters set the Retained EU Law (Revocation and Reform) Act 2023 (REUL Act 2023) within its broader historical context, summarise provisions likely to be of interest to the legal information community, and explain how and why the REUL Act 2023 has given rise to legal uncertainty.

Keywords: European Union; European Union (EU) law; government; Brexit



INTRODUCTION

The Retained EU Law (Revocation and Reform) Act 2023 (REUL Act 2023) received Royal Assent on 29 June 2023, but most of the changes took place on 1 January 2024.

Although the enacted legislation differs in significant respects from the UK government's original Bill, it still brings about considerable change to how the law works, alongside more superficial changes to what the law is called. These changes can complicate the tasks of cataloguing and classifying the law.

As a result, legal professionals are having to get to grips with the latest set of legal rules and are starting to

employ the new terminology when using legal information services.

Before looking at where we are now, it helps to journey back through time to understand how we got here and why. The REUL Act 2023 was presented by the UK government as an obvious next legal step that was always intended to follow the enactment of the European Union (Withdrawal) Act 2018 (EUWA 2018). But the motivation for, and the content of, the REUL Act 2023 can be traced back to older legislation that long pre-dated the UK's withdrawal from the EU.

EUROPEAN COMMUNITIES ACT 1972: INTO THE EEC

Until the UK's withdrawal from the EU on 31 January 2020 (exit day), the European Communities Act 1972 (ECA 1972) played a central role in the implementation of the UK's rights and obligations under EU law as an EU member state.

On 18 October 1972, UK ministers ratified the 1972 Treaty of Accession that enabled the UK to become a member of the European Economic Community on 1 January 1973. The day before, Parliament had passed the implementing legislation: the ECA 1972. This legislation had to be in place beforehand because the UK is a dualist state, so ratification alone cannot incorporate the terms of an international treaty into domestic law. Instead, Parliament decided, by enacting the ECA 1972, how the UK would give effect to its EU rights and obligations.

The ECA 1972 had several unusual features that would steer many of the legal changes that were made initially by the EUWA 2018 and subsequently by the REUL Act 2023. For example:

- Section 2(1) of the ECA 1972 enabled the UK to give effect to much (but not all) EU law. It provided for the automatic incorporation in domestic law of directly applicable EU law (such as EU regulations), and EU law that met the EU conditions for direct effect. Some EU law, such as EU directives, needed additional legislation to implement the details. But individuals could rely on directly effective rights before domestic courts and tribunals via section 2(1) even if there was no separate legislation. These included rights under the EU treaties.
- Section 2(4) gave effect to the principle of the supremacy of EU law; so EU law had priority over any incompatible or inconsistent domestic law made before or after the enactment of the ECA 1972. Domestic law had to be interpreted in accordance with EU law as far as possible, and domestic courts and tribunals had to disapply or quash domestic law (including Acts of Parliament) to the extent that it was inconsistent with EU law.
- Section 3 required domestic courts and tribunals to decide questions about the interpretation of EU law in accordance with the principles and decisions of the Court of Justice of the European Union (CJEU). This reflected the role of the CJEU, as the ultimate authority on the meaning of EU law, in ensuring the consistent interpretation and application of EU law.

EUROPEAN UNION (WITHDRAWAL) ACT 2018: OUT OF THE EU

On exit day (31 January 2020), the UK left the EU, the UK-EU withdrawal agreement came into force, and the EUWA 2018 repealed the ECA 1972. However, the withdrawal agreement required the UK to continue to give effect to most EU law during the transition period (which

ran from exit day until 11pm on 31 December 2020). So the EUWA 2018 immediately saved much of the effect of the ECA 1972, in modified form, until the end of the transition period. This is why most of the substantive legal changes linked to withdrawal took place at the end of transition, rather than on exit day.

The EUWA 2018 was originally described by the UK government as the Great Repeal Bill,¹ and, while it begins at section 1 with the repeal of the ECA 1972, many of its subsequent provisions (before amendment by the REUL Act 2023) originally aimed for legal continuity and the maintenance of legal certainty. The repeal switched off the EU laws and EU rules of priority and interpretation that used to apply via the ECA 1972, but the EUWA 2018 switched on domestic equivalents at the end of the transition period.

The UK government's 2018 explanatory notes to the EUWA 2018 observed that, as a general rule, the same rules and laws would apply, since the principal purpose of the EUWA 2018 was to provide a functioning statute book.² The foreword to the UK government's 2017 white paper on *Legislating for the United Kingdom's withdrawal from the European Union* explained that this approach would provide maximum certainty, adding: "It will then be for democratically elected representatives in the UK to decide on any changes to that law, after full scrutiny and proper debate."³

RETAINED EU LAW

The EUWA 2018 created a new category of domestic law at the end of the transition period, based on the EU and EU-derived law that applied to the UK at that time. Some of this "retained EU law" already existed in domestic law and acquired a new label, and some was created for the first time to replace EU law which had stopped flowing into domestic law through ECA 1972 mechanisms such as direct applicability and direct effect.

Retained EU law originally comprised the following, as amended by domestic legislation from time to time, and as interpreted by domestic courts and tribunals:

- EU-derived domestic legislation. This caught most domestic legislation passed before the end of the transition period with an EU connection, including Acts of Parliament. The "saving" for EU-derived domestic legislation in section 2 of the EUWA 2018 extended far beyond the secondary legislation made under the power in section 2(2) of the ECA 1972 that had to be saved from falling on repeal.
- Retained direct EU legislation. Section 3 of the EUWA 2018 created domestic versions of EU regulations and EU decisions which used to be directly applicable via section 2(1) of the ECA 1972. The definition in section 3 is complex and did not necessarily copy across the text of the entire legal instrument; and to add to the uncertainty, the UK government did not publish definitive texts of the domestic versions

showing which of the original EU provisions (or parts of them) had been incorporated into the UK statute book.

- Section 4 converted into domestic law many of the EU-derived rights, powers, liabilities, obligations, restrictions, remedies and procedures that used to take effect automatically via section 2(1) of the ECA 1972, and which were not caught by section 3 of the EUWA 2018. For example, section 4 converted directly effective rights and obligations derived from some EU treaties and some EU directives. Section 4 was drafted as a broad sweeper provision to plug legal gaps. The EUWA 2018 did not list the laws retained by section 4, and the UK government did not publish a definitive list.

Retained EU law did not remain a frozen snapshot, and some has been amended or repealed since the end of transition.

If a law falls within the category of retained EU law, this could be significant, as it brings that law within the scope of other EUWA 2018 provisions governing the status and interpretation of retained EU law, and within powers conferred on the executive (by the EUWA 2018 and by other legislation, including the REUL Act) to change retained EU law. Discussions of retained EU law tend to focus on section 4 rights or the retained EU law versions of EU legislation created by section 3, but retained EU law also includes the vast quantity of law that falls within the definition of EU-derived domestic legislation.

On 22 June 2022, the UK government published a retained EU law dashboard,⁴ which is periodically updated. This dashboard is just a list of retained EU laws identified by government departments, and is neither comprehensive nor definitive. The UK government has explained that it sets out the relevant government departments' "best understanding" of their catalogue of retained EU law.⁵ When first published, it listed 2417 pieces of law. At the time of writing, it lists 6757 pieces. This still falls short of the likely overall amount, particularly as regards section 4 retained EU law, and it does not include any legislation made by the devolved institutions in Scotland, Northern Ireland or Wales.

Retained EU law is defined by the EUWA, so it is a matter of statutory interpretation whether a particular legal provision forms part of this body of law. Any uncertainties about the correct interpretation would ultimately be for the courts to decide.

ORIGINAL EUWA 2018 RULES OF PRIORITY AND INTERPRETATION

The original EUWA 2018 rules of priority and interpretation (before amendment by the REUL Act 2023) aimed to provide continuity and legal certainty. They drew heavily on the ECA 1972, while limiting the extent to which EU-derived legal principles and interpretations

inherited from the time before the end of the transition period could affect domestic law passed or made afterwards.

The original section 5 of the EUWA 2018 retained some aspects of the principle of the supremacy of EU law. Domestic law passed or made before the end of the transition period had to be interpreted in accordance with EU law as far as possible. Domestic courts and tribunals had to disapply or quash domestic law (including Acts of Parliament) passed or made before the end of the transition period to the extent that it was inconsistent with retained direct EU legislation or retained EU law under section 4. The UK government's 2017 white paper observed: "Any other approach would change the law and create uncertainty as to its meaning."⁶

The original section 6 of the EUWA 2018 retained (initially) the interpretations of EU and EU-derived law decided in domestic and EU case law before the end of transition. Section 6 required domestic courts and tribunals to decide questions about the interpretation of retained EU law in accordance with a defined body of retained domestic case law, retained EU case law and retained general principles of EU law, until a relevant domestic court departed from that body of case law and principles, or until domestic legislation modified the relevant retained EU law. The EUWA 2018 definitions covered the case law and principles that applied at the end of transition, as subsequently modified post-transition by domestic law.

As the UK government explained in the 2017 white paper: "Everyone will have been operating on the basis that the [EU-derived] law means what the CJEU has already determined it does, and any other starting point would be to change the law."⁷

RETAINED EU LAW (REVOCATION AND REFORM) ACT 2023

On 31 January 2022, the UK government announced its intention to bring forward a "Brexit Freedoms" Bill to ensure that retained EU law could be more easily amended or repealed, and to end the special status of EU law in the UK legal framework.⁸

Retained EU law already formed part of domestic law. Some of this retained EU law had been created at the end of the transition period by an Act of Parliament (sections 3 and 4 of the EUWA 2018), and some already existed in domestic law as EU-derived domestic legislation. It is notable that the UK government's policy document that accompanied the Bill announcement presented retained EU law as separate from domestic law, and described it as a "foreign-derived body of law" that might not be right for the UK.⁹

By the time the Bill arrived in Parliament it had acquired the formal parliamentary title of the Retained EU Law (Revocation and Reform) Bill. The ideology underpinning the Bill, evident from its original name and

the accompanying information supplied by the UK government, stimulated heated debate. Some MPs and peers pointed to political motivations and questioned the legal necessity for the Bill.¹⁰

One of the underlying aims of the REUL Act 2023 was to speed up the pace of revoking and reforming the EU-derived laws that remained on the UK statute book. The REUL Act 2023 did not identify any particular policy areas requiring reform because its main target was EU-derived laws in general. Instead, it made some broad revocations and provided general mechanisms to encourage faster reform of EU-derived laws. It also delegates extensive powers to the executive to make further changes to individual pieces of retained EU law via secondary legislation. This leaves uncertain the extent of any particular policy changes, and subjects such changes to lighter scrutiny than amendments made by primary legislation.

REVOCATION AND REFORM OF RETAINED EU LAW

Following its enactment, the REUL Act 2023 made significant changes to the category of retained EU law and the way in which it operates, largely through amendments to the EUWA 2018, most of which took effect on 1 January 2024.

The REUL Act 2023 includes provisions that:

- Revoked the subordinate legislation and retained direct EU legislation listed in Schedule 1 at the end of 2023.¹¹ Much of this law was already defunct.
- Repealed section 4 of the EUWA 2018 at the end of 2023.¹² The EU-derived rights and obligations which had been retained in domestic law by the section 4 sweeper are no longer recognised or enforceable in relation to anything occurring after the end of 2023. It is unclear what laws this repeal removed from the statute book. (The repeal is not retrospective, so these EU-derived rights and obligations continue to be recognised and enforceable in relation to acts or events which occurred before the end of 2023.)
- Amended the EUWA 2018 and other Acts of Parliament on 29 June 2023 to make it easier for the executive to amend retained direct principal EU legislation and to reduce the degree of parliamentary scrutiny of the amendments made.¹³ (Retained direct principal EU legislation is a type of retained direct EU legislation that used to have the same status as an Act of Parliament for amendment purposes.)
- Conferred extensive powers on the executive to restate, reproduce, revoke or replace secondary retained EU law¹⁴ (which, after the end of 2023, is called secondary assimilated law). The type of law that falls within the scope of these powers includes all retained direct EU legislation and all EU-derived

domestic legislation that is not primary legislation. It also extends to any part of EU-derived domestic legislation that is primary legislation if the text was inserted by subordinate legislation, such as text in an Act of Parliament that was inserted by a statutory instrument.¹⁵ The laws amended under these delegated powers do not have the full scrutiny and debate that Parliament would give to primary legislation.

AMENDED EUWA 2018 RULES OF PRIORITY AND INTERPRETATION

Another objective of the REUL Act 2023 was to remove or reduce the influence of EU-derived legal principles and rules of interpretation.

Section 3 of the REUL Act 2023, headed 'Abolition of supremacy of EU law', amended section 5 of the EUWA 2018 on 1 January 2024 to end:

- The statutory requirement for domestic law passed or made before the end of the transition period to be interpreted in accordance with EU law. However, domestic courts and tribunals can still adopt a purposive approach and can still use EU law as an external aid to the interpretation of domestic law under ordinary domestic principles of statutory interpretation.¹⁶
- The priority previously given to retained direct EU legislation (which used to take precedence over conflicting domestic law passed or made before the end of the transition period).

The UK government's 2017 white paper had indicated that one of the original reasons for retaining some aspects of the principle of the supremacy of EU law was to maintain certainty about the meaning of the law.¹⁷ By removing these elements, the REUL Act 2023 creates uncertainty because it takes away part of the legal foundations on which domestic courts and tribunals had built their interpretations of domestic law.

Another significant change affecting future litigation and interpretation is the loss of the ability to invoke directly before domestic courts and tribunals the EU-derived rights that were originally saved in domestic law by section 4 of the EUWA 2018. The courts can no longer look beyond the provisions of domestic legislation to enforce these directly effective rights (unless the particular acts or events occurred before the end of 2023).

The REUL Act 2023 has also amended the EUWA 2018 to remove from domestic law the effects of general principles of EU law after the end of 2023.¹⁸ These amendments included removing the reference to retained general principles of EU law from section 6 of the EUWA 2018.¹⁹ Domestic courts and tribunals no longer need to apply retained general principles of EU law when deciding questions about the interpretation of retained EU law. Like the amendments to section 5, this removes some of

the legal underpinnings of previous interpretations, leaving the outcome of future decisions uncertain.

At the time of writing, the changes to the role of the courts that will be made by section 6 of the REUL Act 2023 are not yet in force. These aim to encourage the courts to depart from retained EU case law when interpreting retained EU law, but do not oblige courts to depart from it.

ASSIMILATED LAW

Section 5 of the REUL Act 2023 provides for retained EU law and related bodies or types of law to be known by different names as regards all times after the end of 2023. For example, retained EU law is known as assimilated law, retained direct EU legislation is known as assimilated direct legislation, and retained EU case law is known as assimilated EU case law. The renaming is not retrospective, so as regards all times at or before the end of 2023, these types of law continue to be known by their previous names.²⁰

The UK government explained that the renaming was to reflect that various interpretive effects of EU law no longer apply to this body of law following the changes made by sections 2, 3 and 4 of the REUL Act.²¹ (These are the provisions that repealed section 4 of the EUWA 2018, ended the principle of the supremacy of EU law,

and removed the effects of general principles of EU law after the end of 2023.)

In the Scottish government's view, this change of terminology appeared to be ideologically driven, and potentially introduces confusion to an already complex legal landscape. This view is recorded in a policy note to a Scottish statutory instrument which updated the terminology in Scottish legislation.²² The changes were made because the Scottish government felt that it would be confusing to the end user of legislation for superseded terminology to remain on the devolved statute book.

This change from retained EU law terminology to assimilated law terminology has also complicated the tasks of professionals in the legal information community. While the new names do not themselves change the legal effects of the renamed law, the other changes made by the REUL Act 2023 leave gaps in the statute book and create uncertainty about the meaning of some domestic law (including Acts of Parliament) until resolved by the courts under the new rules.

The extent of change in particular legal practice areas and sectors will also depend heavily on the delegated legislation made by the executive under powers conferred by the REUL Act 2023, which will in turn depend on policy decisions about how far to reform assimilated law.

Footnotes

- ¹ Department for Exiting the European Union, *The United Kingdom's exit from, and new partnership with, the European Union* (White Paper, Cm 9417) ch 1. Available at <www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>
- ² Explanatory Notes to the EUWA 2018, para 10. Available at: <www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpgaen_20180016_en.pdf>
- ³ Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (White Paper, Cm 9446), page 5. See also paras 1.16, 1.21 and 1.22. Available at: <www.gov.uk/government/publications/the-repeal-bill-white-paper>
- ⁴ Department for Business and Trade, *Retained EU law dashboard*. Available at: <www.gov.uk/government/publications/retained-eu-law-dashboard>
- ⁵ Government response (REU0029) to House of Commons European Scrutiny Committee, *Retained EU Law: where next?* (HC 2022-23, 122). Available at <<https://committees.parliament.uk/writtenevidence/113000/pdf/>>
- ⁶ Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (White Paper, Cm 9446), para 2.20
- ⁷ *ibid*, para 2.14
- ⁸ Prime Minister's Office, 10 Downing Street, *Prime Minister pledges Brexit Freedoms Bill to cut EU red tape* (Press release, 31 January 2022). Available at <www.gov.uk/government/news/prime-minister-pledges-brexite-freedoms-bill-to-cut-eu-red-tape>
- ⁹ Cabinet Office, *The benefits of Brexit: how the UK is taking advantage of leaving the EU* (Policy paper, 31 January 2022), pages 32–33. Available at <www.gov.uk/government/publications/the-benefits-of-brexite>
- ¹⁰ See, for example, HL Deb 23 February 2023, vol 827, col 1838. Available at <[https://hansard.parliament.uk/lords/2023-02-23/debates/CE2F40E5-AA5C-487C-88E1-FFE9027219E3/RetainedEULaw\(RevocationAndReform\)Bill](https://hansard.parliament.uk/lords/2023-02-23/debates/CE2F40E5-AA5C-487C-88E1-FFE9027219E3/RetainedEULaw(RevocationAndReform)Bill)>
- ¹¹ REUL Act 2023, s. 1
- ¹² REUL Act 2023, s. 2
- ¹³ REUL Act 2023, s. 9
- ¹⁴ REUL Act 2023, ss. 11–14
- ¹⁵ REUL Act 2023, s. 12(2)

¹⁶ *E-Accounting Solutions Ltd (t/a Advancetrack) v Global Infosys Ltd (t/a GI Outsourcing)* [2023] EWHC 2038 (Ch); *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850.

¹⁷ Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (White Paper, Cm 9446), para 2.20. Available at <www.gov.uk/government/publications/the-repeal-bill-white-paper>

¹⁸ REUL Act 2023, s. 4

¹⁹ REUL Act 2023, s. 4(3)(a)

²⁰ REUL Act 2023, s. 5(2)

²¹ Explanatory Notes to the REUL Act 2023, paras 28-29. Available at <www.legislation.gov.uk/ukpga/2023/28/pdfs/ukpgaen_20230028_en.pdf>

²² Policy note to the Retained EU Law (Revocation and Reform) Act 2023 (Consequential Amendments) (Scotland) Regulations 2023, SSI 2023/374. Available at <www.legislation.gov.uk/ssi/2023/374/pdfs/ssipn_20230374_en_001.pdf>

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