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Retained EU Law (Revocation and Reform) Act 2023

The Retained EU Law (Revocation and Reform) Act 2023 has significant effects that are likely to have an impact on the regulation of environmental matters, even though the most dramatic feature of the Bill – the revocation of all retained EU law at the end of 2023 - had been abandoned by the time the Act was finally approved. The provisions that have been enacted are complex but give extensive law-making power to governments, subject to limited parliamentary scrutiny, and with a clear push towards deregulation. The Bill's passage was hotly contested, and even after the reversal of the proposal to introduce a "sunset" clause on all EU retained law (unless expressly excepted - see (2023) 214 SPEL 122) there was considerable to-and-fro between the Commons and Lords at the final stages, including unsuccessful attempts to add an environmental non-regression provision.

The automatic revocation of all retained EU law (in future to be known as "assimilated law") has now been replaced by a provision revoking several hundred expressly listed EU and UK measures but leaving unaffected other elements of retained EU law, both UK regulations implementing EU law and directly effective EU provisions. Most of the measures being revoked are no longer of any relevance but concern has been expressed in relation to some air quality measures that are included and at the time of writing the Scottish Government is in discussion over their possible retention or replacement.

The status of the case-law inherited from the Court of Justice of the European Union is further reduced by removing its supremacy over domestic enactments, abolishing any legal recognition of general principles of EU law and providing greater encouragement to the higher courts to use their powers under the European Union (Withdrawal) Act 2018 to depart from EU decisions, for example when following EU interpretations would "restrict the proper development of domestic law". The lower courts and law officers are given a streamlined way of referring to the higher courts any cases where retained case-law is still initially binding but considered undesirable. Since much of the practical impact of retained EU law depends on case-law, e.g. the precautionary approach in relation to protected habitat, the increased vulnerability of the inherited case-law can only add uncertainty on important matters.

Very wide legislative powers are given to ministers to restate, revoke or replace retained EU law. Where the aim is to revoke or replace the law, these powers can be used only where the change does not increase the regulatory burden, in terms of financial cost, administrative inconvenience or obstacles to trade, innovation, productivity or profitability. There is thus a strong preference towards legislating to achieve deregulatory results, rather than seeking enhanced environmental or other standards. These powers are largely shared by UK and devolved authorities, but there is no limit on UK ministers acting in devolved areas, with the only requirements being consultation with, not consent from, the devolved government. The parliamentary scrutiny of all such new regulations is limited, another issue that caused tension between the Lords and Commons as the Bill was being passed.

The widespread relief at the abandonment of the legislative cliff-edge created by the original "sunset" provisions should not overshadow the significant impact of this Act. The regulatory landscape is considerably affected by the further weakening of the status of EU case-law and the wide powers conferred on the governments to legislate as they wish with limited parliamentary controls. The enhanced position of the executive is only increased when one considers the further legislative powers (often overlapping) already conferred under the European Union (Withdrawal) Act 2018 and by post-Brexit legislation on issues such as trade, agriculture and fisheries. At the same time the deregulatory thrust here conflicts with the Scottish Government's policy of "keeping pace" with the EU and the powers to achieve that conferred in the UK Withdrawal from the European

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Union (Continuity) (Scotland) Act 2021. The scene is thus set for potentially increased tensions over regulatory divergence, exacerbated by the expanding ability of UK ministers to encroach on devolved matters. The overall effect is of increased complexity, continuing uncertainty and extended ministerial power, leaving the arguments about what Brexit will bring still far from settled.

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