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The Future of Retained EU Law

The introduction of the Retained EU Law (Revocation and Reform) Bill in the UK Parliament threatens to cause major disruption to the law on the environment and in other areas. The essence of this Bill is to remove from UK law all the measures inherited from our time as members of the EU, and to do so mostly by the end of 2023. Even if the opportunity is taken actually to preserve much of that law, the need to take positive action if the law is not to disappear will impose a major burden on government departments.

Under the Bill, all delegated legislation made under the European Communities Act 1972, the route by which most EU law was implemented within the UK, will cease to have effect at the end of 2023. Particular measures can be expressly exempted from this "sunset" provision or allowed an extended deadline until no later than 23 June 2026 (10 years after the referendum). Also at the end of 2023, all rights, powers and liabilities under retained EU law will cease to be part of domestic law. The case-law inherited from the EU will be stripped of its remaining authority, with the higher courts free to depart from it (and encouraged to do so readily) and the lower courts and law officers given a streamlined way of referring to those courts any cases where retained case-law is still initially binding and considered undesirable.

Ministers are given very wide powers to restate, revoke or replace retained EU law, but revocation or replacement is allowed only where the change does not increase the regulatory burden, in terms of financial cost, administrative inconvenience, obstacles to trade, innovation, productivity or profitability. 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.

The Bill is complex and its procedural provisions very detailed, but its intended impact will be large and immediate. As withdrawal from the EU was being discussed, it was rapidly decided that trying to identify and decide the fate of every piece of EU law was simply not practical over a short period, and consequently it was all carried over as retained EU law. Now government departments are being given a matter of months to identify and assess every piece of inherited law. Even if it is decided to retain the law (in which case it will be known as "assimilated law") or to seek additional time to reach a conclusion, implementing that decision requires a positive act at a time when departments already have limited capacity to cope with the biodiversity, climate, energy and cost of living crises. Since environmental law is one of the areas most dependent on retained EU law, the impact in this area will be particularly significant and the timetable leaves little scope for meaningful consultation and stakeholder engagement.

A further issue is that the difference in policy goals, with the Scottish government favouring alignment with the EU and the UK government its own distinct deregulatory path, is likely to lead to increased regulatory divergence and tension within the UK. Over seven years after the EU referendum was called, one might have hoped that things would be settling down, but the disruption and uncertainty continue.

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