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# Retained EU Law Update

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## Retained EU Law Update



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## FTB Public Law Updates

# Context and overview of the 2023 REUL Act.



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## What's in store...

1. Part I: EU Law before Brexit
2. Part II: EU Law post-Brexit (2018 and 2020 Acts).
3. Part III: Six Features of the 2023 REUL Act
4. Part IV: The Department for Business & Trade Assimilated Law Parliamentary Report June 2024 – December 2024.



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## PART I: EU Law before Brexit



## Origins of EU Law (1)

### (1) Post WWII developments (NATO (1949), Council of Europe (1949))

### (2) A new plan for political co-operation (Schuman Declaration (9 May 1950))

- (1) Joint management of coal and steel production in France and Germany – but open to other countries
- (2) *“The solidarity in production that will thus be established will make it plain that any war between France and Germany becomes not only unthinkable but materially impossible”*

### (3) European Coal and Steel Community (April 1951).

- (1) Six Countries (France, Germany, Luxembourg, Belgium, Netherlands and Italy)
- (2) *“founded on a common market, common aims, and common institutions” (Art. 1)*
- (3) Judicial body to oversee it.



## Origins of EU Law (2)

### **(1) Treaty of Rome (1957) (and Euratom) “to lay the foundations of an ever-closer union among the peoples of Europe”**

- (1) Sectoral vs general integration (general common market for goods, services, people and capital)
- (2) Institutional growth (more developed and permanent institutions).
- (3) Broader rights/social policies (freedom of movement, coordination of social policies, improving living standards)

### **(2) *Van Gend en Loos* (1963)**

- (1) Increase in duties post Treaty of Rome, which in Art. 12 prohibited such increases.
- (2) AG said “these provisions in fact only lay down an obligation on the part of Member States.”
- (3) CJEU: **Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is intended to confer upon them rights which become part of their legal heritage”**



## Origins of EU Law (3)

### (1) *Costa v ENEL* (1964)

- (1) Refused to pay electricity bill issued by recently nationalised energy company. Contrary to monopolies/state aid provisions in the Treaty of Rome
- (2) “law stemming from the Treaty, an independent source of law” [...] “special and original nature” cannot be “overridden by domestic legal provisions, however framed”

### (2) *Internationale Handelsgesellschaft* (1970). (Direct constitutional conflict)





## Origins of EU Law: in the UK (4)

**(1) Joined the EU on 1 January 1973 (referendum in 1975 – 67.2% remain)**

**(2) European Communities Act 1972**

**2 General implementation of Treaties**

- (1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly ; and the expression " enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.



## Scope and Content of EU Law (1)

### (1) Treaties (now Treaty of Lisbon)

- (1) Treaty on the Functioning of the European Union; Treaty on European Union
- (2) European Charter of Fundamental Rights and Freedoms.

### (2) Directives (to be implemented by Member States)

### (3) Regulations (in and of themselves have direct effect).

### (4) General principles (e.g. non-discrimination, proportionality).

### (5) Parasitic duties/rights

- (1) E.g. interpret national law in the light of a Directive (*Marleasing*)
- (2) E.g. compensation for breach of EU Law (*Francovich*)



## Scope and content of EU law (2): (Environmental Law as a case study).

### **(1) Consistent, binding interpretation of EU Law by CJEU.**

(1) E.g. what does “project” mean in the EIA Directive?

### **(2) Supremacy of EU law**

(1) E.g. if project means X in EU law, but Y in domestic law, must apply X.

### **(3) Duty to refer matters to CJEU (Article 267, TFEU)**

(1) Can you (and must you?) undertake an EIA at reserved matters stage where outline permission has already been granted (*Barker v LB Bromley* C-290/03)

### **(4) CJEU polices EU law, e.g. through infringement proceedings (Article 258 TFEU)**

(1) E.g. C-502/15 (Waste Water Treatment); C-664/18 (Air Quality)



## Practical examples of EU Law

### (1) Consumer protection

- (1) Product Liability Directive (Council Directive 85/374/EEC of 25 July 1985)
- (2) Consumer Protection Act 1987 (s. 1(1))
- (3) Consumer Rights Act 2015 (Explanatory Notes, §9 “The European Directives implemented in the Act are [...]”)

### (2) Equal pay/Equality

- (1) *Defrenne v SABENA* (equal pay for air stewardesses) (1976), §12 “equal pay forms part of the foundations of the community”.
- (2) Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women

### (3) Intellectual property law



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## Part II: EU Law post-Brexit



## Brexit Timeline

- (1) 23 June 2016 - Referendum vote (52% leave; 48% remain)**
- (2) 29 March 2017 – notification of intention to leave the EU**
- (3) 26 June 2018 – EU Withdrawal Act (“2018 Act”)**
- (4) Exit day 1, 29 March 2019**
- (5)... Exit day 2 (31 January 2020)**
- (6) 1 February 2020 - EU Withdrawal Agreement (“Withdrawal Agreement”), implemented in the EU Withdrawal Agreement Act (“2020 Act”)**
- (7) June 2023 – REUL Act 2023**



## EU Law post-Brexit (1A) Under the 2018 Act and under the 2020 Act.

### (1) The 2018 Act (as enacted). Principal effects

- (1) "Retention of existing EU Law" (ss. 2 – 6). "Retained EU law". Different gateways:
  - (1) Saving for EU-derived domestic legislation (s. 2(1))
  - (2) Incorporation of direct EU legislation (s. 3)
  - (3) Saving of EU rights (s. 4)
  
- (2) Supremacy of EU law does not apply after exit day (s. 5(1)).
  
- (3) End of supremacy of CJEU decisions.
  - (1) No reference to CJEU after exit day (s. 6(1)(b))
  - (2) CJEU decisions not binding after exit day (s. 6(1)(a))
  - (3) May have regard to any CJEU decision after exit day (s. 6(2)).
  
- (4) Retained EU law to be interpreted in line with retained case law (s. 6(3)(a)), but otherwise not bound by said case-law (s. 6(4)).
  
- (5) Powers under Henry VIII Clauses to amend some retained EU law (s. 7(2) to (5)).



## EU Law post-Brexit (1B) Under the 2020 Act

- (1) 2020 Act implements the Withdrawal Agreement (and provide an implementation period). Exit day – IP Completion Day.
- (2) The Withdrawal Agreement (read with s. 7A of the 2018 Act) provides for, amongst other things, rights in transitional periods. Significantly – litigation started before IP Completion Day.
- (3) E.g. So for example, EU trade mark regulations apply in respect of legal proceedings instituted before the end of IP completion day (***SkyKick v Sky Ltd*** [2024] UKSC 36, §439, commenting those provisions have “direct effect”, and that the UK needs to be treated “as if [it] were still a Member State” (§456)





## EU Law post-Brexit (1C) In a nutshell

- (1) *What?* Took a “snapshot” of EU law.
- (2) Start a process of “disentanglement”. End of EU supremacy, CJEU references, etc.
- (3) *Why?* Preserve legal continuity and certainty. Minimisation of changes.



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## Part III: Six Features of the 2023 REUL Act.



## EU Law Post-Brexit: REUL Act 2023, Context

### (1) Impetus: “taking back control”

- (1) Formally left EU, but EU law still frozen in time
- (2) Democratic accountability?
- (3) Legal and regulatory break? Desire for divergence (“My Government will continue to seize the opportunities of the United Kingdom’s departure from the European Union, to support economic growth” HM Queen Elizabeth II, May 2022)

### (2) Overarching aim, Explanatory Notes, §13

“The Retained EU Law (Revocation and Reform) Act facilitates the amendment, restatement or revocation and replacement of REUL and assimilates REUL remaining in force after the end of 2023 by removing the special EU law features attached to it.”



## EU Law Post-Brexit: REUL Act 2023, Six Main Features

### (1) "Sunsetting" (ss. 1 and 2)

- (1) Watered down from initial proposals in June 2022 (Cl. 1(1) "the following are revoked at the end of 2023" included EU-derived subordinate legislation and retained EU legislation.
- (2) Now: s. 1(1) "Legislation listed in Schedule 1 is revoked at the end of 2023". Roughly 600.
- (3) Assimilated law, not retained law (s. 5(1))

### (2) Powers to update/revoke etc (ss. 14-16)

- (1) Broad powers for a Minister to "revoke any secondary retained EU law without replacing it (s. 14(1), or with an alternative (s. 14(3)) (until 23.06.26).
- (2) Powers to update for technological, scientific understanding (s. 15(1)), or to reduce burdens (s. 16)



## EU Law Post-Brexit: REUL Act 2023, Six Main Features

### (3) Dashboard and updates (ss. 17 ff of the 2023 Act).

- (1) Creates EU law dashboard, an interactive database of retained EU law (June 2022, catalogued short of 2500 REUL).

*[14] The assimilated law dashboard provides the public with information on how much legislation is derived from the EU, and the actions the Government has taken to either reform, revoke or retain it.*

Department for Business & Trade: Assimilated Law Parliamentary Report June 2024 – December 2024

- (2) Duty on SoS to maintain and update it
- (3) Publish and lay before Parliament a report on the revocation and reform of retained EU law every six months.



Department for  
Business & Trade

[See more information about this guidance](#)

Research and analysis

## List of REUL and assimilated laws

Updated 23 January 2025

[Download CSV 3.75 MB](#)

### Download the file to see all the information

This preview shows the first 1,000 rows and 50 columns. [Download CSV 3.75 MB](#)

REUL Name	Legislation Description	New Lead Dept	Type of REUL
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## EU Law Post-Brexit: REUL Act 2023, Six Main Features

### (4) (Qualified) abolition of supremacy of EU law (s. 3 of the 2023 Act amending s. 5 of the 2018 Act)

- (1) Previously, if domestic law said "X" and EU law said "Y", "X" was to be disapplied (see *Factortame (No. 2)* [1991] 1 AC 603, 659AB)
- (2) Now: **NOTE:** This does **NOT** have retrospective effect (s. 22(5) 2023 Act)
  - (1) Supremacy of EU law is not part of domestic law (s. 5(A1) 2018 Act);
  - (2) Any retained direct EU legislation must be "read and given effect in a way which is compatible with all domestic enactments", but will be subject to domestic legislation. EU law no longer trumps (but see s. 5(A3) 2018 Act) ("**Priority Rule**")
- (3) **Subject to regulations** – can provide that the Priority Rule does not apply to certain provisions. In that case, the Court will have to issue an incompatibility order identifying conflict with retained direct EU legislation (s. 7 of the 2023 Act).



## EU Law Post-Brexit: REUL Act 2023, Six Main Features

### (5) Abolition of general principles of EU law (s. 4 of the 2023 Act)

- (1) Examples given in Explanatory Memorandum §100, proportionality and the protection of fundamental rights.
- (2) Maintained in section 6(3) of the 2018 Act. REUL had to be interpreted consistently with the “snapshot” of EU general principles on exit day.
- (3) Now, REUL/assimilated law to be interpreted using standard domestic principles of interpretation.
- (4) Explanatory Memorandum, §104 “The changes made by section 4 of this Act, mean that after the end of 2023, courts will no longer be **bound** to interpret assimilated law by such principles.” (emphasis added).
- (5) Again – not retrospective (s. 22(5) of the 2023 Act).





## EU Law Post-Brexit: REUL Act 2023, Six Main Features

### (6) Role of courts, s. 6 of the 2023 Act

- (1) This is prospective only, not currently in force. (s. 22(1) and (3))
- (2) In deciding whether to depart from “retained EU case law” a higher court **must** have regard to certain factors. (s. 6(5) of 2018 Act, as substituted).
- (3)... and **may depart** from “its own retained domestic case law” if “it considers it right to do so” (s. 6(5ZA) of the 2018 Act, as inserted).
  - (1) Contrast, e.g. Court of Appeal departing from its own case-law only if *per incuriam* (*Young v Bristol Aeroplane Co.* [1944] KB 718, 726)
  - (4) Preliminary reference-style provision in s. 6A of the 2018 Act. Can refer “points of law which arise on retained case law” to (essentially) a higher court.



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## **PART IV: Department for Business & Trade Assimilated Law Parliamentary Report June 2024 – December 2024**



## EU Law Post-Brexit: Department for Business & Trade Assimilated Law Parliamentary Report June 2024 – December 2024

### **(1) Department for Business & Trade Assimilated Law Parliamentary Report June 2024 – December 2024**

- (1) Dashboard (initially 2417 pieces of REUL, now 6901) (§15)
- (2) 2395 have been revoked or reformed (§17)
- (3) Table 1: 64% unchanged, and 22% repealed.

### **(2) overall aim (§6)**

- (1) “In terms of our plans for future use of the REUL Act powers, the Government is committed to creating a pro-business environment with a regulatory framework that supports innovation, economic growth, investment, and high-quality jobs.”

### **(3) Highly nitty gritty. §5 “examples of reforms to assimilated law” which support “Government priorities” (ionising radiation medical devices)**



## Public Law Webinar

# Retained/assimilated EU law: principles from the case law



**Esther Drabkin-Reiter**



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## What I'll cover...

Principles arising in the cases on:

1. Departure from assimilated EU case law – rules and principles
2. Status of post-Brexit CJEU case law
3. The legal status of EU rights arising prior to Brexit
4. Conforming interpretation after REUL 2023



## Departure from assimilated EU case law – principles

### ***Warner Music UK Ltd and another v TuneIn Inc* [2021] EWCA Civ 441**

- Q: whether TuneIn's links to internet radio streams a "communication to the public" in breach of copyright
- TuneIn: depart from entire body of EU case law on "communication to the public"
- CoA: paradigm case where there should be no departure



## Reasons for not departing – *TuneIn Inc*

- No change in domestic legislation
- No change in international legislative framework
- Difficult concept in which the CJEU has unrivalled experience
- Academic commentary is not all one way
- Case law outside the EU does not offer settled or consistent guidance
- Returning to the drawing board would create considerable legal uncertainty
- Applying SC test: CoA/SC should not refuse to follow an earlier decision of SC or HoL merely because they would have decided the case differently
- CJEU's approach to the law neither impeding nor restricting the proper development of the law, nor is it leading to results which are unjust or contrary to public policy



## Departure from assimilated EU case law - principles

### ***ICE v ICE* [2023] EWCA Civ 1451**

- Q: when five-year acquiescence period starts to run for trademark infringement
- D: depart from CJEU finding in *Budvar* that need to be aware of **registration** of later trademark (not just use)
- CoA agreed to depart





## Reasons for departing – *ICE v ICE*

- No analysis of this issue in AG Opinion or CJEU Judgment – just a bald conclusion
- Isolated decision – cf body of case law in *TuneIn*
- Not followed by General Court or EU Intellectual Property Office in other cases
- No risk to legal certainty (given conflicting approaches)
- Lack of academic criticism of little relevance as narrow issue in specialist field
- Does restrict the proper development of the law
  
- But:
  - Not relevant that this issue not determinative in *Budvar* (obiter) – CJEU does not follow the rules of precedent which apply in domestic law
  - Not enough that a different reading is tenable and might seem preferable



## Departure from assimilated EU case law - principles

### ***Thatchers v Aldi* [2025] EWCA Civ 5**

- Q: Whether Aldi breached Thatchers' "cloudy lemon cider" trademark through a lookalike product
- Aldi: depart from CJEU finding in *L'Oreal v Bellure* that consumer confusion/detriment to trademark unnecessary for "unfair advantage" – enough that lookalike product simply riding on the coat tails of the trademarked product
- CoA refused to depart from CJEU case law



## Reasons for not departing – *Thatchers v Aldi*

- Relevant domestic provisions (implementing EU law) remained unchanged
- Should therefore strive for harmony with CJEU (and other European courts), unless CJEU interpretation is erroneous
- Need for a (different) principled basis for determining what is an “unfair advantage” – no such basis articulated by Aldi
- *L’Oreal v Bellure* not an isolated decision (cf *TuneIn* and *ICE v ICE*) – applied by General Court and EU Intellectual Property Office
- Departure would cause considerable legal uncertainty
- CJEU judgment has not restricted the proper development of the law or turned it in a wrong direction – does not prevent fair competition



## Departure from assimilated EU case law - rules

### ***Merck Serono SA v Comptroller-General* [2025] EWCA Civ 45**

- Challenge to refusal of application for a Supplementary Protection Certificate (an extension to patent protection)
- Merck asked CoA to depart from CJEU case law – *Santen*
- CoA held it could not – see reg.4(2) of the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020
  - Where there is post-Brexit EU case law which modifies or applies retained EU case law and is binding on a court, the court cannot depart from that retained EU case law
  - Binding where ratio of post-Brexit decision of CoA modified or applied retained EU case law (and none of the *Young v Bristol Aeroplane* factors apply)
  - Here: previous CoA decision applying *Santen* - binding on CoA in *Merck*



## Departure from assimilated EU case law - overview

- Check: any relevant binding post-Brexit case law that modifies/applies EU law?
- Still a high threshold – not just disagreement
- Harder to depart where large body of case law or based on international treaty
- Easier to depart where conflicting position in EU case law
- Legal certainty highly relevant
- Consider any academic criticism
- Does the CJEU approach impede or restrict the proper development of the law?

NB: change to test for departure in REUL Act 2023 not yet implemented



## Status of post-Brexit CJEU case law

### *TuneIn Inc*

Highly persuasive where:

- One of many relevant judgments, the rest of which are retained EU case law
- Builds upon and further refines the CJEU's previous jurisprudence
- Decision of the Grand Chamber
- Directly relevant to the issues in the present case
- Addresses the relationship between earlier CJEU decisions which appear to be conflicting

Warning from Rose LJ: just because law of CJEU is summarised in CoA judgment, does not mean lower courts cannot have regard to subsequent CJEU case law



## Legal status of EU rights arising prior to Brexit

### *Lipton v BA Cityflyer* [2024] UKSC 24

- Effect of Brexit on claim for compensation due to delayed flight in 2018
- Helpful summary of legal implementation of Brexit (paras.10-26)
- Liptons had an accrued cause of action for compensation – what prevented it from being extinguished by UK exit from EU?
- Two rival analyses:
  - Complete Code: EUWA 2018 deals comprehensively with EU law – all accrued EU law causes of action are part of assimilated EU law
  - Interpretation Act : EUWA 2018 only brings forward legislative instrument (eg EU Regulation) not causes of action, which are saved by Interpretation Act s.16



## Legal status of EU rights arising prior to Brexit

### *Lipton v BA Cityflyer* [2024] UKSC 24

- SC found (Lord Lloyd-Jones JSC dissenting):
  - Complete Code analysis correct, although no difference to outcome so obiter
  - s.3(2)(a) EUWA 2018: EU Regulations fall within the definition of direct EU legislation “as they have effect in EU law” immediately before 31 Dec 2020
  - “Effect” of relevant EU Regulation included causes of action under that Regulation to be recognised and enforced by domestic court
  - Aligns with fundamental purpose of EUWA – to provide comprehensively for post-Brexit legal landscape
  - Applying Interpretation Act analysis – unclear whether possible to depart from CJEU case law and possibly still bound by post-Brexit CJEU case law
  - Drafters of EUWA 2018 would not have left such an important matter open





## Conforming interpretation after REUL 2023

### ***E-Accounting Solutions v Global InfoSys* [2023] EWHC 2038 (Ch)**

- Abolition of supremacy and general principles of EU law applies from end of 2023
- Includes indirect effect – requirement to interpret domestic law consistently with the directive it seeks to implement
- Where domestic legislation was enacted to implement a directive, the directive may be an “external aid” to interpretation

### ***CG Fry v SSLUHC* [2024] EWCA Civ 730**

- Begin with domestic legislation as drafted and apply ordinary principles of statutory interpretation
- In that case, not necessary to consider indirect effect – as did not lead to a different outcome



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