Retained EU Law: A Tale of Two Statutes

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Key Points:

- Whilst REULA has some difficulties, its approach to the revocation of retained EU law and its limits on and scrutiny of the use of secondary legislation to restate and modify the regulatory regime are preferable to the approach to revocation and the broader powers available to the Treasury under FSMA23.
- Both REULA and FSMA23 use burden as a limiting factor for certain powers, a dubious constraint since reduced burden may not necessarily mean better regulation results – but unlike equivalent powers under REULA, there are no restrictions on increasing regulatory burden when restating legislation under FSMA23.
- FSMA23 allows Treasury to make greater use of the negative procedure when making secondary legislation which does not require actual approval by both Houses of Parliament.
- The approach to revocation under FSMA23 makes it hard for those regulated by its provisions to ascertain what remains applicable.

Abstract

The Retained EU Law (Revocation and Reform) Act 2023 and the Financial Services and Markets Act 2023 received royal assent on the same day. One is generally applicable; the other is specifically related to financial services and markets regulation. Both allow for the revocation, restatement and modification of retained EU law, though their approaches differ. This article will compare the mechanisms in each to argue that a single regime, based on the approach in REULA, would have been preferable.

Introduction

Two significant pieces of legislation for the post-Brexit regulatory landscape in the UK received royal assent on the same day, namely the Retained EU Law (Revocation and Reform) Act 2023 (REULA) and the Financial Services and Markets Act 2023 (FSMA23). One is generally applicable whereas the other specifically relates to financial services and markets regulation, but, though their approaches differ, both allow for the revocation, restatement and modification of retained EU law, ostensibly to reduce burden.

This article starts with an overview of the background to and relevant provisions of each Act before comparing their approaches to revocation and the streamlined procedures for

restatement and modification each introduces to argue that a single regime, based on REULA as the least bad option, would have been preferable. It should be noted from the outset that this article is concerned with the mechanisms for change to retained EU law contained in each of the Acts. It makes no comment on the detail of the substantive changes made under them.

Retained EU Law (Revocation and Reform) Act 2023

Brexit was a staged process. After the referendum in 2016, the Government embarked on a period of negotiation with the EU triggered by notice given under Article 50 of the Treaty on European Union. This culminated in the Withdrawal Agreement, which, among other things, governed a period of transition between 31 January 2020 and 31 December 2020 during which, although the UK had left the EU, it remained subject to EU law.

Even after the transition period ended, EU law then in effect in the UK remained applicable as 'retained EU law' under the European Union (Withdrawal) Act 2018 (as amended) (EUWA), pending review and potential reform or revocation. The aim, according to the Explanatory Notes accompanying EUWA, was to 'provide a functioning statute book on the day the UK leaves the EU', a laudable aspiration. The Explanatory Notes went on to say:

> 'The Act does not aim to make major changes to policy or establish new legal frameworks in the UK beyond those which are appropriate to ensure the law continues to function properly from exit day. The Government will introduce *separate primary legislation to make such policy changes* which will establish new legal frameworks.' (emphasis added)

The task involved in sifting through retained EU law to identify what change is merited is immense. According to the REUL dashboard, 2,417 pieces of retained EU law were initially identified. However, as of 31 January 2024, that number has increased to 6,757, of which the Treasury is responsible for 809. As noted in the quote above, it is possible for any requisite changes to be made via primary legislation, though there are inevitably limits on Parliamentary time. Hence, in the Queen's Speech 2022, a Brexit Freedoms Bill was announced to 'seize the opportunities' of the UK's exit from the EU by enabling law 'inherited from' the EU to be more easily amended. The aim, according to Jacob Rees-Mogg, the then Minister for Brexit Opportunities and Government Efficiency, was to act as an 'impetus for change' and 'to drive momentum for a regulatory reform process that would remove unnecessary burdens'.

When first published, the Bill proposed the wholesale automatic sunset of certain types of retained EU law unless measures were specifically saved via a process set out in the Bill, but after a u-turn, the scheme of the Act was reversed so that it was only the law itemised in the Schedule that was repealed. Nonetheless, REULA contains streamlined legislative processes to allow for expeditious reform of any remaining retained EU law by revocation, restatement or modification without the need for primary legislation, particularly where the result is a reduction, or at least no increase, in regulatory burden. These are considered further in the 'Approach to Change' section below.

REULA goes further though. It also changes the nature of certain supervening principles, rights, powers etc. of EU law that were carried over via EUWA and abolishes the supremacy of EU law with effect from 1 January 2024, thereby changing interpretative principles applicable to retained EU law from that date. Hence, even though no longer subject to automatic sunset, the effect of remaining retained EU law may be subtly different, though there are time-bound enabling powers to allow these new interpretative principles to be reversed in specific cases via regulation and courts and tribunals can issue incompatibility orders if a clash between retained EU law and domestic law emerges. Such interpretative principles and powers only apply to retained EU law though. If such law is restated or modified, it ceases to be retained EU law and is therefore subject to the same interpretative principles as ordinary domestic law. It may reproduce an effect equivalent to the retained EU law it replaces, but such effect would need to be included in the restatement and interpreted as domestic law.

This article has so far used 'retained EU law' to refer to EU-derived law carried over by EUWA both pre and post 1 January 2024, but, finally, it must be noted that REULA renames any remaining retained EU law as 'assimilated law' with effect from that date. Though tempting to see this as mere wordsmithing that allows for convenient political spin about diminished EU influence over UK regulation, a more benevolent interpretation would recognise some utility in the new nomenclature given the different interpretative principles that apply either side of that date. Depending on the time of the relevant cause of action, future court cases may require the interpretation of measures derived from the EU before or after 1 January 2024 and given the changed interpretative approach introduced by REULA, a distinction may be helpful.

So, in overview, REULA revokes some specific EU-derived law, changes the interpretative approach to the rest, which is renamed ‘assimilated law’, and introduces alternative legislative procedures for its revocation, restatement or amendment. What about FSMA23?

Financial Services and Markets Act 2023

Ss. 1 to 7 of FSMA23 purport to do something similar for the financial services and markets sector. However, in trying to come up with a sector-specific regime at the same time as general principles were being legislated for, duplication and inconsistency was perhaps inevitable. From almost the moment it was passed, FSMA23 needed amendment.

Given the rebranding to ‘assimilated law’ under REULA, references to retained EU law etc. in FSMA23 were outdated by 1 January 2024. However, it was not possible to include FSMA23 in the list of consequential amendments in REULA because it had not yet been passed. Hence, SI 2023/1424 makes the necessary changes, though the ‘gloss’ in s. 5(4) REULA had perhaps already technically achieved the same result. Similarly, s.1(3) FSMA23 which dealt with rights, powers, etc. carried over by s. 4 of EUWA in legislation contained within Schedule 1 of FSMA23, was revoked, no doubt to avoid overlap with the more general provisions about the future interpretation of assimilated law in REULA.

In other areas, FSMA23 adopts a similar but different approach to REULA, giving the Treasury a choice of powers, and a corresponding choice of legislative processes (see ‘Approach to Change’ below).

Finally, FSMA23 revokes some specific law pertaining to the regulation of financial services and markets, though the approach adopted is somewhat arcane (see ‘Approach to Removal’ below).

By comparing the approach in the two Acts in more detail, this article will argue that the complexity resulting from the approach to revocation under FSMA23 makes it hard for those regulated by its provisions to ascertain what remains applicable. It will go on to suggest that the processes for further revocation, restatement and modification in FSMA23 further weaken scrutiny, and that again, the approach in REULA, though not without controversy, is preferable.

Approach to Removal

The overall approach in FSMA23 is closer to that ultimately eschewed by REULA – abolish unless saved – but the way it has been brought into force shifts the presumption. At first sight, the revocations appear extensive. All legislation to be repealed is listed in Schedule 1, and part 5 of that Schedule contains a sweep-up provision. Hence, the Schedule also

includes ‘all EU-derived legislation’ ‘relating to financial services’ unless the Treasury makes specific regulation to exclude it. What is ‘related to financial services’ is open to interpretation; it depends on whether the purpose, or at least one of the main purposes, of the legislation relates to ‘the imposition of requirements on the provision of financial services or the operation of financial markets or exchanges’, and so is potentially very broad. However, not all of Schedule 1 is yet in force.

To understand what provisions are currently ‘assimilated’ and what are revoked therefore requires painstaking review of the relevant commencement orders and other subordinate legislation. Under Commencement Order No. 1 (SI 2023/779) and Commencement Order No. 4 (SI 2023/1382), laws listed in Schedule 1 (or more accurately parts of laws since sometimes individual sections of legislation or individual articles of supervening EU regulations are referenced) are revoked with effect from various dates between 29 August 2023 and 30 June 2024. Others remain in limbo at the time of writing. To add to the complexity, not all revocations need to be contained in commencement orders. To understand the provisions currently applicable, it is also necessary to consider secondary legislation containing revocations, modifications and restatements made under the enabling powers discussed below. For those blessed with access to an electronic legal database that updates legislation in real time and provides cross-references to the amending instruments, tracking what remains in force is time-consuming and pernickety. For those without, the task is considerably more onerous.

Though not perfect, the outcry about the automatic sunset provisions in REULA means the approach it adopts is marginally better. Whilst some provisions listed in its Schedule have been saved by the Retained EU Law (Revocation and Reform Act) 2023 (Revocation and Sunset Disapplication) Regulations 2023/1143, the law listed in REULA has largely been revoked, and typically it is the whole instrument rather than individual sections. Still though there is limited explanation of the effect of the changes or cross-referencing to replacement provisions.

If the aim is the reduction of burden, individual instruments effecting revocation named to refer to the legislation being revoked, accompanied by Explanatory Notes explaining the effect and consolidating any remaining applicable provisions would have been preferable. This would have been possible using the streamlined legislative processes to which this article now turns.

Approach to Change

Both REULA and FSMA23 empower further change, by revocation, restatement or modification, without the need for primary legislation.

Under s. 12 REULA, a relevant national authority (defined to include a Minister of the Crown, which under s. 8(1) of the Ministers of the Crown Act 1975 includes the Treasury) can restate assimilated law that is not primary legislation or at least not a section of primary legislation inserted by subordinate legislation. Restatements are limited to resolving ambiguities, removing doubts or anomalies and facilitating improvement in clarity or accessibility, but may not reproduce overarching interpretative principles such as the supremacy of EU law. Restatements are made by secondary legislation using the procedure in Schedule 5 of REULA, which varies according to whether the effect is limited to England or involves one or more of the devolved nations and according to whether primary legislation is being restated. However, even for more straightforward regulations, the process to be adopted is itself subject to scrutiny by members of committees of the House of Commons and the House of Lords. Hence, a more rigorous process can be demanded for more consequential amendments.

In addition, under s. 14 REULA, a relevant national authority can, at least until 23 June 2026, revoke any secondary assimilated law and replace it with something that achieves the same or similar objectives. This broad power includes the power to create criminal offences and to impose monetary penalties, to empower the making of further subordinate legislation and to confer functions and discretions on a person but it does not allow for the creation of a public authority or for the imposition of taxation and the provision is only applicable if the overall effect does not result in increased burden. Again, such regulations are made using the procedure in Schedule 5 REULA, which includes scrutiny of the procedure to be used.

Furthermore, under s. 16 of REULA, EU-derived legislation (including primary legislation) can be amended using a Legislative Reform Order, essentially a type of secondary legislation that reduces burden. There are three different processes for making Legislative Reform Orders (negative, affirmative and super-affirmative (described in ss. 12 to 18 of the Legislative and Regulatory Reform Act 2006)) but all require consultation and a committee report and there is a process for Parliament to have input into the process to be used and hence the level of scrutiny a measure receives.

Thus, although REULA allows for restatement, modification and revocation other than by primary legislation, there are some safeguards designed to ensure a measure of scrutiny for important changes irrespective of the type of instrument being amended. Under s. 4 FSMA23, however, the Treasury has supplementary powers to restate law listed in the Schedule so that its effect immediately before revocation is replicated. This power includes

not only the power to make the law clearer and more accessible, but also the power to make changes thought necessary or desirable by the Treasury to further any of the purposes listed in s. 3(2) of FSMA23, which are aimed at safeguarding financial services and markets, promoting competition in such markets and protecting consumers. Hence, as the title of the section recognises, restatement includes modification, and unlike equivalent powers under REULA, there are no restrictions on increasing regulatory burden. Depending on whether what is being restated or modified is in primary or secondary legislation, the powers can be exercised via statutory instrument made using either the negative or affirmative procedure. However, there is no process whereby those entitled to use the negative procedure can be subjected to more detailed scrutiny.

The Treasury is also empowered by s. 5 of FSMA23 to modify legislation to replace references to EU directives with another appropriate provision. The power is predicated on the same conditions as the modification power under s. 4, and must follow the same process, but the power is not limited to the law listed in the Schedule.

Finally, under s. 6 of FSMA23, the Treasury can specify certain regulatory rule-making or rule-changing powers by making regulations using the affirmative procedure, and if so specified, statutory procedural safeguards, such as public consultation, are disapplied. Similarly, the procedural obligations can be disapplied when certain rules are revoked. A rule-making or rule-changing power specified under this section can only make material change if that change reduces regulatory burden, and the relevant regulator must publish a statement, which in some cases must include an explanation of certain matters, but nonetheless, scrutiny by industry is reduced by the simplified procedure.

Hence, the Treasury has broader powers under FSMA23 than it does under REULA. Both use burden as a limiting factor for certain powers, a dubious constraint since reduced burden may not necessarily mean better regulation results, but nonetheless a constraint. However, FSMA23 has more scope for restatement and modification without such a constraint. It also allows the Treasury to make greater use of the negative procedure, which allows an instrument to be annulled but does not require actual approval by both Houses of Parliament. Regulation of the financial services and markets sector is complex, and the framework needs to be right. Input into that framework by democratically elected representatives or industry players is likely to result in a more robust system. An opportunity for the level of scrutiny to be questioned would have been preferable.

Conclusion

REULA and FSMA23 both deal with the revocation, restatement and modification of retained EU law. Whilst REULA has some difficulties, its approach to the revocation of retained EU law and its limits on and scrutiny of the use of secondary legislation to restate and modify the regulatory regime are preferable to the approach to revocation and the broader powers available to the Treasury under FSMA23.

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