



Retained EU Law (Revocation and Reform) Act 2023

2023 CHAPTER 28

Interpretation and effect of retained EU law

6 Role of courts

- (1) Section 6 of the European Union (Withdrawal) Act 2018 (interpretation of retained EU law) is amended as specified in subsections (2) to (7).
- (2) In subsection (4) (courts not bound by retained case law)—
 - (a) in paragraph (b)—
 - (i) in sub-paragraph (i) omit the words from “otherwise” to “1998”;
 - (ii) after sub-paragraph (ii) (and on a new line) insert “(except, when sitting as a court of appeal in relation to a compatibility issue or devolution issue, so far as there is relevant domestic case law which modifies or applies the retained EU case law and is binding on the court);”;
 - (b) for paragraph (ba) substitute—

“(ba) a relevant appeal court is not bound by any retained EU case law (except so far as there is relevant domestic case law which modifies or applies the retained EU case law and is binding on the relevant appeal court), and”;
 - (c) after paragraph (c) (and on a new line) insert “and see also [subsection \(5ZA\)](#) below and sections [6A](#) to [6C](#).”
- (3) For subsection (5) substitute—

“(5) In deciding whether to depart from any retained EU case law by virtue of subsection (4)(a), (b) or (ba), the higher court concerned must (among other things) have regard to—

 - (a) the fact that decisions of a foreign court are not (unless otherwise provided) binding;

- (b) any changes of circumstances which are relevant to the retained EU case law;
- (c) the extent to which the retained EU case law restricts the proper development of domestic law.”

(4) After that subsection insert—

“(5ZA) A higher court may depart from its own retained domestic case law if it considers it right to do so having regard (among other things) to—

- (a) the extent to which the retained domestic case law is determined or influenced by retained EU case law from which the court has departed or would depart;
- (b) any changes of circumstances which are relevant to the retained domestic case law;
- (c) the extent to which the retained domestic case law restricts the proper development of domestic law.”

(5) Omit subsections (5A) to (5D) (power to make regulations about which courts or tribunals are bound by retained EU case law).

(6) After subsection (6A) insert—

“(6B) In this section—

“compatibility issue” has the meaning given by section 288ZA(2) of the Criminal Procedure (Scotland) Act 1995;

“devolution issue” has the meaning given by paragraph 1 of Schedule 6 to the Scotland Act 1998;

“relevant appeal court” means—

- (a) the Court Martial Appeal Court,
- (b) the Court of Appeal in England and Wales,
- (c) the Inner House of the Court of Session,
- (d) the court for hearing appeals under section 57(1)(b) of the Representation of the People Act 1983,
- (e) the Lands Valuation Appeal Court, or
- (f) the Court of Appeal in Northern Ireland;

“relevant domestic case law” means any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom, as they have effect on or after IP completion day.”

(7) In subsection (7) before the definition of “retained case law” insert—

““higher court” means—

- (a) the Supreme Court,
- (b) the High Court of Justiciary when sitting as mentioned in subsection (4)(b)(i) or (ii), or
- (c) a relevant appeal court;”.

(8) After section 6 of that Act insert—

“6A References on retained case law by lower courts or tribunals

- (1) A court or tribunal (other than a higher court) may refer one or more points of law which arise on retained case law and are relevant to proceedings before it if—
 - (a) it is bound by the retained case law, and
 - (b) it considers that the point or points of law are of general public importance.
- (2) A court or tribunal may make a reference—
 - (a) of its own motion, or
 - (b) pursuant to an application made by a party to the proceedings.
- (3) A reference is to be made—
 - (a) in the case of a reference concerning (wholly or in part) retained case law of the Supreme Court, to that court;
 - (b) in any other case, to the appropriate appeal court.
- (4) Where a single point of law is referred to a court, the court may accept the reference if it considers that the point of law—
 - (a) is relevant to the proceedings, and
 - (b) is of general public importance.
- (5) Where two or more points of law are referred to a court, the court may accept the reference so far as relating to a point of law which the court considers meets the conditions in [subsection \(4\)\(a\)](#) and [\(b\)](#).
- (6) A court which has accepted a reference must decide the point or points of law concerned; and the court or tribunal which made the reference must apply that decision so far as relevant to the proceedings before it.
- (7) No appeal may be made from a decision of a court or tribunal—
 - (a) to make, or not to make, a reference, or
 - (b) to accept or refuse a reference.
- (8) An appeal from a decision of the appropriate appeal court under [subsection \(6\)](#) may, with permission, be made to the Supreme Court.
- (9) In this section—

“the appropriate appeal court” means, in relation to proceedings before a court or tribunal, the court mentioned in [subsection \(10\)](#) to which an appeal from the court or tribunal in those proceedings on the point of law (or an appeal at any remove from that appeal) would lie;

“permission” means permission granted by the court making the decision or by the Supreme Court.
- (10) The courts referred to in [subsection \(9\)](#) are—
 - (a) the Court Martial Appeal Court;
 - (b) the Court of Appeal in England and Wales;
 - (c) the Inner House of the Court of Session;

- (d) the High Court of Justiciary when sitting as a court of appeal or on a reference under section 123(1) of the Criminal Procedure (Scotland) Act 1995;
- (e) the court for hearing appeals under section 57(1)(b) of the Representation of the People Act 1983;
- (f) the Lands Valuation Appeal Court;
- (g) the Court of Appeal in Northern Ireland.

6B References on retained case law by law officers

- (1) This section applies where—
 - (a) proceedings before a court or tribunal (other than a higher court) have concluded,
 - (b) no reference was made under section 6A in relation to the proceedings, and
 - (c) either—
 - (i) there has been no appeal, or
 - (ii) any appeal has been finally dealt with otherwise than by a higher court.
- (2) The following may refer a point of law which was relevant to the proceedings and arises on retained case law—
 - (a) any UK law officer;
 - (b) the Lord Advocate, if the point of law relates to the meaning or effect of relevant Scotland legislation;
 - (c) the Counsel General for Wales, if the point of law relates to the meaning or effect of relevant Wales legislation;
 - (d) the Attorney General for Northern Ireland, if the point of law relates to the meaning or effect of relevant Northern Ireland legislation.
- (3) A reference must be made within the period of 6 months beginning with—
 - (a) if there has been no appeal, the last day on which an appeal could have been made;
 - (b) otherwise, the day on which the appeal was finally dealt with.
- (4) A reference is to be made—
 - (a) in the case of a reference concerning (wholly or in part) retained case law of the Supreme Court, to that court;
 - (b) in any other case, to the appropriate appeal court (as defined by section 6A).
- (5) The court to which the reference is made must accept the reference, and decide the point or points of law concerned.
- (6) Any such decision does not affect the outcome of the proceedings mentioned in subsection (1).
- (7) An appeal from a decision of the appropriate appeal court under subsection (5) may, with permission, be made to the Supreme Court.
- (8) In this section—

“permission” means permission granted by the court making the decision or by the Supreme Court;

“relevant Northern Ireland legislation” means—

- (a) Northern Ireland legislation,
- (b) subordinate legislation made by a Northern Ireland devolved authority acting alone,
- (c) anything inserted into an enactment by legislation within paragraph (a) or (b), or
- (d) any other provision of an enactment if—
 - (i) the provision would be within the legislative competence of the Northern Ireland Assembly if it were contained in an Act of that Assembly and the provision would not, if it were contained in a Bill in the Northern Ireland Assembly, result in the Bill requiring the consent of the Secretary of State under section 8 of the Northern Ireland Act 1998, or
 - (ii) it is provision which could be made in other subordinate legislation by any Northern Ireland devolved authority acting alone;

“relevant Scotland legislation” means—

- (a) an Act of the Scottish Parliament,
- (b) subordinate legislation made by the Scottish Ministers, the First Minister or the Lord Advocate acting alone,
- (c) anything inserted into an enactment by legislation within paragraph (a) or (b), or
- (d) any other provision of an enactment if—
 - (i) the provision would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament, or
 - (ii) it is provision which could be made in other subordinate legislation by the Scottish Ministers, the First Minister or the Lord Advocate acting alone;

“relevant Wales legislation” means—

- (a) an Act or Measure of Senedd Cymru,
- (b) subordinate legislation made by the Welsh Ministers acting alone or the National Assembly for Wales constituted by the Government of Wales Act 1998,
- (c) anything inserted into an enactment by legislation within paragraph (a) or (b), or
- (d) any other provision of an enactment if—
 - (i) the provision would be within the legislative competence of Senedd Cymru if it were contained in an Act of the Senedd (ignoring any requirement for consent of a Minister of the Crown imposed under Schedule 7B to the Government of Wales Act 2006), or
 - (ii) it is provision which could be made in other subordinate legislation by the Welsh Ministers acting alone;

Status: This is the original version (as it was originally enacted).

“UK law officer” means the Attorney General for England and Wales, the Advocate General for Scotland or the Advocate General for Northern Ireland.

- (9) For the purposes of subsections (1)(c)(i) and (3), ignore the possibility of an appeal out of time.

6C Interventions on retained case law by law officers

- (1) This section applies where a higher court is considering any argument made by a party to proceedings that the court should depart from retained case law.
- (2) The following are entitled to notice of the proceedings—
- (a) each UK law officer;
 - (b) the Lord Advocate;
 - (c) the Counsel General for Wales;
 - (d) the Attorney General for Northern Ireland.
- (3) The following are entitled to be joined as a party to the proceedings on giving notice to the court—
- (a) any UK law officer;
 - (b) the Lord Advocate, if the argument relates to the meaning or effect of relevant Scotland legislation;
 - (c) the Counsel General for Wales, if the argument relates to the meaning or effect of relevant Wales legislation;
 - (d) the Attorney General for Northern Ireland, if the argument relates to the meaning or effect of relevant Northern Ireland legislation.
- (4) Notice under subsection (3) may be given at any time during the proceedings.
- (5) In this section, “relevant Northern Ireland legislation”, “relevant Scotland legislation”, “relevant Wales legislation” and “UK law officer” have the meaning given by section 6B.”
- (9) In section 21(1) of that Act (index of defined expressions), in the Table after the entry for “Future relationship agreement” insert—

“Higher court	Section 6(7)”.
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- (10) In section 60A of the Competition Act 1998 (principles etc to be applied in relation to competition decisions) after subsection (9) insert—

“(10) Section 6(2) to (6) of the European Union (Withdrawal) Act 2018 (which make provision similar to that made by this section) do not apply.”

7 Compatibility

- (1) A relevant national authority may by regulations provide that subsection (2) applies (and section 5(A2) of the European Union (Withdrawal) Act 2018 does not apply) to the relationship between—
- (a) any domestic enactment specified in the regulations, and
 - (b) any provision of retained direct EU legislation so specified.

- (2) Where this subsection applies, the domestic enactment specified under subsection (1)(a)—
 - (a) must, so far as possible, be read and given effect in a way which is compatible with the provision of retained direct EU legislation specified under subsection (1)(b), and
 - (b) is subject to that provision of retained direct EU legislation so far as it is incompatible with it.
- (3) Regulations under subsection (1) may make provision by modifying any enactment.
- (4) No regulations may be made under subsection (1) after 23 June 2026.
- (5) In this section “domestic enactment” has the same meaning as in section 5 of the European Union (Withdrawal) Act 2018.

8 Incompatibility orders

After section 6C of the European Union (Withdrawal) Act 2018 (inserted by [section 6](#) of this Act) insert—

“6D Incompatibility orders

- (1) This section applies if a court or tribunal decides, in the course of any proceedings—
 - (a) that a provision of retained direct EU legislation is incompatible with, and by virtue of section 5(A2)(b) subject to, any domestic enactment, or
 - (b) that a domestic enactment is incompatible with, and by virtue of section 7(1) of the Retained EU Law (Revocation and Reform) Act 2023 subject to, a provision of retained direct EU legislation.
- (2) The court or tribunal must make an order (an “incompatibility order”) to that effect (in addition to any exercise of other powers that it may have in relation to the proceedings).
- (3) An incompatibility order may (among other things)—
 - (a) set out the effect of the relevant provision in its operation in relation to that particular case;
 - (b) delay the coming into force of the order;
 - (c) remove or limit any effect of the operation of the relevant provision before the coming into force of the order.
- (4) Provision included in an incompatibility order may be made subject to conditions.
- (5) In this section—

“domestic enactment” has the same meaning as in section 5 of this Act;

“the relevant provision” means section 5(A2)(b) of this Act or section 7(1) of the Retained EU Law (Revocation and Reform) Act 2023 (as the case may be).”