The concept, status and constitutional place of assimilated law in the post-Brexit legal order

Lord Sales[*]

Assimilated Law Conference, Oxford, 13 April 2026

1 Introduction

I am honoured to be asked to give the keynote lecture for this conference on the important topic of assimilated law. Assimilated law is a rather bland expression for a complex and significant phenomenon. It is good to have the opportunity to devote attention to it.

Professor Kenneth Armstrong wrote in the aftermath of Brexit that "*it is one thing for an EU member state to make the sovereign choice to end its membership of the Union and to trigger the legal mechanism in Article 50 to bring that membership to an end. It is another matter whether as a result of making that choice, a former Member State can escape the orbit of influence of the EU as a political, economic and legal order.*"[1] Assimilated law sits at the heart of that second matter. As a category of law, its existence is a direct result of the UK's period of EU membership and its subsequent withdrawal. As a form of law, it is marked by its EU roots and also by the uprooting process which led to its being subsumed into the new category of "assimilated law", which was previously designated by the statutory term "Retained EU law". Nevertheless, assimilated law is not truly a *sui generis* category of law. It is ultimately domestic legislation which happens to have been enacted in, and as a result of, a particular legal and political context.

The nature of assimilated law as domestic law which bears the hallmark of its European origins gives rise to interesting interpretive questions. Interpreting assimilated law demands some delineation between those original legislative purposes which do, and

---

[*] Deputy President of the UK Supreme Court. I am grateful to my Judicial Assistant, Dana McGibbon, for her excellent assistance in the preparation of this lecture.

[1] Kenneth Armstrong, '(Br)exit from the European Union- Control, Autonomy and the Evolution of EU Law' in Paul Craig and Gráinne de Búrca (ed(s)) *The Evolution of EU Law* (OUP, 2021) p.426.

those which do not, inhere in the assimilated legislation and which are capable of affecting its meaning. It also demands careful consideration of the extent to which judgments of the Court of Justice of the European Union ("CJEU") - both pre-dating and post-dating the operational date for Brexit to take full effect, known as IP completion day[2] - should inform the interpretation of assimilated legislation by domestic courts.

The complexities of interpreting assimilated law feed into a broader matrix of constitutional questions in the post-Brexit political and legal order. In particular, assimilated law raises concerns about the delicate balance between primary and delegated legislation, and therefore about the balance between Parliament and the executive government with respect to the legislative function. That balance has significant implications for the rule of law, democratic accountability, legal certainty and accessibility of the law.

I will begin by outlining the constitutional and legal background from which the concept of 'assimilated law' emerges. I will then turn to consider its conceptual nature, its legal status, and the particular questions of interpretation which arise in relation to it. Finally, I will discuss the constitutional position of this important category of law.

2 The concept and status of assimilated law

The origin story of assimilated law has its roots in the enactment of the European Communities Act 1972 ("the ECA 1972") on 17 October 1972, as "*an Act to make provision in connection with the enlargement of the European Communities to include the United Kingdom."* As became apparent over the course of subsequent decades, the Act effected a radical change in the UK's constitutional order.[3] The day after the ECA 1972 received royal assent, the UK government ratified the 1972 Accession Treaty on behalf of the United Kingdom. That treaty paved the way for the UK's membership of the European Economic Community ("EEC"), as it then was, the European Union ("EU"), as it became.

The enactment of the ECA 1972 marked a fundamental shift in the legal system in the UK. It was by virtue of that Act that when - on 1 January 1973 - the UK became a

---

2 31 December 2020: section 39(1) of the European Union (Withdrawal Agreement) Act 2020.

3 See *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61 ("*Miller I"*) at §60.

member state of the EEC, European law became not only a source of domestic law, but a source of law which would take precedence over (virtually[4]) any conflicting domestic law.

Section 2 of the ECA 1972 was the foundation for that change. Section 2(1) provided that:

> "*all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the [European] Treaties, and all such remedies and procedures from time to time provided for 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."*

Accordingly, section 2(1) established a new source of domestic law in the form of directly applicable rights and duties set out in the European Treaties and directly applicable European legislation, in particular in the form of Regulations.[5] Section 2(2) authorised the implementation of European law, in particular European legislation in the form of Directives, by delegated legislation.

Section 2 therefore functioned as a "*conduit pipe"*[6] whereby, so long as the 1972 Act remained in force, its effect was to constitute EU law as an independent and overriding source of domestic law. In the UK's traditionally dualist legal order the ECA 1972 was an exceptional piece of legislation. For first time in the UK's constitutional history, a "*dynamic, international source of law was grafted onto, and above, the well-established existing sources of domestic law: Parliament and the courts."*[7]

It is significant to note that it was the ECA 1972 - a piece of primary legislation - which created this conduit pipe. The conduit pipe was enacted by Parliament and it was in Parliament's gift to close it off. Parliament remained sovereign in the most fundamental

---

4 The qualification is to take account of the possibility that some particularly fundamental rules of domestic law remained resistant to the supremacy of EU law under the ECA 1972: see *R (HS2 Action Alliance) v Secretary of State for Transport* [2014] UKSC 3, §§206-208.

5 Which are directly applicable by virtue of what is now article 288 of the Treaty on the Functioning of the European Union.

6 *Miller I* (n 3 above) at §65, referring to the analysis by Professor Finnis.

7 Ibid §90.

sense, even though it had ceded a certain part of its supremacy as a lawmaking institution during the period of the UK's membership of the EU.

The political question of whether Parliament should close off the conduit pipe was answered in the first instance by the popular vote in the 2016 Brexit referendum[8] and then by measures taken under the authority of Parliament, namely by sending the notice under article 50 TEU (Treaty on the European Union) which was required in order for the UK to withdraw from the EU and then by legislating for the legal measures which constituted the new Brexit settlement. The outcome of the referendum led to the UK's withdrawal from the EU. The idea of a "Great Repeal Bill" was mooted to reverse the effects of the ECA 1972 and expunge from the domestic legal order the substantial amount of EU law which had flowed through the conduit pipe of section 2 of that Act into domestic law during the period of EU membership.

The legislation eventually enacted had the less conspicuous title of the European Union Withdrawal Act 2018 ("the Withdrawal Act"), but nonetheless enacted important changes to the UK's legal order. Section 1 of the Act bluntly stated that "*the European Communities Act 1972 is repealed on exit day."* This closed the conduit pipe which had established the flow of EU law into domestic law.

Repealing the ECA 1972 did not, however, resolve the complex question of what should be the fate of the vast amounts of EU law which had already flowed into domestic law. In the post-Brexit legal and constitutional order, what status and role does this law have? How should it be interpreted in a world where there have been significant changes in the constitutional order since those EU laws were promulgated?

It is often said that EU law is to be interpreted in a purposive way. That is also true of domestic legislation. This poses problems for the post-Brexit legal order. How can a court identify and give effect to the purpose of law which has its origins in the EU legal context, in a post-Brexit environment? Also, by what mechanisms, and towards what end or ends, should this corpus of law be amended and updated?

Those questions, and a number of important adjacent ones, are the focus of this lecture. They bring us to the concept of assimilated law, a term coined by the Retained EU Law Revocation and Reform Act 2023 ("the 2023 Act"), which substantially amended the

8 Held pursuant to the European Referendum Act 2015.

Withdrawal Act. The 2023 Act introduced the concept of assimilated law, to replace and substantively change the effect of the concept of retained EU law which was central to the regime under the Withdrawal Act.

Assimilated law falls broadly into two categories. The first category is EU-derived domestic legislation.[9] This category comprises primary and secondary legislation which was passed to give effect to EU Directives.[10] The second category is directly applicable EU legislation.[11] This principally comprises EU Regulations, which as a matter of EU law had direct applicability.[12] In this way the concept of assimilated law is given a specific EU legislative focus.

The scope of "assimilated law" is therefore narrower than the scope of retained EU law used to be. This is because, in addition to changing the name, the 2023 Act removed the category of directly effective rights, powers, liabilities, obligations, remedies and procedures, which had initially been preserved by section 4 of the Withdrawal Act, but which according to section 2 of the 2023 Act no longer forms part of domestic law.[13]

The 2023 Act was posited as a "Brexit Freedoms Bill" which would make it easier for the government to amend or revoke retained EU law. The overarching policy aim was stated to be to deliver on the objectives of Brexit by facilitating a pro-business environment of deregulation, in which the sovereignty of domestic law was

---

9 Section 2 of the Withdrawal Act.

10 EU Directives did not have direct applicability in domestic law and therefore required domestic legislation to implement them and give them effect in that law: Article 288 TFEU (Treaty on the Functioning of the European Union), (ex Article 249 TEC – Treaty on the Economic Community) "*a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."*

11 Section 3 of the Withdrawal Act as originally enacted.

12 Article 288 TFEU, (ex Article 249 TEC): "*A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."* An example which recently came before the Supreme Court is Regulation (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products (see *Dairy UK Ltd v Oatly AB* [2026] UKSC 4). The relevant EU Regulation included a provision restricting the availability of designations of products as "milk". The Supreme Court upheld the Court of Appeal's ruling that the effect of the Regulation (as it continues in force as a piece of assimilated direct EU legislation) was to render unlawful Oatly's putative trade mark of the phrase 'Post Milk Generation' for use in relation to oat-based food and drink. The judgment is one example of the way in which the effects of EU law continue to manifest themselves years after IP-completion: Oatly had registered its trade mark in April 2021, after IP Completion Date, and the judgment was wholly concerned with the effects of assimilated law in the post-Brexit legal order.

13 Cf *Lipton v BA CityFlyer* [2024] UKSC 24 for an example of litigation arising from this category of retained EU law.

reasserted.[14] In addition to sunsetting retained EU rights, powers and liabilities and introducing the concept of assimilated law, the 2023 Act enacted other significant changes, three of which should be mentioned here.

First, the 2023 Act inserted into the Withdrawal Act a new section 5(A4), which provides that "*no general principle of EU law is part of domestic law after the end of 2023."* This is significant because prior to that date the retention of general principles of EU law had left them available as an interpretive tool for construing retained EU law. The revocation of general principles therefore has implications for the courts' approach to construing assimilated law.

Secondly, the 2023 Act revoked the principle of the supremacy of EU law. In the initial post-Brexit period, the withdrawal legislation made provision for the continuation of the supremacy principle, albeit to a modified and limited extent. Section 5(1) of the Withdrawal Act provided that the principle of the supremacy of EU law did not apply to any enactment or rule of law passed on or made on or after IP completion day, but section 5(2) stated that it continued to apply on or after exit day "*so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day*."[15]

Thirdly, the 2023 Act conferred on the government significant powers to modify, restate, revoke and replace assimilated directly effective legislation and EU-derived domestic secondary legislation.[16]

It is against the background of those shifts that assimilated law emerged as a distinct legal category. This gives rise to the question of what status assimilated law has in the constitutional and legal order which follows the 2023 legislation.

Assimilated law is, fundamentally, domestic law. It is not treated as an aspect of international law, and neither (in the post-2023 Act legal order) does it enjoy the supreme status which EU law held during the UK's period of active EU membership.[17]

---

14 See the Explanatory Notes to the 2023 Act: "*the Act gives effect to the policies that were set out in the Benefits of Brexit Report."*

15 Section 5(1) and 5(2) of the Withdrawal Act, as originally enacted. In addition, section 6 of the Withdrawal Act (as originally enacted) provided that retained EU law was to be interpreted in accordance with retained general principles of EU law, which included the supremacy principle.

16 See sections 11-16 of the 2023 Act.

17 See e.g. *Costa v ENEL* [1964] ECR 585, 593-594.

The principle of the supremacy of EU law is a powerful one, whereby the "*whole of* [*European*] *law prevails over the whole of national law."*[18] Prior to withdrawal, the principle worked itself out in two important aspects of domestic law, which together elevated EU law in the hierarchy of norms of domestic law. First, it imposed a robust interpretive obligation on the UK to interpret all legislation, *"as far as possible",* in a manner compliant with EU law. This duty to apply a conforming interpretation flowed from the supremacy of EU law coupled with the duty of sincere cooperation, which obliged Member States to take all appropriate measures to ensure the fulfilment of EU obligations.[19] The scope of the conforming interpretation obligation was stated in *Marleasing* in these terms:

> "*in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter."*[20]

The *Marleasing* interpretive obligation at times resulted in the adoption by domestic courts of a very robust approach to statutory interpretation, to mould the meaning of the language used in domestic legislation to conform with the interpretation of the relevant provision of EU law. It also created the potential for a bifurcated approach to statutory construction, whereby legislation was construed in a particular manner *only* for the purposes of achieving compliance with EU law, and was therefore construed differently in circumstances which did not engage any conflict with EU law. This could happen, for example, where the relevant legislation had not been passed specifically to implement EU law, and therefore applied both to cases which had and to those which did not have an EU law dimension. An example of this is *Gingi v Secretary of State for Work and Pensions,*[21] where the Court of Appeal held that the term "habitually

---

18 R Kovar, 'The Relationship between Community Law and National Law', in EC Commission (ed.), *Thirty Years of Community Law* (EC Commission, 1981), 109 at 112-13. See *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

19 This obligation became Article 5 of the TEC, and in turn became Article 4(3) TEU: "*Pursuant to the principle of sincere cooperation, the Union and Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting form the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."*

20 *Marleasing SA v La Comercial International de Alimentacion SA* (C-106/89) [1990] ECR I-4135, §8.

21 [2001] EWCA Civ 1685.

resident" within the meaning of the Income Support (General) Regulations 1997 had a different meaning depending on whether EU law did or did not apply to a claim.[22] There was therefore no single meaning of "habitually resident" within the Regulations for all purposes.

The *Marleasing* interpretive obligation had its limits, however. It was stated to be applicable only where a conforming interpretation was "possible". It could not be used to justify interpretation of legislation *contra legem*. In cases where permissible interpretation could not produce a result compatible with relevant EU law, the principle of the supremacy of EU law meant that domestic courts would be obliged to disapply the relevant legislation insofar as it conflicted with EU law.[23] This was an even more dramatic effect.

By virtue of the 2023 Act, after the end of 2023 the principle of supremacy of EU law is not part of domestic law, in relation to any enactment or rule of law (whenever passed or made).[24] As pointed out in *Bennion on Statutory Interpretation*, one consequence of this is that the *Marleasing* obligation no longer binds domestic courts.[25] This is significant because there was a period between IP completion day and the coming into force of section 3 of the 2023 Act in which the *Marleasing* principle had an uncertain status. It rested on the dual foundation of the sincere cooperation obligation and the supremacy principle, and it therefore had an uncertain status in the period where one of those foundations (sincere cooperation) had been removed but the other (supremacy) remained. A line of cases falling under the legal framework existing in that period

---

22 Ibid. See e.g. Arden LJ at §43: *"the obligation on this Court under Community law to interpret* [the Regulations] *in accordance with the meaning of 'habitual residence' in Community legislation arises only in cases involving Community rights. This Community law principle is not, then, inconsistent with the proposition that words may have one meaning in an enactment for the purposes of national law, and another for the purposes of Community rights."* See also the discussion in *R (Z) v Hackney LBC* [2020] UKSC 40, §§113-114.

23 Thus in the seminal *Factortame* cases, the provisions of Part 2 of the Merchant Shipping Act 1988 were disapplied on the basis of non-conformity with the Treaty principle of non-discrimination on the ground of nationality, and the Treaty right of establishment. But they were *only* disapplied in relation to nationals of Member States of the European Community; they remained valid as regards nationals of non-Member States: see *R v Secretary of State for Employment ex p Equal Opportunities Commission* [1995] 1 AC 1 at 27D-H (Lord Keith).

24 Section 5(A1) of the Withdrawal Act, as inserted by the 2023 Act.

25 See D Bailey and L Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation,* (Lexis Nexis, 2nd supplement to 8th edn, 2023) §§ 3.1 and 4.1.

applied the *Marleasing* principle,[26] but its validity as a tool of statutory construction was debatable. It was unnecessary for the Supreme Court to determine the issue in the *C.G. Fry* judgment,[27] because in that case standard domestic construction rules sufficed to produce a conforming interpretation.

The other significant consequence of the abolition of the principle of supremacy is that assimilated law does not enjoy a status above that of any other domestic law. Thus, EU-derived domestic legislation (primary or secondary) simply has the same status as equivalent non-EU derived domestic legislation would have.[28] Assimilated direct legislation, however, has a *lesser* status than other domestic law. Section 5(A2) of the Withdrawal Act, as inserted by the 2023 Act, provides that assimilated direct legislation is now inferior to all other domestic law, including secondary legislation, and must (so far as possible) be read and given effect in a way which is compatible with all domestic enactments, and, so far as it is incompatible with such legislation, is subject to it.[29] This is, in effect, a reversal of the principle of supremacy (in relation to both its interpretive effect and its disapplication effect) in favour of domestic legislation.

Section 5(A2) sits alongside section 7(4A) of the Withdrawal Act, which provides various powers for the modification of assimilated direct legislation by subordinate legislation.[30] In relation to the status of assimilated direct legislation, it should be noted that section 7 of the 2023 Act confers on a relevant national authority the power to make regulations which subject a specified domestic enactment to a specified provision of assimilated direct legislation.[31] By these powers, the executive government is given a

---

26 See, e.g., *AGA Rangemaster Group Ltd v UK Innovations Group Ltd* [2025] EWCA Civ 1622 (in particular at §§79-80) and *Trustees of the Panico Panayi Accumulation and Maintenance Settlements Numbers 1 to 4 v HMRC* [2024] UKUT 00319 (TCC).

27 *C.G. Fry & Son Limited v Secretary of State for Housing, Communities and Local Government* [2025] UKSC 35; [2026] 1 All ER 615.

28 Section 7(1A) of the Withdrawal Act. This is subject to a specific exception for data protection legislation: section 5(A3) of the Withdrawal Act and section 186 of the Data Protection Act 2018.

29 Notably, this is subject to s184A and 186 of the Data Protection Act 2018, which was inserted by s106 of the Data (Use and Access) Act 2025 and arguably elevates the Data Protection Act 2018 and UK GDPR (assimilated law) to a quasi-constitutional status.

30 Section 7(4A) of the Withdrawal Act provides that assimilated direct legislation may be modified by "*subordinate legislation so far as is made under a power which permits such a modification."* Those powers are set out in paragraphs 3, 8(3), 11A, 11B and 12(3) of Schedule 8 to the Withdrawal Act.

31 To date, only the Retained EU Law (Revocation and Reform) Act 2023 (Social Security Co-Ordination) (Compatibility) Regulations 2025/ 580 have been made pursuant to this power. Regulation 2 subjects the Insolvency Act 1986, section 4 of the Social Security

primary role in managing the interaction of domestic law and EU law. But this occurs under the conceptual framework created by the Withdrawal Act, as amended by the 2023 Act.

Under that framework, retained EU law has been transformed into and replaced by assimilated law, which in terms of its nature and its status is simply domestic law and operates and has effect according to domestic law reasoning. It does not comprise a truly *sui generis* category of law. It does not have a unique status or nature, apart from domestic law.

At the same time, it is law which is marked out by its EU origins. Those origins raise specific issues regarding the proper interpretive approach to be applied to this category of law, to which I now turn.[32]

3 Interpreting assimilated law

It is a standard approach to interpretation of legislative instruments in all legal systems that their meaning is capable of being informed by principles or provisions which constitute the constitutional architecture of the regime under which they are promulgated. Legislation will typically be interpreted in the light of basic assumptions which underpin that regime and in the light of superior constitutional norms and principles which constitute it.

The particular challenges associated with interpreting assimilated law can be identified as deriving from the following feature of the UK's legal order brought about by Brexit: EU laws promulgated under the EU constitutional order, designed to serve EU constitutional ends and falling to be interpreted by the institutions of member states in light of the EU constitutional architecture were given continued existence in a UK constitutional order which, with Brexit, became detached from the EU constitutional architecture. That being so, to what extent did or does the now non-applicable EU constitutional architecture continue to supply relevant guidance for the interpretation of, first, retained EU law and, now, assimilated law?

Contributions (Transfer of Functions etc) Act 1999, the Insolvency Act 2000, the Debt Arrangement and Attachment (Scotland) Act 2002, the Bankruptcy (Scotland) Act 2016, the Insolvency (Northern Ireland) Order 1989 and the Insolvency (Northern Ireland) Order 2002 to Article 84 of Regulation (EC) No 883/2004 and Chapter 3 of Title 4 to Regulation (EC) No 987/2009.

32 For discussion see P Sales, 'Retained EU Law: Purposive Interpretation when the Constitutional Architecture Changes' (2024) 49 EL Rev 3.

That is to say, the constitutional architecture which forms the background to the interpretation of these forms of domestic law has changed since the relevant assimilated legislation was passed. This gives rise to questions as to what assumptions UK courts should understand as underpinning that legislation at the point in time when it falls to be applied and as to how they should understand the purposes for which it was enacted and for which it remains on the statute book. These points of principle have practical implications, because they affect the meaning to be given to particular legal provisions of assimilated law.

Assimilated law is ordinary domestic law, so domestic canons of statutory construction apply. But it is a commonplace that domestic statutory interpretation is purposive, in the sense that the courts seek to give effect to the purposes for which legislation was enacted. With assimilated law, this basic model is called in question. That is because of the gap in time between the promulgation of relevant EU law and its application in particular cases combined with the deliberate emphasis - first in the Withdrawal Act and then even more strongly in the 2023 Act – upon the change in the constitutional architecture in light of which the legislative text (which is unchanged) falls to be interpreted and applied. The picture is further complicated by the fact that, at least to some degree, the retention of assimilated law as a category is intended, as a matter of domestic legislative purpose, to produce a significant element of legal continuity.

Accordingly, the interpretive exercise in relation to assimilated law potentially calls for a double movement. First, to read the unchanged legislative text *as though* it was promulgated subject to the new UK constitutional architecture structured by the Withdrawal Act and the 2023 Act, rather than as subject only to the EU constitutional architecture; that is, a fiction has to be applied. Secondly, to read the assimilated law, as so construed, in light of an intention of the UK legislature to secure a significant element of legal continuity; that is, the disruptive potential of the first movement has to be qualified and dampened down to some degree in the light of the object of achieving reasonable legal continuity and certainty. Difficult and delicate judgments may be called for, particularly in marginal cases.

Another complicating factor is the interaction between the current interpretation of assimilated law as it falls to be applied and pre-Brexit and post-Brexit decisions of the CJEU regarding the proper interpretation of the legislative text. Again, the issue is one of the collision of background legal orders bearing on the interpretation of the same

legal instrument and text. It is for the CJEU to provide authoritative interpretations of EU legislation in an EU context. It is for the domestic courts to provide authoritative interpretations of EU legislation as assimilated law in a UK context. They are operating within a different authority structure. To what extent should UK courts treat CJEU decisions as binding or persuasive?

However, as a starting point, it is important to recall that the "assimilated" nature of assimilated law does not necessarily alter the basis on which the interpretive exercise is to be conducted, if domestic purposive interpretation in a given context replicates the purposive interpretation which would apply under EU law. That may often be the case where a court has regard to the specific legislative objectives of a particular legislative instrument, as appear from the instrument itself, without the need for recourse to guidance in the form of higher and more abstract constitutional norms.

This is illustrated by the judgment of the Supreme Court in *C.G. Fry and Sons Limited v Secretary of State for Housing, Communities and Local Government.*[33] This case raised a question as to the proper interpretation of the Conservation of Habitats and Species Regulations 2017, which implemented the EU Habitats Directive.[34] This falls into the category of assimilated EU-derived domestic legislation.[35]

The developer, C.G. Fry, had obtained outline planning permission for an extensive residential development on land in Somerset designated for protection as a wetlands site under the Ramsar Convention. It was not designated for protection under the EU Habitats Directive, but the domestic policy framework stated that the same protection should be given to the site as if it had been.

A question therefore arose concerning the proper interpretation of domestic regulation 63, which transposed article 6(3) of the Habitats Directive, requiring an "*appropriate assessment"* to be made for the purpose of considering consent for development in cases where there is the potential for a detrimental impact on the integrity of a protected site. The courts had to decide whether the regulation 63 obligation applies only at the

---

33 *C.G. Fry & Son Limited v Secretary of State for Housing, Communities and Local Government* [2024] EWCA Civ 730; [2024] PTSR 2000 ("*Fry Court of Appeal judgment"*), and [2025] UKSC 35; [2026] 1 All ER 615 ("*Fry Supreme Court judgment"*).

34 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

35 Section 2 of the Withdrawal Act, as amended by the 2023 Act.

initial stage when a planning authority decides to grant outline planning permission for a development, as the developer argued, or whether it also applies at the later stage when a planning authority decides to discharge conditions attached to the outline permission, as the Secretary of State contended.

To some extent, the interpretive exercise was simplified by the fact that C.G. Fry had throughout the proceedings accepted that the Regulations should be construed (even in the post-Brexit world) in the light of the EU Directive which they had been enacted to transpose, and that the norms of EU law governing the interpretation of EU legislative instruments such as the Directive (in particular, the principle of purposive interpretation and the precautionary principle in relation to environmental protection) were applicable when construing the Regulations.[36] No submission was made that the political or legal changes wrought by Brexit should lead to a different approach to the construction of the Regulations, and therefore there was no need for the Supreme Court to grapple with that issue.

The Court of Appeal and the Supreme Court accepted the Secretary of State's submission regarding the application of regulation 63, following the application of ordinary domestic principles of statutory construction.[37] There was no special approach taken in the light of the fact that they were dealing with "assimilated law" which had flowed into domestic law under the ECA 1972.

The ordinary domestic principles of statutory construction are well-known and can be simply stated: the basic task is to identify the meaning borne by the words in question in their particular context.[38] Identifying the purpose of the legislation is of central importance to that task.[39] A court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. It is fair to say that this perhaps represents a more textual approach than is taken in relation to the construction of EU

---

36 *Fry Supreme Court judgment* at §15.

37 *Fry Court of Appeal judgment* at §§66-97; *Fry Supreme Court judgment* at §59.

38 *R v Secretary of State for the Environment, Transport and the Regions Ex p Spath Holme Ltd* [2001] 2 AC 349, 396.

39 *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687; *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs* [2011] 1 WLR 1546; *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, §§40-41.

law,[40] although the modern domestic law of statutory interpretation has moved in an increasingly purposive direction.

Viewed in their historical context, the purpose of the Regulations was to give effect in domestic law to the Habitats Directive, which in turn had the objective of ensuring a "*high degree of protection for vulnerable habitats and sites of various kinds… and to ensure careful scrutiny of development proposals likely to have an impact on such habitats and sites with a view to minimising or avoiding such impact.*"[41] Brexit had not affected that underlying legislative purpose, and therefore giving the words of regulation 63 their ordinary and natural meaning in the context in which they appear led to the construction for which the Secretary of State contended.[42]

There are important issues which were not in dispute in *C.G. Fry,* but which may give rise to interpretive complexities in other cases.

First, it was not disputed that the context of Brexit had not altered the underlying purpose of the Habitats Directive and Regulations. Environmental protection is an objective which is not unique to the EU's constitutional framework. It has an independent normative force irrespective of the UK's later departure from the EU. In that regard the underlying legislative purpose of enacting the Habitats Regulations had not been affected by Brexit.[43] But in other cases, the underlying purpose of the legislation may have been affected, and courts will have to grapple with this.

Secondly, none of the parties in *C.G. Fry* submitted that the Court of Appeal or Supreme Court should exercise their powers to depart from assimilated domestic or EU case law when construing the Habitats Regulations or the Directive. Had such an argument been made, there would have been a move into more difficult waters, in which the domestic courts' powers to depart from decisions of the CJEU or previous domestic courts construing assimilated law (known respectively within the scheme of the Withdrawal

---

40 See e.g., *Henn and Darby v DPP* [1981] AC 850, 905, per Lord Diplock: "*the European court, in contrast to English courts, applies teleological rather than historical methods to the interpretation of the Treaties and other Community legislation. It seeks to give effect to what it conceives to be the spirit rather than the letter of the Treaties: sometimes, indeed, to an English judge it may seem to the exclusion of the letter. It views the Communities as living and expanding organisms and the interpretation of the provisions of the Treaties as changing to match their growth."*

41 *Fry Supreme Court Judgment*, §47.

42 Ibid, §51.

43 Ibid, §44.

Act, as amended, as assimilated EU and assimilated domestic case law) are governed by section 6 of the Withdrawal Act.

4. Section 6 of the Withdrawal Act: the interpretive relevance of assimilated case law

Section 6 of the Withdrawal Act, as amended by the 2023 Act, provides that any question as to the validity, meaning or effect of any assimilated law is to be decided in accordance with any assimilated case law and having regard (amongst other things) to the limits, immediately before IP completion day, of EU competences. This applies to assimilated law which remains unmodified after IP completion day.[44] It also applies to assimilated law which has been modified, provided that interpreting it in accordance with assimilated case law is consistent with the intention of the modifications.[45]

A distinction is drawn between assimilated case law (both domestic and EU) which pre-dates and post-dates IP completion day.

Section 6(1) and (2) of the Withdrawal Act provides that domestic courts are not bound by, but are permitted to have regard to, CJEU rulings which post-date IP completion day.[46]

Section 6 also makes provision for specified courts to depart from assimilated EU case law which pre-dates IP completion day. The Supreme Court has that power and, by virtue of a statutory instrument, so does the Court of Appeal.[47]

The test to be applied is the same as applied by the Supreme Court to depart from its own previous decisions,[48] as set out in the House of Lords' 1966 Practice Statement.[49]

The test is open-textured and not always easy to apply. It seeks to strike a balance between the demands of legal certainty and adherence to precedents and the conflicting

---

44 Section 6(3) of the Withdrawal Act.

45 Section 6(6) of the Withdrawal Act.

46 This is subject to several exceptions specified in the EU Withdrawal Agreement where a reference may or must be made to the CJEU.

47 Section 6(4)(ba) of the Withdrawal Act, together with the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations (SI 2020/1525) (made pursuant to section 6(5A) of the Withdrawal Act).

48 Section 6(5) of the Withdrawal Act.

49 *Practice Statement (HL: Judicial Precedent)* [1966] 1 WLR 1234, [1966] 3 All ER 77. The same criteria are applied by the Supreme Court: see *Austin v Southwark London Borough Council* [2010] UKSC 28; [2011] 1 AC 355, §25.

requirement that the law should be developed to promote coherence and to conform with contemporary understandings of justice.[50]

The court will not overrule a past decision simply because a present constitution of the court would decide the case differently.[51] The court is cautious about changing decisions on statutory interpretation.[52] "*[A] previous decision on interpretation will not be departed from if it reflects a tenable view."*[53]

Nevertheless, the court will be willing to reconsider a decision which is thought to be impeding the proper development of the law, or is clearly causing uncertainty, administrative difficulty, or individual injustice.[54] The court will also take into account, in deciding whether it is right to depart from it, whether there has been a relevant change in circumstances since the earlier decision.[55]

In relation to assimilated law, it may be highly significant that the change in the constitutional architecture is such as to introduce new factors into the relevant matrix for statutory interpretation. This is because that indicates that a legislative text may legitimately be given a different meaning where different interpretive inputs apply (as in the *Gingi* example) and also because the change in the constitutional architecture means that, at a fundamental level, a new impulse is present for the proper development of the law. The question whether the court should exercise its power to depart from assimilated EU case law in any given case is likely to be a nuanced one which requires close consideration of the particular context and the particular decision.

So far there have been only a few cases in which the courts, at the level of the Court of Appeal, have had to confront the question of whether to depart from a pre-IP completion day CJEU decision. That has given rise to very close analysis of the particular

---

50 Lord Reed, 'Departing from Precedent: the experience of the UK Supreme Court' (Speech at the international Conference on Implementation of the Rule of Law, 20 January 2023) <ukraine_departing_from_precedent_lord_reed_82d71af3e3.pdf>,

51 *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd* [2020] UKSC 36, para 49 (Lord Wilson), citing *Horton v Sadler* [2007] 1 AC 307, para 29 (Lord Bingham).

52 *Jones v Secretary of State for Services* [1972] AC 944, 966 (Lord Reid: "*in very many cases it cannot be said positively that one construction is right and the other wrong. Construction so often depends on weighing one consideration against another. Much may depend on one's approach"*).

53 *JTI Polska sp z oo v Jakubowski* [2024] AC 621, §43.

54 *Jones v Secretary of State for Social Services* [1972] AC 944.

55 *Arthur JS Hall v Simons* [2002] 1 AC 615, 683, 688.

legislative context and the reasoning of the relevant CJEU decisions. Three themes have emerged.

First, the specific legal context of the assimilated law is important. In *TuneIn Inc v Warner Music Ltd,*[56] the court drew attention to the fact that the relevant assimilated copyright legislation[57] interacted with and gave effect to various international treaties.[58] In that context, the courts should strive to achieve "*harmonious interpretation… not individualistic disharmony."*[59] Also, infringement of copyright by communication to the public often produces impacts across national borders, and it would be "*undesirable for one nation to depart from the CJEU's approach without an exceptionally good reason."*[60]

Secondly, the CJEU's expertise on the relevant issue and the quality of its reasoning are significant factors. In *Merck Serono v Comptroller-General of Patents*[61] the court referred to these factors to explain why it would not have departed from a relevant CJEU patents judgment.[62] Conversely, in *Industrial Cleaning Equipment v Intelligent Cleaning Equipment*[63] Arnold LJ described the impugned judgment[64] as an isolated decision which stated a "*bald conclusion"* and did not contain a full interpretive analysis.[65] He contrasted it with *TuneIn,* where the CJEU's jurisprudence had developed over the course of twenty-five judgments and was the product of "*far greater experience of the issue"* than the Court of Appeal had.[66]

A third theme is the relevance of the fact that Parliament has not chosen to modify a particular piece of legislation in the post-Brexit world. The Court of Appeal has relied

---

56 [2021] EWCA Civ 441.

57 Section 20 of the Copyright, Designs and Patents Act 1988, which implemented Article 3(1) of the Information Society Directive.

58 [2021] EWCA Civ 441, §198.

59 Ibid.

60 Ibid.

61 [2025] EWCA Civ 45.

62 Case C-673/18 *Santen SAS v Directeur general de l'Institut national de la propriete industrielle*.

63 *Industrial Cleaning Equipment (Southampton) Ltd v Intelligent Cleaning Equipment Holdings Co Ltd* [2023] EWCA Civ 1451. This is the only case so far in which the Court of Appeal has decided to depart from relevant assimilated CJEU authority.

64 Case C-482/09 *Budějovický Budvar np v Anheuser-Busch Inc* [2011] ECR I-08701.

65 *Industrial Cleaning Equipment* [2023] EWCA Civ 1451, §83.

66 Ibid, §84. Cf Nugee LJ's reasoning, which was less critical of the CJEU's reasoning in the *Budvar* case (§§120-121) and relied more on its divergence from the construction adopted by other expert bodies, ie the General Court and the European Union Intellectual Property Office.

on the absence of legislative change as a positive reason why it would not be right to depart from the assimilated EU authorities in *Thatcher's Cider Co Ltd v Aldi Stores Ltd.*[67] Similarly in the *Merck* case it was pointed out that the relevant assimilated direct legislation had not been amended since the UK's withdrawal from the EU, the inference being that "*it remains the will of Parliament that the legislation should continue to be harmonised with that of the EU."*[68] The force of this point depends on the prior existence of an opportunity to review and amend the legislation. Given the extensive powers under the Withdrawal Act and the 2023 Act to do just that, it seems a justified inference. Might it be that the force of the point increases with the passage of time without amendment?

Similar themes emerge from decisions which consider whether to follow post-IP completion EU case law. In a VAT case, *Tower Bridge GP v HMRC,*[69] the Court of Appeal decided not to follow a CJEU judgment[70] because it had broken new ground, was "*at odds with the previous jurisprudence of the court"* and lacked adequate reasoning.[71] In *Farley v Paymaster (1836) Limited,*[72] the Court of Appeal decided to follow a line of post-IP completion day CJEU authorities construing EU data protection legislation, in which the CJEU had consistently held that it is impermissible for domestic courts of EU countries to require proof that the damage suffered by a claimant under the data protection legislation reaches a minimum degree of seriousness.[73] Warby LJ noted that in domestic post-Brexit successor legislation (the UK GDPR) Parliament

---

67 [2025] EWCA Civ 5 (on the meaning of 'unfair advantage' in the context of section 10 of the Trade Marks Act 1994, read in the light of Case C-487/ 07 *L'Oréal SA v Bellure NV* [2009] ECR I-5185, §37): see §146 per Arnold LJ - in those circumstances, the Court of Appeal would "*strive for harmony with the jurisprudence of the Court of Justice, rather than adopting a divergent interpretation, unless driven to the conclusion that the Court of Justice's interpretation of the legislation is erroneous (as in [Industrial Cleaning Equipment v Intelligent Cleaning Equipment]".*

68 *Merck Serono v Comptroller-General* at §59.

69 [2022] EWCA Civ 998.

70 Case C-154/20 *Kemwater ProChemie sro v Odvolací finanční ředittleství,* judgment of 9 December 2021.

71 [2022] EWCA Civ 998, §119.

72 [2025] EWCA Civ 1117.

73 *UI v Österreichische Post AG,* Case C-300/21, [2023] 1 WLR 3702; *VB v Natsionalna agentsia za prihodite,* Case C-340/21, [2024] 1 WLR 2559; *BL v MediaMarktSaturn Hagen-Iserlohn GmbH,* Case C-687/21, [2024] 1 WLR 2597.

decided to adopt materially identical language.[74] The Supreme Court has granted permission to appeal in this case, so it will examine the principles to be applied.[75]

Finally, I should mention that the 2023 Act contains a provision which, if and when brought into force, will amend section 6 of the Withdrawal Act so as to provide that when deciding whether to depart from any assimilated EU case law, the domestic court must have regard to a series of particular factors, including any changes of circumstances, the fact that decisions of a foreign court are not (unless otherwise provided) binding, and the extent to which the case law restricts the proper development of domestic law.[76] If implemented, that provision seems to be a legislative nudge for the courts to be less circumspect in exercising their power to depart from assimilated EU case law.[77] The current government has decided to pause the commencement of the provision in order to "*allow time to consider this within the wider context of our work to grow the economy and reset relations with the EU and devolved governments.*" [78]

Underlying the complexities of the interpretive guidance given by assimilated case law is a more fundamental question of how to approach purposive interpretation in a context where the constitutional architecture has changed since the enactment of the relevant legislation. That requires discussion of the constitutional place of assimilated law, to which I now turn.

5 The constitutional place of assimilated law

(a) Purposive interpretation in the post-Brexit constitutional order

The shift in the constitutional architecture brought about by the UK's withdrawal from the EU creates a complex challenge for the courts in following a purposive interpretive approach, as required by domestic law.[79] The EU origins of assimilated law are an

---

74 *Farley*, §67: Warby LJ acknowledged that it is open to the UK, as a "*political choice and a legislative option*" to choose to plot a different course from the CJEU. However, he considered that a judicial decision to do so would call for "*sufficiently compelling reasons.*"

75 Ibid, §67.

76 Section 6 REULRRA 2023.

77 This was noted by HHJ Tindal (sitting as a High Court judge) in *E-Accounting Solutions Ltd v GlobalInfosys Ltd* [2023] EWHC 2038 (Ch) at §13.

78 Baroness Jones of Whitchurch, answer to 'Question for Department for Business and Trade' (3 December 2024) <https://questions-statements.parliament.uk/written-questions/detail/2024-11-19/HL2667/> (accessed 3 March 2026).

79 See, eg, *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, §§40-41. For further discussion see Sales, 'Retained EU Law' (n 32 above).

important part of the historical context in which it came into existence, and it was created to serve particular purposes (albeit as perceived by the EU legislator) which inform its meaning on a purposive approach to interpretation. But to what extent do those purposes apply in the interpretive exercise, now that the constitutional architecture has changed in a major way?

For the domestic courts blindly to continue to keep pace with the CJEU's interpretation of the equivalent legislation would contradict the substantial constitutional shift brought about by the UK's withdrawal from the EU. Accommodating that shift in an interpretive approach which is appropriate for assimilated law calls for something of a half-way house, according to which some weight is given to at least some of the original legislative purposes, in so far as they can properly be endorsed within the new constitutional framework. Therefore, interpretation of assimilated law is a nuanced exercise which calls for careful consideration of the particular context and purpose of any given item of assimilated legislation and consideration of the extent to which such purpose can be regarded as having continuing validity under that new framework.

The dilemma is how courts should set about distinguishing between the purposes of EU law which may be taken to continue to infuse and animate assimilated law. Addressing this calls for a sophisticated understanding of the role of legislative purpose in providing guidance for the interpretation of legislation. I propose a methodology consistent with the traditional domestic approach to interpretation, which builds up from the legislative text itself and draws on higher level framings of legislative purpose only to the extent that they may be required to resolve some continuing uncertainty of meaning.

In broad terms, one can conceive of legislative purpose as operating at three levels. First, a basic sense of the purpose of the legislation is necessary to provide orientation for the way language is being used in the particular provision, and sometimes that may be all that is required if one can then determine what is the clear ordinary meaning of the language used.[80] Secondly, if one cannot be confident about that, it may be relevant to seek guidance as to the intended meaning of the provision by having regard to the legislative purpose framed at a higher level, drawing on the objects appearing from the legislative instrument itself, as occurred in *C.G. Fry*. Thirdly, if there is still doubt about the intended meaning, it may be relevant to seek guidance by reference to purposes

[80] See *PACCAR*, §41.

framed at a still higher level of abstraction, taking account of the general background objects of the state/the EU or the legislator itself (and sometimes, in EU legislation, these may be referred to in the legislative instrument itself). I refer to these as the "meta-purposes" of the relevant legal order. At the first two levels, EU legislative purposes are likely to be capable of endorsement in domestic law for interpretive guidance. It is at the third level that greater scope for divergence between the interpretation of EU law and of assimilated law may arise.

Some of the meta-purposes of the EU legal order (such as the spirit of the treaties, the mandatory effectiveness of EU law and the principle of ever closer union) do not retain their normative weight in the post-Brexit domestic legal order.[81] For example, requiring UK courts to interpret assimilated law in a way that achieves the EU's common market objectives or ensures uniform application by the UK and its EU counterparts is not in itself obviously a purpose which is relevant in a post-Brexit legal system.[82] Other purposes, however, remain relevant to the UK after Brexit: this is particularly true of those objectives which were not unique to the EU framework and telos but which relate to broader common economic or social aims.[83] This may be significant in areas such as consumer rights, workers' rights, environmental protection standards, data protection and intellectual property. The answers will lie in careful consideration of the purpose for which a specific piece of assimilated law was enacted, and evaluation of whether that objective has been affected by our withdrawal from the EU.

(b) Future directions: convergence or alignment?

Looking to the future, an interesting dimension of assimilated law is the fact that it is a category of law which, for the most part, is envisaged as having only a limited lifespan. The amount of assimilated law on the statute books has already shrunk considerably.[84]

---

81 P Sales, 'Retained EU Law' (n 32 above). See also M Brenncke, 'Statutory Interpretation and the Role of the Courts after Brexit' (2019) 25 *European Public Law* 637, 645.

82 Ibid.

83 Ibid.

84 See Retained EU Law (REUL) and Assimilated Law Parliamentary Reports, available here:<https://www.gov.uk/government/publications/retained-eu-law-reul-parliamentary-report>. The report for 24 June 2025 to 23 December 2025 shows that at December 2025,, the total number of assimilated laws stood at 6,925 instruments and that since the previous update to the assimilated law dashboard, 61 assimilated law instruments had been either revoked or reformed: <https://www.gov.uk/government/publications/retained-eu-law-reul-parliamentary-report/assimilated-law-parliamentary-report-june-2025-to-december-2025-executive-summary> (accessed 3 March 2026).

There are several possible trajectories for the corpus of law which currently comprises the category of assimilated law.

In some areas, the UK will plot a course of active divergence from the EU, by positively deciding to forge its own path, distinct from EU law. This would be in line with one of the envisaged benefits of Brexit being that the UK would gain the autonomy to diverge from the EU in order to secure a competitive advantage and to legislate in a way that better suits our own conditions.[85] Examples are agricultural policy;[86] fisheries policy;[87] and AI development, in relation to which the UK has adopted a more flexible regulatory regime by contrast with the EU's AI Act. Where this occurs, assimilated law will be slowly, but actively, repealed and replaced with non-assimilated, i.e. pure domestic, law which diverges from the equivalent EU law.

In other areas, divergence from the EU will occur not as the result of dynamic divergence, but passively over time as domestic law and regulation is not updated at the same rate as the European equivalent. An example is liability for defective products. The Consumer Protection Act 1987 was enacted for the purpose of transposing the Product Liability Directive of 1985,[88] to establish a strict liability regime for dangerously defective products. It has not been materially amended since Brexit. The EU, however, has introduced a new Product Liability Directive to replace the 1985 Directive.[89] The recitals to the new Directive state that the old Directive needs to be revised "*in light of developments related to new technologies, including artificial intelligence, new circular economy business models and new global supply chains,*

---

85 See for example Sir David Frost, 'Reflections on the revolutions in Europe' (17 February 2020), <https://no10media.blog.gov.uk/2020/02/17/david-frost-lecture-reflections-on-the-revolutions-in-europe/ > (accessed 3 March 2026).

86 Agriculture Act 2020, sections 37-40.

87 See in particular section 36 of the Fisheries Act 2020, which confers on the Secretary of State the power to make provision by regulations for the purpose of implementing international obligations relating to fisheries, conservation purposes, and fish industry purposes.

88 Directive of the Council of the European Communities dated 25 July 1985 (No.85/3764 EEC) on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. As originally enacted, section 1(1) of the Consumer Protection Act 1987 provided that its Part 1 "*shall have effect for the purpose of making such provision as is necessary in order to comply with the product liability Directive and shall be construed accordingly."* On IP completion day, those words were substituted so that section 1(1) of the Act now states that "*This Part was enacted for the purpose of making such provision as was necessary in order to comply with the product liability Directive and shall be construed accordingly."*

89 Directive 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85.374/EEC.

which have led to inconsistencies and legal uncertainty, in particular as regards the meaning of the term 'product.'"[90] The Directive thus expands liability to include digital products, such as software and AI systems. It also covers components that are integrated into a product, including digital services.[91]

Another model is legislation intended actively to promote alignment of domestic law with EU law, as a matter of political choice. Parliament has recently passed legislation which may be used to achieve active alignment with the EU in the sphere of product safety and regulation. The Product Regulation and Metrology Act 2025 provides the Secretary of State with the power to make regulations for the purpose of "*reducing or mitigating risks presented by products,"*[92] as well as regulations which correspond with or are similar to an EU provision setting environmental standards for products.[93]

In some areas, passive alignment may be possible for a time and to a degree. The courts have a subsidiary role to play in that regard, as illustrated by the Court of Appeal decisions about whether to follow pre- and post-Brexit CJEU caselaw in circumstances where assimilated legislation has not been subject to amendment. The courts draw an inference as to whether it is appropriate to endorse interpretations in the new constitutional framework from the legislator having omitted to intervene to change the law.

(c) The constitutional balance: legislation by the executive and by Parliament

The question whether greater alignment or convergence should be pursued in any given area is a question of policy for determination in the political realm. However, if that policy question is in practice determined by the executive government and given effect through delegated legislation, there is limited democratic oversight of and input into what may be an important policy issue. This gives rise to a broader issue about the role of delegated legislation in connection with assimilated law, which affects the balance of the UK's constitutional order in the post-Brexit world.

---

90 Ibid, Recital 3.

91 Ibid, Recital 17. Examples given in the Directive are "*the continuous supply of traffic data in a navigation system",* a "*health monitoring service that relies on a physical product's sensors to track the user's physical activity or health metrics"* and "*temperature control service that monitors and regulates the temperature of a smart fridge, or a voice-assistant service that allows one or more products to be controlled by using voice commands."*

92 Section 1(1)(a) of the Product Regulation and Metrology Act 2025.

93 Section 1(2) of the Product Regulation and Metrology Act 2025.

The 2023 Act conferred substantial powers to amend and revoke assimilated secondary legislation and direct EU legislation by delegated legislation. Delegated legislation will be used for much of the basic work of deregulating and re-regulating in the post-Brexit world. This raises constitutional concerns about the appropriate balance between the law-making powers of Ministers and of Parliament itself, because the Act allows the making of substantial policy changes through delegated legislation.[94]

It is important to acknowledge that secondary legislation does have an important role to play. It creates flexibility and enables the state to respond promptly to new circumstances and to bring expertise to bear. It can also be a means of avoiding the inefficient use of Parliamentary time on highly technical aspects of regulation.[95] There are oversight mechanisms to mitigate the risks of reliance on delegated legislation, such as the work of the Delegated Powers and Regulatory Reform Committee.[96] In addition, judicial review functions as a limited check on executive law-making, in so far as it ensures that delegated legislation is within the *vires* of the enabling provisions.

Nevertheless, the constitutional concern remains a prominent one. The balance between primary and delegated legislation raises an issue regarding the values embodied by the rule of law, which include the "*cardinal principles of accessibility and legal certainty.*"[97] Individual decisions as to whether to diverge or align in a particular legislative area may be highly technical and subject specific. However, the cumulative impact of all of those fragmented individual decisions as to whether to align with or diverge from EU law means that there is a sensitive, highly political strategic question as to what course should be adopted, which tends to be obscured. There is an argument, articulated by some parliamentarians, that greater democratic oversight in this area should be required, as would be associated with enactment of primary legislation. For example, Lord Goodman of Wycombe, commenting on the Product Regulation and

---

94 See on this P G Hidalgo, 'Parliamentary Scrutiny of Delegated Powers Clauses: Plus ça change' [2026] PL 25.

95 See for example Justin Madders in his oral evidence to the Delegated Powers and Regulatory Reform Committee about the Product Regulation and Metrology Bill, emphasising that the government needs to "*keep this very important but very technical area of law satisfactorily updated, and we need to be nimble in order to be able to respond to emerging safety threats and global regulatory developments,"* (16 October 2024) <https://committees.parliament.uk/oralevidence/14942/html/> (accessed 3 March 2026).

96 Recently highlighted by Hidalgo (n 94 above).

97 Lord Hermer KC, 'The Rule of Law in an Age of Populism' (Bingham Lecture 2024), <https://www.biicl.org/documents/12532_bingham_lecture_2024.pdf> (accessed 27 February 2026).

Metrology Bill and referring to the question of whether the UK should adopt a policy of dynamic alignment with, or divergence from, EU regulation, asked "*is this not a policy decision, and should this be decided not by regulation but debated fully in Parliament?"*[98]

This is to raise, in the context of assimilated law, a wider constitutional issue about the balance of legislative power which extends far beyond that particular subject area. It is one which is difficult to ignore as we look ahead to the future of assimilated law, and the choice between different models of closer alignment with or greater divergence from EU law. The Brexit referendum and the legislation which followed was only the start of a process of political and legal reorientation which continues.

6 Conclusion

Assimilated law is an odd and novel category of law. It is clearly, in simple terms, a variety of domestic law which is essentially legislative in character. Yet it raises a specific set of interpretive and conceptual complexities. This conference is a valuable forum in which to explore those complexities.

[98] Oral evidence to the DPRRC on the Product Regulation and Metrology Bill (16 October 2024) <committees.parliament.uk/oralevidence/14942/pdf/> p13 (accessed 3 March 2026).