



House of Commons  
European Scrutiny Committee

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**Retained EU Law:  
Where next?:  
Government response  
to the Committee's  
Fifth Report**

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**Second Special Report of Session  
2022–23**

*Ordered by the House of Commons  
to be printed 10 November 2022*

## European Scrutiny Committee

The European Scrutiny Committee is appointed under Standing Order No.143 to examine European Union documents.

### Current membership

Sir William Cash MP (Conservative, Stone) (Chair)  
Tahir Ali MP (Labour, Birmingham, Hall Green)  
Mr John Baron MP (Conservative, Basildon and Billericay)  
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### Powers

The Committee's powers are set out in Standing Order No. 143. The scrutiny reserve resolution, passed by the House, provides that Ministers should not give agreement to EU proposals which have not been cleared by the European Scrutiny Committee, or on which, when they have been recommended by the Committee for debate, the House has not yet agreed a resolution. The scrutiny reserve resolution is printed with the House's Standing Orders, which are available at [www.parliament.uk](http://www.parliament.uk).

### Publications

Committee reports are published on the Committee's website and in print by Order of the House. Evidence relating to this report is published on the inquiry publications page of the Committee's website

### Staff

The staff of the Committee are Ravi Abhayaratne (Committee Operations Assistant), Hannah Barlow (Committee Specialist), Joanne Dee (Deputy Counsel for European and International Law), Alistair Dillon and Leigh Gibson (Senior Committee Specialists, European Affairs Unit), Nat Ireton (Committee Operations Officer), Daniel Moeller (Committee Operations Manager), Foeke Noppert (Senior Committee Specialist, European Affairs Unit), Indira Rao MBE (Counsel for European and International Law), Emily Unwin (Deputy Counsel for European and International Law), Dr George Wilson (Clerk).

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## Second Special Report

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The European Scrutiny Committee published its Fifth Report of Session 2022–23, *Retained EU Law: Where next?* (HC 122), on 21 July 2022. The Government response was received on 19 October 2021 and is appended below. It was originally published as written evidence on 21 October 2022.

### Appendix: Government Response

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The Government welcomes the European Scrutiny Committee's interest in and report on retained EU law. Government is grateful to the Committee for its consideration of this important subject and gives thanks to all who contributed to the Committee inquiry.

The report is a thorough yet timely examination of the issue of retained EU law. The Government mostly agrees with the recommendations of the Committee and has sought to implement them via the Retained EU (Revocation and Reform) Bill. This response notes where the Government has addressed the recommendations via the Retained EU Law (Revocation and Reform) Bill, which was introduced in Parliament on 22nd September 2022. This response also sets out, in more detail, the Government's aims for retained EU law reform.

#### ***Recommendations 1 – 4 (Supremacy of retained EU law)***

**We urge the Government to consult us on its plans for this aspect of the Bill before introduction, as it undertook to do in December 2021. (Paragraph 41)**

**We consider that the 'principle of the supremacy of EU law' should be removed. It is incongruous in the post-exit domestic legal framework. The 'principle of the supremacy of EU law' is part of an arrangement that was only ever intended to be temporary. The existence of retained EU law—with the trappings of the EU's legal order—alongside 'true' UK law is historically inappropriate and does not fit with our legal traditions and legal culture. (Paragraph 42)**

**The application of section 5(2) EUWA as it stands results in retained EU law prevailing over a later, incompatible Act of Parliament if that Act was made before 1 January 2021. However, retained EU law does not prevail over a later, incompatible Act of Parliament if that Act was made on or after 1 January 2021. The 'principle of the supremacy of EU law' undermines the principle that the most recent expression of Parliament's will prevails. Having a different rule where retained EU law is involved creates a second statute book in effect. This is untenable and not suitable for reasons of certainty and clarity. The Bill should give effect to the principle that, in the event of incompatibility, retained EU law should not take precedence over any Act of Parliament whether enacted before or after 1 January 2021. (Paragraph 43)**

**Retained EU law lacks the democratic legitimacy of an Act of Parliament. It was originally adopted under EU processes. In many cases, this involved qualified majority voting in the Council of Ministers behind closed doors without a transcript. Although the UK had a seat at the table, its scope to block the adoption of EU laws to which it objected was limited. (Paragraph 44)**

The Government recognises the incongruous nature of retained EU law, particularly the principle of EU supremacy, which has no place in the legal system of an independent, sovereign nation. We agree that removing this anomalous category of law is key to ensuring the UK has a single functioning statute book. As is befitting an independent, sovereign nation, there should be no higher law in the UK than an Act of Parliament.

Removing the principle of supremacy of EU law from the UK statute book is a key aspect of restoring the sovereignty of Parliament. Clause 4 of the Retained EU Law Bill abolishes the principle of supremacy from 31st December 2023, along with other aids to interpretation. The Government agrees with the Committee that retained EU Law should not be supreme over any UK law, and the Bill legislates for this to come into effect on 31st December 2023. After this date, new default rule established by the Bill in Clause 4 mean that UK law - regardless of when it was made - will take precedence over retained direct EU legislation where there is a conflict.

Where it is deemed necessary, the Government has the ability to specify, using the power in Clause 8, the legislative hierarchy between specific pieces of legislation and retained direct EU legislation to ensure that policy continues to function as intended, without using EU law principles of interpretation. In line with the Committee's recommendation, and rather than continuing an EU-derived principle, this will provide greater clarity, in legislation of how specific legislation interacts with each other. Departments should make any required changes to their legislation by 31st December 2023, to ensure the required policy continuity, but the power will be available until 23rd June 2026

The Government has consulted extensively with a range of legal experts ahead of the publication of the Bill. The Government has also been active in communicating the intent for the Bill, with Written Ministerial Statements indicating the policy direction for the Retained EU Law published on September 16th 2021, December 9th 2021 and June 22nd 2022. The rationale for the Bill was set out in the Benefits of Brexit publication on January 31st 2022, and the Queen's Speech, and subsequent debates in May 2022. The Secretary of State also met the Committee in April as part of this inquiry.

The Secretary of State welcomes further engagement and consultation with the committee on the points raised.

### ***Recommendations 5 – 14 (Changing retained EU law and parliamentary scrutiny)***

**Currently, when retained EU law is amended, it keeps the status of retained EU law. We recommend that when retained EU law is modified by domestic legislation, the Government ensures that the amending legislation clearly indicates whether the modified legislation is to keep the status of retained EU law. We consider that the status should not continue. This point is also pertinent in the context of our recommendations relating to the interpretation of retained EU law in Chapter 4. (Paragraph 63)**

**Substantive changes to retained EU law by secondary legislation should be possible. A wide amending power is necessary in the Bill, described in written evidence we received as “the reverse equivalent of s2(2) European Communities Act 1972”. This**

is necessary in the interests of speed and given the significant amounts of retained EU law on the statute book. Only allowing amendment by way of primary legislation would significantly slow the process of repealing retained EU law. (Paragraph 82)

Delegated powers providing for this should, however, be carefully drawn. We recommend that clear criteria are set out in the Bill as to when the powers can be used. The Government should exercise restraint before including Henry VIII powers in the Bill. We urge the Government to consult us on this specifically when consulting us more widely in advance of the publication of the Bill. (Paragraph 83)

We urge the Government to consult us and other stakeholders in Parliament on what form parliamentary scrutiny should take for amending powers in the Bill. We ask the Government to note ESIC's specific request to be consulted on any proposed change to its remit and/or powers. (Paragraph 90)

In the light of the significant experience and expertise of the European Scrutiny Committee, we expect the Government to involve us in any process designed to assess the policy implications of changes to retained EU laws. (Paragraph 91)

Subject to appropriate consultation, we urge that the Bill should include a 'sunset' provision with an effective timeframe under which all retained EU law is repealed, which provision must take effect on the date of Royal assent, which itself must be timed to take effect (if applicable) within the timeframe of the completion of the procedures prescribed under the Parliaments Acts 1911 and 1949. Careful consideration and sufficient human resources should therefore be given to any necessary replacement legislation to avoid gaps on the statute book and legal uncertainty. (Paragraph 95)

We draw to the Government's attention the evidence we have taken on the application of the Interpretation Act 1978 in relation to "repeal of repeals" in this respect and request that any "revived" legislation is "fit for purpose" in present times. (Paragraph 96)

We urge the Government to consider including a mid-point review in the Bill, in parallel with a sunset provision to meet the timeframe we propose in paragraph 95. This would focus on the Government assessing progress and identifying any potential legislative cliff-edges. It would also enable Parliament to assess how amending powers have been used and whether changes need to be made to the Government's approach. (Paragraph 97)

We welcome the sectoral approach taken by the Government so far to amending retained EU law. (Paragraph 104)

We recommend that the Government identifies early on clear priorities in its task of reviewing and amending retained EU law. We encourage the Government to commit to amending the priority category within two years. This is irrespective of whether the Bill includes a 'sunset' provision. (Paragraph 105)

The Government remains committed to ending retained EU law as a legal category. To that end, Clause 1 will apply a sunset to the substance of a large proportion of retained EU law at the end of 2023. Clauses 3, 4 and 5 will address the anomalous status of retained EU law by removing the application of EU law concepts from the UK statute book. These clauses

will ensure that any remaining retained EU law that is assimilated onto the UK statute book is effective by interpreting such former retained law in line with more traditional domestic rules of interpretation.

These sunset clauses, and the other provisions in the Bill will be supported by a comprehensive programme of REUL reform ahead of the 31st December 2023 sunset date. While it is important that REUL reform is completed as a priority to ensure the swift removal of laws that are not suited to the UK, it is important that we take this opportunity to also make wider ranging framework reforms. To ensure that this work is completed, the restatement, and revoke and reform powers within the Bill can also operate on the category of assimilated law that the Bill creates until 23rd June 2026. While it is important reform is completed, we do not consider there is value in having an indefinite continuing power taken by the Government. Therefore, this is not a direct replacement of the Section 2(2) power provided by the European Communities Act, and there is nothing in the Bill that is a replacement for this power.

To achieve the comprehensive reform of REUL, this Bill takes powers to enable Ministers to make changes to retained EU law where appropriate. The Government agrees with the Committee's recommendation that the powers in the Bill should make clear that modifications to retained EU law are not retained EU law and should be capable of ensuring an entire instrument is no longer retained EU law where it has been substantively amended. Therefore, the significant powers in Clauses 12, 13 and 15 will mean that, when used, the legislation made under those powers are expressly no longer retained EU law, nor assimilated law as established by the Bill. Where an entire retained EU law instrument is replaced under these powers, the replacement instrument will not be retained EU law. These remaining pieces of legislation will be domestic law, just like any other domestic law.

The Government notes the Committee's concern about the potential breadth of the powers. I would like to draw your attention to the fact that, clause 15, the power within the Bill to revoke and replace retained EU law requires that there be no increase to the overall regulatory burden from the power's usage. This will prevent the Government from imposing unheralded regulatory burdens and ensure that changes to retained EU law are broadly deregulatory. This power is not a Henry VIII power, so can only be used on secondary legislation. Additionally, in line with standard practice, the Government will consult with interested parties during policy development as necessary when retained EU law is substantively amended or replaced. The Government will of course consider the Committee as a vitally important interested party during this process.

The Government agrees with the Committee's view that retained direct EU legislation should be amendable as secondary legislation. Therefore for the purposes of amendment only, the Bill has downgraded retained direct EU legislation through the provisions in clause 10. This will mean that retained direct EU legislation can be amended by relevant delegated powers (i.e. that are limited to amending secondary legislation) both in the Retained EU Law (Revocation and Reform) Bill, and in existing and future Acts of Parliament. As the Committee notes in its report, this will enable far more significant reform than would be possible if reform had to be achieved solely through primary legislation.

On which retained EU law will be prioritised for reform, this will remain a matter for departments. We expect Cabinet Ministers will outline their priorities for reform in due course. In terms of the midpoint review, the Government agrees with the Committee that it is important to ensure that no legislative cliff edges are created. Therefore, the Department for Business, Energy and Industrial Strategy will be leading and coordinating a cross-Whitehall retained EU law reform programme. At present, due to the length of the sunset provision, we do not consider that a legislative midpoint review would be necessary to aid the reform programme. However, we will keep this under review.

### ***Recommendations 15 – 17 (Role of the courts)***

**Given the direct impact on how the law is interpreted, we recommend that when retained EU law is modified, the Government ensures that the amending legislation clearly indicates whether the modified legislation is to keep the status of retained EU law. We consider that the status should not continue.** (Paragraph 132)

**We recommend that the Bill contains the requirement that, before deciding to extend the range of courts that can depart from retained EU case law, the Government consults senior members of the judiciary.** (Paragraph 133)

**We support the Government's proposal to reconsider the role of retained general principles. We do not believe it is appropriate in the domestic legal context that retained EU case law is interpreted using the purposive approach adopted by the Court of Justice of the European Union.** (Paragraph 134)

The Bill will ensure any remaining retained EU law will become assimilated law and will no longer have a number of EU rules of interpretation applying to it. In line with the Committees' recommendations, the effect of General Principles on relevant UK legislation will be ended on 31st December 2023 as per Clause 5 of the Bill. We agree with the Committee that their maintenance would be incongruous within the domestic legal context, and as such the Bill does not allow for their direct preservation. If a department wishes to maintain the policy effect that a general principle provides, they would need to write in the policy effect they wish to preserve into legislation.

Provisions made under the revoke and replace power or the restatement power, including those modifying existing REUL, will expressly not be retained EU law. In instances where an entire retained law instrument is replaced with an alternative, it follows that the replacement will not be retained law and will not be subject to associated rules of interpretation. This legislation will be subject to standard domestic rule of interpretation.

### ***Recommendations 18 – 20 (Devolution)***

**We urge the Government to consult the devolved administrations as early as possible on the content of the Bill. This may mean going beyond usual practice in intergovernmental relations. Early consultation will help the Government to anticipate some of the complex constitutional, legal and Common Frameworks issues flagged in the evidence we received from legal experts on devolved matters.** (Paragraph 177)

**Likewise, we ask the Government to confirm that devolved administrations will be similarly consulted early on specific changes to retained EU law within devolved competence. (Paragraph 178)**

**We recommend that, until a satisfactory long-term resolution to the impact of the Protocol is achieved, the Government ensures that any future legislation to change the functioning of retained EU law includes provisions to ensure that Parliament is informed if changes to retained EU law could lead to divergence between Northern Ireland and the rest of the UK. (Paragraph 179)**

The Government has consulted extensively at official and ministerial level with the Devolved Administrations on retained EU law and the provisions in the Bill. Further engagement and discussions will be held during the Bill's passage and as part of continuing retained EU law reform. Requests for legislative consent have been issued, and the Government will continue to work with the Devolved Administrations to secure legislative consent.

The Brexit Opportunities Unit has already requested and encouraged departments to engage with their devolved counterparts on REUL reform and will continue to work with departments to support this engagement in the future. The Government wishes to firmly establish and make publicly available via the existing dashboard the territorial application of existing retained EU law clearly.

In reference to the Committee's concerns around Northern Ireland, the Government will of course maintain and uphold all international obligations to which it is a party. Whilst a formal mechanism to inform Parliament of where changes to REUL could impact on divergence with Northern Ireland is not included in this Bill, the Government will of course work to ensure that Parliament is kept informed of any divergence related issues.

### ***Recommendations 21 – 27 (Transparency – accessibility of retained EU law and consultation)***

**We welcome the Government's publication of the catalogue of retained EU law and interactive dashboard. It improves the accessibility of retained EU law and will be a useful tool for tracking and evaluating the progress of the Government's programme for amending or replacing retained EU law. (Paragraph 191)**

**We ask the Government to clarify whether the catalogue contains a comprehensive list of the retained EU law in the category defined in section 4 of the EUWA, the 'sweeper' provision. (Paragraph 192)**

**We note that the catalogue does not address the concerns we heard about the lack of a publicly available database of the up-to-date consolidated legal text of pieces of REUL. For as long as REUL remains, we consider that there is value in having such a database in the interests of legal certainty and transparency. We encourage the Government to look into the feasibility of this. (Paragraph 193)**

**The Committee regrets that the Government's commitments to consult select committees on the content of the Bill have not materialised. However, it is not too late to consult prior to introduction. It is an important and worthwhile exercise because of the breadth and volume of law that will be affected. (Paragraph 197)**

**The Committee notes that, even after cutting out a consultation stage, the Government has indicated that it might not address all of the changes it identified in the Benefits of Brexit policy document because of its self-imposed legislative timetable. We welcome the offer of the Brexit Opportunities Minister to return to the Committee once the Bill has been published to explain what he described as the “trade-offs” between the timeliness of the Bill and its scope. (Paragraph 198)**

**We urge the Government to begin consultation on the content of the Bill immediately and to introduce the Bill as soon as possible after that. Adequate time must be allowed for the parliamentary stages of the Bill. (Paragraph 199)**

**We also urge the Government to ensure that there is effective and well-coordinated cross Government working on the review and matters covered by the Bill. (Paragraph 200)**

The Government thanks the Committee for its positive response to the Retained EU Law dashboard. The dashboard details relevant Government Departments' best understanding of their catalogue of REUL at the time of publication. The maintenance and improvement of the Dashboard is continuing and will be further iterated and improved, as well as updated on a quarterly basis. Positive feedback on the functioning of the Dashboard has been received from a number of interested parties. We can build on this first iteration and we will further develop the functionality in our quarterly updates. The dashboard provides an excellent way for the public to understand the body of retained EU law and for the public to suggest priorities from reform or repeals.

In response to the Committee's remarks on consultation, the Government has informally engaged during the Bill's development. We are confident that a sufficient range of people and institutions were consulted ahead of and during the Bill's development. The Government will continue to engage with interested parties over the Bill's passage.

As I set out above, as part of the Government's preparations for the REUL reform programme, the Department for Business, Energy and Industrial Strategy is establishing a cross-Government programme to coordinate the reform of retained EU law. The Brexit Opportunities Unit will coordinate the programme of secondary legislation to follow the Bill. The Secretary of State is keen to discuss this programme with the Committee once the initial scoping phase of this work has been completed.