

To: The Senedd Legislation, Justice and Constitution Committee Date: 16th November 2022
Cc: Ref:
Contact:
Tel: [REDACTED]
Fax:
Email: [REDACTED]

Dear Committee

The Retained EU Law (Revocation and Reform) Bill

NFU Cymru champions Welsh farming and represents farmers throughout Wales and across all sectors. NFU Cymru's vision is for a productive, profitable, and progressive farming sector producing world renowned climate-friendly food in an environment and landscape that provides habitats for our nature to thrive. Welsh food and farming delivering economic, environmental, cultural, and social benefits for all the people of Wales whilst meeting our ambition for net zero agriculture by 2040.

We welcome the opportunity to provide the Legislation, Justice, and Constitution Committee with our thoughts on the REUL Bill. Our views set out in this submission are based on our current understanding of the Bill as introduced, an understanding which is almost certainly imperfect, which will probably evolve further as we develop our knowledge of the Bill and its implications, and as the Bill itself is amended as part of the scrutiny process.

Regulation and agriculture

1. Regulation is something which has become part and parcel of modern agriculture, and over the course of almost half a century of EU membership, agriculture has been more exposed to EU law-making than any other sector of the economy. We recognise the value and importance of sound regulation, particularly as it relates to the safeguarding of the environment, human and animal health and the protection of consumers.
2. Good regulation balances the fundamental value of an economic activity with appropriate controls which ensure that the risk of harm is minimised. In contrast poor regulation imposes burdens on business which are disproportionate to any benefits derived, these burdens add to costs, place businesses under competitive disadvantage, and may deter businesses from undertaking activities which are valuable to society.
3. NFU Cymru has long advocated for better regulation and has been at the forefront of calls to reform and improve poor regulation and regulatory practices. Having left the EU, we see opportunities to review the regulation of the agricultural sector.

4. The regulatory environment within which farmers operate needs to be proportionate in the way it impacts on farm businesses, as well as a means by which intended outcomes are delivered. Regulations must be well designed, clear, accessible, and easily understood, and Government must remain open to reviewing and updating regulations so that they stay current and fit for purpose.
5. As part of our response to the Welsh Government Agriculture (Wales) Bill White Paper in March 2021 we called for a full-scale review of the current regulatory framework that farmers operate within. We said that this should consider areas of duplication, the coherence between different regulations, areas where there is overlap between regulators and the potential for misunderstanding and misinterpretation of regulations. Decisions around regulation should be based on robust evidence with comprehensive regulatory impact assessments, with due consideration of alternative interventions that may shape business behaviours.
6. NFU Cymru does have concerns about the REUL Bill both in terms of what it proposes to do and how it proposes to do it. Good, sound law-making and regulatory reform takes time and should properly engage Ministers, Governments, legislatures as well as encompassing discussion and consultation with stakeholders, interested and affected parties.
7. The conferral of unprecedented powers on Ministers to change the regulatory landscape (with few of the usual checks and balances), coupled with revocation by default of retained EU law invites the creation of legal uncertainty and an incoherent regulatory landscape. We would instead advocate for an incremental approach to regulatory reform and the development of the law in a manner which is clear, predictable, and understood by all.
8. If we are denied the opportunity to properly work through the body of REUL then we run the risk of discarding important regulatory protections, and also incurring the opportunity cost of failing to realise the desired outcome of designing better regulation or regulatory approaches in some areas.
9. Where regulations end up being repealed without due regard to the likely impacts or there is a failure to properly understand the interdependencies of pieces of law then Governments may find themselves fighting hasty rear-guard actions to close legislative gaps which have opened up. Such a scenarios will be damaging for business and consumer confidence and certainty.
10. Regulatory changes and reforms, however desirable they are, need to be trailed as far in advance as possible, and introduced gradually so that implementation, compliance, and enforcement requirements can be aligned to the new regulatory environment and that those impacted may properly prepare for the altered regulatory landscape.
11. At this point we would remind any intending reformers of the cautionary principle of 'Chesterton's fence,' specifically that reforms should not be attempted until the reasoning behind the existing state of affairs is properly understood.

The Bill's impact in Wales and on Wales' regulatory landscape, the role of the Senedd and the implications of the deadlines introduced by the Bill

12. NFU Cymru supports the position that powers to amend legislation relating to devolved matters should rest with Welsh Ministers and where the Bill provides for concurrent powers, UK Ministers should seek the consent of Welsh Ministers before exercising these powers.
13. The Bill as drafted creates concurrent powers for Ministers of the Crown and Welsh Ministers, powers which could be exercised by Ministers of the Crown with or without the consent of Welsh Ministers, or alternatively by Welsh Ministers acting alone.
14. It is therefore difficult to arrive at a view in terms of the Bill's impacts in Wales without knowing exactly what approach might be taken to exercising the powers conferred by the Bill in respect of areas of devolved competence.
15. It is however worth noting of course that retained EU law very often intersects extensively with devolved competencies, for example the volume of legislation relating to agriculture exceeds that relating to any other sector. The exercise of powers contained in the Bill, whether by UK Government Ministers or by Welsh Ministers is likely to place a significant resource demand on stakeholders such as NFU Cymru at the very time when they are properly concerned with matters of first order importance, such as the Agriculture (Wales) Bill.
16. We are also concerned at the resource implication that this opens up for Welsh Government departments which will have to direct resources and capacity away from other important work areas, something which is likely to be exacerbated in light of any future public spending restraints. The creation of an (artificial) sunset deadline of the end of 2023 introduces further resource strain on UK and Welsh Government departments, particularly those departments which are home to large amounts of retained EU law.
17. We would not want any piece of regulation discarded without a proper assessment, including stakeholder consultation, on whether it ought to be retained, amended, or discarded, or indeed whether it would be sensible to prepare an entirely new regulation or regulatory approach. We are concerned that insufficient capacity coupled with a tight deadline heightens the risk of errors and oversights.
18. It is likely that NFU Cymru would need to conduct an extensive analysis of retained EU law and liaise with Welsh Government and UK Government departments in order to help them arrive at views as to what should happen with retained EU law, this is a process which requires time and resource. By removing the sunset provisions altogether and not working to a highly truncated timeline, we would be better placed to properly resource such an exercise, and work properly with government on post-Brexit regulatory reform.
19. The December 2023 deadline therefore imports a particular risk. A piece of REUL for which no saving provision is made will fall away at the end of next year at the expiry of the sunset deadline. We point once again to the real possibility that there will be oversights, and pieces of law which it might be desirable to save will simply fall away,

while opportunity costs will be incurred as we fail to properly examine if and how we might better integrate, and reform retained EU law within our domestic legal system.

20. We therefore call on the UK Government to consider extending the sunseting deadline beyond the end of 2023, or alternatively removing the legislative cliff-edge altogether. A review of REUL can then take place without the backdrop of a hard deadline.
21. We also foresee a potential for significant (and ultimately unnecessary, time consuming and unproductive) disputes about where devolved competence lies, and as such matters become contested then we expect that they will place a further strain on intergovernmental relations.

The lack of Welsh Government assessment of REUL and the Welsh Government's capacity to carry out such an assessment and to use its powers under the Bill

22. Welsh Government is of course best placed to speak to its decision not to undertake an assessment of REUL, and NFU Cymru's discussions with Welsh Government have not given any indication of the reasons behind its decision not to carry out an assessment of REUL.
23. This lack of assessment could be due to capacity issue and may also, in part, be down to the fact that the UK Government may not have held much in the way of pre-legislative discussions with Welsh Government as regards its intentions in relation to the REUL Bill.
24. Owing to where EU law typically intersects with devolved competence this will disproportionately impact certain portfolios, particularly those taking in matters such as agriculture and the environment. These are comparatively small departments in terms of headcounts, which are at the moment engaged with pressing issues such as the passage of the Agriculture Bill.
25. It is certainly the case that any assessment of REUL within various Welsh Government Ministerial portfolios will take time, as will the exercise of those powers conferred on Welsh Ministers under the Bill.
26. If the decision by Welsh Government not to scope out the extent of REUL is indeed due to capacity issues, then this would also indicate that the Welsh Government may also struggle to use the powers conferred upon it in the Bill.
27. Although the UK Government has sought to bring together all REUL as a dashboard, it remains the case that pieces of REUL are still being uncovered. It is quite possible that there are pieces of REUL which have not been populated to the dashboard.
28. Unless these pieces of REUL are all identified, and a decision made on whether they are to be amended, repealed, or replaced, they will fall automatically fall away on the passing of the sunset deadline creating risks of gaps in the law.

The scope of regulation-making powers granted to Welsh Ministers and scrutiny procedures attached to those powers

29. NFU Cymru acknowledges that Welsh Ministers have not sought these powers in relation to REUL for themselves, rather these powers are set to be conferred on Welsh Ministers at the initiative of the UK Government.
30. NFU Cymru believes that there should be oversight and involvement for the Senedd when it comes to the exercise of these powers by Welsh Ministers. We are uncomfortable with the way in which the Bill places democratic oversight of changes to REUL in the hands of UK and Welsh Ministers and not the Westminster and Welsh Parliaments.
31. At Clause 1(2) Welsh Ministers and Ministers of the Crown are granted powers to delay the sunset of REUL indefinitely. It therefore seems quite anomalous to us that Welsh Ministers are not granted the power to delay sunset until 23rd June 2026 in the same way as Ministers of the Crown are at Clause 2.
32. We are keen to avoid a situation arising whereby the sunset of REUL at the end of 2023 could potentially be leveraged for the purposes of reducing scrutiny of actions to amend or replace REUL. For example, we would be concerned if Ministers in London or Cardiff were to introduce legislation to amend or replace retained EU law late on in 2023, in the full knowledge that if their respective parliaments were to delay its passage, the retained EU law will simply fall away, leaving a gap in the statute book.
33. This would put Parliamentarians in an invidious position whereby they may not be able to press for the scrutiny that they might desire for fear that they would end up with no legislation at all governing a particular field.
34. Similarly, we would be concerned at the prospect of Welsh or UK Ministers making late decisions about whether to save retained EU, amend it or simply let it fall away. This is likely to leave little time for businesses to implement and comply with new regulatory requirements.
35. Clause 15 confers very wide-ranging discretions on Ministers to make such alternative provisions as they might consider appropriate with very few oversight requirements, such as duties to consult which may well have accompanied the original REUL which is being replaced. This could mean significant policy changes with no proper oversight or stakeholder engagement.

Improving on pre-Brexit standards

36. It is worth noting that one legacy of our EU membership is some of the highest environmental and animal welfare standards in the world. The starting point is therefore one of very high standards, standards which have not always been rewarded by the marketplace and which going forward we feel are at increasing jeopardy as a result of trade deals struck with countries operating to lower standards.
37. Our members are proud of these high standards of production which underpin Welsh agriculture, and we would regard the desire to uphold our high standards as commendable. These high standards must however be properly rewarded from the

marketplace, otherwise our producers will simply be placed at a competitive disadvantage.

38. NFU Cymru notes the provisions at Clause 15 which will not permit a relevant national authority to increase the regulatory burden when it replaces secondary retained EU law with another provision, and so in essence REUL represents a regulatory ceiling. As a Union we fully recognise how this forecloses on what might otherwise have been legitimate devolved policy choices directed at improving on pre-Brexit standards, within the competence of the Senedd and Welsh Ministers.
39. Setting aside the impact of Clause 15, when it comes to making decisions around standards expected of their producers, Welsh Ministers cannot be naïve to what might be happening in England, the other UK home nations, the EU27 and further afield. If they chose to pay no attention to standards in other jurisdictions whilst increasing the standards demanded of their own producers, then they will end up putting their own producers at a competitive disadvantage.
40. In this context we would also point to the provisions of the Internal Market Act 2020 which prevents Welsh Government from being able to exclude products produced to different (lower) standards from being marketed and sold within Wales' borders.
41. We recognise that the Clause 15 provision introduces new limits on devolved competence in relation to standards and we urge Welsh Government to continue to work with Governments in the other UK home nations to advocate for high standards and resist any race to the bottom when it comes standards.
42. The interrelationship between domestic regulation and international trade must be properly taken into account as part of any regulatory review process to avoid the introduction of unnecessary barriers to trade for our agri-food products.
43. We are very much of the view that over the coming years and decades, Governments in London and Cardiff will need to work together to strike the correct balance between desirable regulatory reform and regulatory stability whilst also being mindful of our obligations at international law.