

Retained EU Law (Revocation and Reform) Bill

Written Evidence for Legislation, Justice and Constitution Committee, Senedd Cymru/Welsh Parliament

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Please find my response to selected questions suggested in your call for evidence. I have focused my responses in particular on the constitutional consequences of the Bill and its impact on devolved competence. I would be happy to discuss any of these, and other issues raised by the Bill with the Committee.

The Bill's impact in Wales – General Comments:

The Retained EU Law (Revocation and Reform) Bill (hereinafter REUL Bill) is the most recent in a line of Westminster legislation dealing with the domestic legal and constitutional consequences of the UK's withdrawal from the European Union.

The Bill follows in the same vein as the EU (Withdrawal) Act 2018, and the UK Internal Market Act 2020 in that it provides new challenges to the effective operation of devolved competence, in part in the apparent pursuit of ensuring cross-UK regulatory consistency following the end of EU membership which brought with it a large body of common, harmonised (though not necessarily identical) regulation.

An additional aim appears to be to facilitate the pursuit of a deregulatory agenda, on which there may be different views across the Governments of the UK. Further the Bill seeks to limit regulation which creates obstacles to trade, which, if interpreted to mean intra-UK trade, could have significant repercussions for devolved regulatory competence.

The approach of the proposed legislation does nothing to support the more collaborative and cooperative intergovernmental modes of governance that might operate across the UK, i.e. through the common frameworks process. The frameworks process was introduced as a means of managing (which includes, where appropriate, accommodating) regulatory divergence. There is no acknowledgement in the Bill of the fact that the existing regulations that fall within the scope of the powers to restate, revoke or replace, may form part of a framework. Under the agreed process for the operation of frameworks however, any proposed change in policy and amendment to the law should be raised with the other governments. None of the powers under the Bill come with a trigger for the frameworks process to be engaged. The approach of the Bill risks undermining the frameworks process.

Additionally, the ideologically-driven commitment in the Bill to a sunset clause for retained EU law (except that transposed by Act of Parliament or the Senedd) places resource pressures on Welsh government departments, requiring them to work through the options of restating, replacing, or rejecting existing legislation, and up against a deadline not of their making. The Welsh Government's existing programme of government will not have taken into consideration the resources required for this exercise.

The Bill provides for concurrent powers for UK and Welsh Ministers to restate, revoke or replace the law within areas of devolved competence. The absence of any requirement to seek consent from Welsh Ministers (or the Senedd) before UK Government Ministers can exercise powers in areas of devolved competence is out of line with previous Brexit legislation, and appears anomalous, and without clear justification.

To what extent might the Bill impact Wales’ regulatory landscape?

The operation of the powers under the Bill has the potential to generate a number of unwelcome impacts on Wales’ regulatory landscape. The potential for *either* government to take actions that restate, revoke or replace existing regulations within devolved competence may create uncertainty, and complexity for those seeking to navigate the statute book applying to Wales.

Further, any attempt to that the Welsh Government may make to improve pre-Brexit standards will engage the requirement in clause 15 (5) that any replacement regulation does not increase the regulatory burden – which is defined in clause 15 (10) as including (among other things)— (a) a financial cost; (b) an administrative inconvenience; (c) *an obstacle to trade* (my emphasis) or innovation; (d) an obstacle to efficiency, productivity or profitability; (e) a sanction (criminal or otherwise) which affects the carrying on of any lawful activity.

This formulation differs from the definition of burden in the Legislative and Regulatory Reform Act 2006, as the Bill includes ‘an obstacle to trade’ – which might be read as a limitation on the exercise of competence where this may result in regulatory divergence that may impact on intra-UK trade flows. Importantly, if it is interpreted in this way, this would go further than the already problematic UK Internal Market Act, which impacts the effects but not legal capacity to regulate.

The Bill ties the devolved governments to an agenda that has been set elsewhere, cutting into the operation of devolved competence, regardless of policy commitments the Welsh Government might have made.

The Bill should be amended to provide either for the removal of UK Government ministerial powers within areas of devolved competence, or for a consent requirement by at least the Welsh Government for the exercise of these powers. Further, the ‘impact on trade’ provision in clause 15(10) should be removed, or more broadly the requirement that the regulatory burden is not increased should be excluded from applying to law making by the devolved legislatures and ministers, within devolved competence.

Implications arising from the potential deadlines introduced by the Bill

The initial deadline for action before the operation of the sunset revoking existing retained (and subsequently, assimilated) EU law is set at ‘the end of 2023’ (Clause 1(1)). This may be extended, to the end of 2026, but the Bill only gives this power to extend to a UK Minister (Clause 2). There is no clear justification why that power is not also given, for law within devolved competence, to Welsh Government ministers.

The date selected for the operation of the sunset does not appear to have been reached on the basis of the feasibility of the task at hand. The true extent of retained EU law within the UK

legal order is a live question, and there is further a lack of detail about measures falling within devolved competence. Against this background, there is an understandable concern that legislation may be sunsetted inadvertently, due to a lack of knowledge.

If a sunset clause is to be incorporated, then it should reflect a more realistic time scale, and should also apply only to positively identified measures, to avoid unforeseen gaps with possible unexpected consequences.

Professor Jo Hunt

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