

Evidence for the Legislation, Justice and Constitution Committee of the Senedd – LCM on the Retained EU Law Revocation and Reform Bill

This evidence was drafted by Dr Viviane Gravey and Dr Lisa-Claire Whitten, Queen's University Belfast. It builds on their ESRC-funded research for Brexit & Environment (VG) and Post-Brexit Governance NI (LCW) on the REUL Bill¹² and prior evidence to the House of Commons Public Bills Committee³.

1. the Bill's impact in Wales

The Bill will have three different types of impact on Wales, both direct and indirect, and in the short or longer term. In the short term, the Bill will require a large amount of work from both the Welsh government and the Senedd – the first impact of the Bill is indirect, in terms of opportunity costs for the devolved administrations. While the Bill is a priority for the UK government it is not one for the devolved administrations who are effectively told to put their plans on hold for 2023. In the medium term, the Bill will have a direct impact on the Welsh regulatory landscape, in both reserved and devolved matters falling within the scope of the Bill (REUL SIs) – it remains to be seen who will be making decisions on the future of these instruments. In the longer term the Bill risks fueling regulatory divergence across the UK with as yet difficult to measure indirect impacts on the UK internal market and Wales' place in it.

2. to what extent the Bill might impact Wales' regulatory landscape

The Bill's impact on the Welsh regulatory landscape depends on two separate issues: first, what is the extent of REUL falling within the scope of the Bill? Second, who will be making decisions on the future of these rules, and how?

We do not know the extent of REUL, either at the UK level, or in Wales. At the UK level, the Dashboard is incomplete: key departments such as DEFRA have not yet provided information as to what part of their REUL is built on primary, or secondary (thus within scope) legislation. The Dashboard does not indicate whether rules listed are reserved or not. The Dashboard furthermore does not include the 1400 'new' REUL uncovered by the National Archives. In Wales, beyond requesting that the UK Government expands the Dashboard to devolved matters, mapping or listing of within-scope REUL has been published. Conversely in NI, both DAERA (600) and DFI (500) have conducted initial reviews of REUL within their remit. While the two devolution settlements are different, the NI numbers provide a good proxy for the

¹ <https://www.brexitenvironment.co.uk/2022/10/17/ten-questions-for-the-reul-bill-in-northern-ireland/>

² <https://www.brexitenvironment.co.uk/2022/10/10/reul-bill-devolution/>

³ https://publications.parliament.uk/pa/bills/cbill/58-03/0156/PBC156_Retained_EU_Law_1st2nd_Compilation_08_11_2022.pdf

consequent scale of REUL in Wales which would fall within scope of this Bill. But mapping across the four administrations will differ: different choices made at the time of transposing a directive (whether to do so via primary or secondary legislation) are now having a direct impact on whether a piece of REUL is in scope of the Bill or not. For example, the Strategic Environmental Assessment directive was transposed via primary legislation in Scotland (thus not concerned by REUL bill) but via secondary legislation elsewhere (Environmental Assessment (Scotland) Act 2005 (replacing interim SSI 2004/258), and SI 2004/1633 (England), SI 2004/1656 (Wales), SRO 2004/280 (NI)). A decision made by the Scottish Government in 2005 thus puts Strategic Environmental Assessment outside the scope of the REUL Bill in Scotland, while it is in scope for the rest of the UK.

A further uncertainty on the impact is to do with who will be in charge of deciding on the future of REUL in Wales in devolved matters. The Bill as it stands allows for decisions on those items of devolved REUL to be taken either jointly or concurrently by the UK and Devolved administrations. This, as Charles Whitmore (Wales Governance Centre) explained to the House of Commons Public Bills Committee is highly concerning:

“It is a constitutional anomaly within our legislation that the UK Government can use concurrent powers in the Bill to legislate in areas of devolved competence without any form of seeking consent from relevant devolved Ministers. It is egregiously out of keeping not only with the Sewel convention, which is already under significant strain but with other EU withdrawal-related pieces of legislation.”⁴

This is even more of an issue due, once more, to past decisions during transposition. If, for simplicity's sake, a single UK-wide SI was taken to transpose a directive in a devolved area, then there is a real risk that if the UK Government were to revoke this piece of REUL it would do so for the whole of the UK.

As such, it is critical that the UK government commits to not making decisions on REUL in devolved matters without the consent of the devolved administrations (and ideally, of the devolved assemblies). But, if the 2023 sunset is kept, this would then put the onus on the Welsh government to restate all relevant REUL within a very short timeframe.

3. what role should the Senedd have in the revocation and reform of retained EU law in devolved areas
4. implications arising from the potential deadlines introduced by the Bill
5. the Welsh Government's decision not to carry out its own assessment of REUL, including not forming its own view on what is devolved and reserved

The Senedd has managed to carve a role for itself in the Brexit SIs work – an area where consent had been agreed, via the 2018 MOU on an intergovernmental basis. But the 2023 sunset, and the lack of REUL mapping from the Welsh Government create a situation in which there is likely to be a trade-off between on the one hand, parliamentary oversight of policy-making and on the other hand, ensuring no single piece of REUL falls off the 2023 sunset cliff-edge by mistake, or through lack of time to restate it.

As such and because the Welsh Government is not in favour of this Bill and its potential to weaken regulations in Wales, the Senedd may wish to push instead for a blanket policy by the Welsh Government

⁴ https://publications.parliament.uk/pa/bills/cbill/58-03/0156/PBC156_Retained_EU_Law_1st2nd_Compilation_08_11_2022.pdf

to *restate* REUL and focus parliamentary work on the cases where the Welsh Government would like to revoke or amend REUL (if any). To do so, however, the Welsh Government must be able to identify REUL that exists within its competence because, under the Bill, ‘sunsetting’ is the default.

6. the Welsh Government’s capacity to carry out such an assessment and to use its powers under the Bill

The finding by the National Archive of 1400 new pieces of relevant REUL is concerning – six months after the publication of the UKG dashboard, more REUL keeps on emerging. This makes the 2023 deadline untenable if it is maintained, even more so in devolved areas where mapping has just started/is yet to start, REUL will fall, and regulatory gaps will occur simply through lack of time.

The Welsh Government’s position so far has been to reject the Bill’s draw on its resources and to refuse to engage in lengthy mapping: this position, while understandable, means that REUL in Wales may be most at risk out of the four administrations, as it is more likely to not be identified in time. The UKG dashboard is explicitly “not intended to provide an authoritative account of REUL that sits within the competence of the Devolved Administrations”⁵ this puts an onus on devolved institutions to carry out specific mapping.

On the issue of REUL mapping, it is worth noting that, during the Common Frameworks initiative, 65 areas of devolved competence in Wales were found to ‘cross-sect’ with, and be underpinned by, EU law and policy.⁶ Findings from the Common Frameworks mapping would be a good place to start mapping the potential scope of REUL that is applicable in Wales but, as yet, ‘missing’ from related policy debates.

Notably, powers granted Welsh Ministers under Schedule 2 of the European Union Withdrawal Act 2018⁷ to amend retained EU law were used to pass 88 Welsh statutory instruments. Any legislation that was amended by these 88 WSIs will likely be subject to REUL sunsetting and may not (yet) feature in any mapping exercise, including that of the UKG dashboard.

7. the Welsh Government’s role in, and plans for, the UK Government’s joint review, announced alongside the Bill

Notwithstanding the UK Government stated intention to work with “Government Departments and the Devolved Administrations” to carry out a review before the end of 2023 to “determine which retained EU law can be reformed to benefit the UK, which can expire and which needs to be preserved and incorporated into domestic law in modified form” its procedure for doing so is unclear. This being so it is worth noting that alongside powers granted Welsh Ministers to review/revoke/restate REUL within devolved competence the Bill also enables central UK government Ministers to review/revoke/restate REUL in devolved areas. This creates the possibility of conflicting actions being taken in respect of REUL at devolved and central government level and again underlines the key question regarding who will make decisions about the future of REUL in Wales.

⁵ See ‘Retained EU Law – Public Dashboard’ Available:

<https://public.tableau.com/app/profile/governmentreporting/viz/UKGovernment-RetainedEULawDashboard/Guidance>

⁶ See UK Government ‘Frameworks Analysis’ 2021. Available:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1031808/UK_Common_Frameworks_Analysis_2021.pdf (accessed 11 November 2022).

⁷ <https://www.legislation.gov.uk/ukpga/2018/16/schedule/2>

Clarifying the process by which the UK government plans to carry out its 'joint review' and determining the extent to which this truly will be *jointly* administered by devolved and central Ministers ought to therefore be an urgent priority for the Welsh Government.

8. the scope of regulation-making powers granted to the Welsh Ministers by the Bill including the scrutiny procedures attached to those powers

The scope should be in line with those of Ministers of the Crown, including revising the sunset date. This is even more the case for Wales where no mapping has been produced and thus where the risk of accidentally sunsetting REUL is the highest. The sunset cliff-edge discourages lengthy scrutiny – considering the breadth of the work that must be done, scrutiny risks being a hurried afterthought.

9. whether the Bill might introduce new limitations for the Welsh Government, which wants to improve pre-Brexit standards, where possible

In line with our answer to question 1, main limitations are those of opportunity costs (Welsh Government having to delay its own agenda, including pre-Brexit standards) to focus on fighting to stand still; and indirect impact of facilitated deregulation in England, which may make improving pre-Brexit standards in Wales more onerous for Welsh businesses (and skew the level playing field in the UK).

10. steps that the Committee could take in future, including with regards to powers exercised under the Bill

The Committee is in a unique position to discuss and comment on the impact that powers under the Bill will have on the broader post-Brexit policy infrastructure, in particular the Common Frameworks and the operation of the UK Internal Market Act. The few provisional Common Frameworks agreed all refer to REUL and will need to be amended. The framework analysis of where Common Frameworks were needed or not was based on both an assumption that there was no significant risk of divergence in many areas (an assumption voided by the REUL Bill) and that pre-existing ways of working between the administrations were sufficient. This Committee should ask that equivalent efforts to cooperate (and at least institute an early warning of any change) is put in place between the four administrations whether the policy topic is covered by a provisional common framework, or pre-existing arrangements.

11. implications for Wales' legal landscape, including the introduction of new categories of legislation, and issues relating to clarity and accessibility

This Bill risks making the already messy post-Brexit legal landscape even messier with reduced clarity and accessibility, and much greater intra-UK divergence, potentially overnight (at the end of 2023).