

## Agenda Supplement – Constitutional and Legislative Affairs Committee

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Meeting Venue:

Committee Room 1 – The Senedd

Meeting date: 30 April 2018

Meeting time: 14.45

For further information contact:

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Committee Clerk

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### – Supplementary briefing

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Please note the documents below are in addition to those published in the main Agenda and Reports pack for this Meeting

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#### 11 The EU (Withdrawal) Bill: Evidence session 2 – Cabinet Secretary for Finance

15.30

(Pages 1 – 29)

Mark Drakeford AM, Cabinet Secretary for Finance

CLA(5)–13–18 – Research Service Briefing Latest Developments

CLA(5)–13–18 – Suggested questions

CLA(5)–13–18 – Legal Summary: House of Lords Report Stage amendments to the EU (Withdrawal) Bill

CLA(5)–13–18 – Supplementary Legislative Consent Memorandum laid by the Welsh Government



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## SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM (MEMORANDUM NO.2)

### EUROPEAN UNION (WITHDRAWAL) BILL

1. This Legislative Consent Memorandum is laid under Standing Order (“SO”) 29.2. SO29 prescribes that a Legislative Consent Memorandum must be laid, and a Legislative Consent Motion may be tabled, before the National Assembly for Wales if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies the legislative competence of the National Assembly.

The European Union (Withdrawal) Bill (the “Bill”) was introduced in the House of Commons on 13 July 2017. . The most recent version of the Bill (HL Bill 79 as introduced in the House of Lords) was published on 18-01-2018 and can be found at [Bill documents — European Union \(Withdrawal\) Bill 2017-19 — UK Parliament](#)

#### Policy Objective(s)

2. The UK Government’s stated policy objective for the Bill is to ensure that the UK withdraws from the EU with maximum certainty, continuity and control. It aims to end the supremacy of European Union (“EU”) law in UK law and to convert EU law as it stands at the moment of exit into domestic law. The Bill also creates temporary powers for Ministers to make secondary legislation to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has withdrawn, so that the domestic legal system continues to function correctly outside the EU. The Bill also enables domestic law to reflect the content of a withdrawal agreement under Article 50 of the Treaty on European Union once the UK leaves the EU.

#### Summary of the Bill

3. The Bill is sponsored by the Department for Exiting the European Union.
4. The Explanatory Notes set out the UK Government’s view that the Bill performs four main functions. It:
  - repeals the European Communities Act 1972
  - converts EU law as it stands at the moment of withdrawal into domestic law before the UK leaves the EU;
  - creates powers to make secondary legislation, including temporary powers to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left the EU and to implement a withdrawal agreement; and
  - maintains the current scope of devolved decision making powers in areas currently governed by EU law.

## **Changes to the Bill since the publication of the first Legislative Consent Memorandum**

5. The Welsh Government laid a Legislative Consent Memorandum in respect of the Bill (as introduced on 13 July 2017) on 12 September 2017, based on the version of the Bill as introduced to Parliament. The Memorandum confirmed that the Welsh Government would not be able to recommend to the Assembly that it gives consent to the Bill as drafted at that stage.
6. Since the publication of the first Memorandum, the Bill has been amended during scrutiny in the House of Commons and House of Lords. This Supplementary Memorandum sets out those changes to the Bill which require the consent of the Assembly. Annex 1 lists the clauses which were amended in the House of Commons. Annex 2 lists government amendments tabled at Report stage in the House of Lords and one non-government amendment that was agreed.
7. Consent is required for the provisions or amendments listed in both annexes either because they modify the Assembly's legislative competence or because they fall within the Assembly's legislative competence.
8. The Welsh Government's objections with the Bill as introduced and which subsequently led to proposed amendments jointly prepared with the Scottish Government being promoted in the House of Commons, related to four issues all of which have been substantially addressed in the amendments made or proposed to the Bill or the Inter-governmental Agreement related to it and published on 25 April:
  - The potential for Minister of the Crown powers to be used to make corrections to the Government of Wales Act: this power has been removed in respect of Clause 7 (and Clause 8 is being deleted in its entirety) and the necessary changes to the Government of Wales Act 2006, prepared in liaison with ourselves, included on the face of the Bill;
  - The fact that where Ministers of the Crown exercise concurrent powers to 'reach over' and make corrections to legislation within devolved competence, there was no requirement to gain the consent of the Welsh Ministers: while the Bill has not been amended, the Inter-governmental Agreement makes clear that UK Ministers will normally seek the consent of Welsh Ministers where UK Ministers legislate on matters the Welsh Ministers can legislate on, an undertaking equivalent to the Sewel Convention requirements;
  - The new constraints on executive and legislative competence proposed under Clause 11: this Clause is being substantially amended to make clear that only where regulations have been

made following an affirmative resolution of Parliament, and normally only with the consent of the National Assembly, will any new constraints on competence be introduced. These will be time-limited and specifically related to areas where it has been agreed that UK wide frameworks are needed and the Inter-governmental Agreement makes a clear and equivalent commitment that the UK Government will not bring forward legislation related to England in these areas for as long as any constraints on the devolved legislatures apply;

- The extent of restrictions placed on Welsh Ministers powers to make corrections to legislation within devolved competence, particularly in respect of retained direct EU law, compared to those of Ministers of the Crown: the blanket restriction on Welsh Ministers correcting direct EU law is being removed, and a restriction will only apply in areas where regulations have been made under Clause 11. The requirement for Welsh Ministers to seek the consent of Ministers of the Crown when making certain types of corrections within devolved competence has been replaced with a requirement to consult.

9. The Cabinet Secretary for Finance made an oral statement on 25 April updating the Assembly on developments in respect of the EU (Withdrawal) Bill [ [Welsh Government | Oral Statement - The EU \(Withdrawal\) Bill](#) ]. The statement outlined in further detail why the Welsh Government felt able to commend the Inter-governmental Agreement and the amendments related to it to Members.

### **Scrutiny of Welsh Ministers' subordinate legislation powers**

10. Paragraphs 19-21 of the first Memorandum described the scrutiny arrangements which would apply to the subordinate legislation making powers provided to Welsh Ministers by clause 10 and Schedule 2. ( <http://www.assembly.wales/laid%20documents/lcm-ld11177/lcm-ld11177-e.pdf> ) These relevant provisions have been amended to reflect the removal of the power to establish a public authority and the removal of the power to make regulations to ensure continued compliance with international obligations.

11. In addition, Schedule 7 has been amended to provide for the establishment of a sifting committee of the National Assembly. The Welsh Ministers will be required to lay a draft of regulations that they consider should be subject to the negative resolution procedure. The sifting committee will then make a recommendation as to the appropriate procedure for the regulations in question.

12. The relevant amendments are further described in Annex 2.

### **Reasons for making these provisions for Wales in the European Union (Withdrawal) Bill**

13. As set out in the first Memorandum, the Welsh Government agrees that legislation is necessary to provide clarity and certainty for citizens and businesses as we leave the EU. We accept in principle the need for provisions which convert EU law into domestic law, and provisions which create temporary powers to make secondary legislation to make corrections to laws that would otherwise no longer operate appropriately once the UK has left the EU. The Welsh Government also agrees that ideally such legislation should be made by Parliament, for the UK as a whole, as this would offer the greatest degree of consistency and certainty for citizens and businesses.

### **Welsh Government position on the Bill as amended**

14. The Cabinet Secretary for Finance confirmed in his oral statement on 25 April that taken together, the amendments tabled by UK Government Ministers for Lords Report, and the associated Inter-Governmental Agreement [ [Intergovernmental Agreement on the European Union \(Withdrawal\) Bill - GOV.UK](#) ] which was published on 25 April, are sufficient to enable the Welsh Government to recommend that the National Assembly give its legislative consent to the Bill.

### **Conclusion**

15. This supplementary memorandum describes the relevant changes requiring Assembly consent made to the EU (Withdrawal) Bill since introduction, and confirms the Welsh Government's position to now recommend that consent to the Assembly.

**Rt Hon Carwyn Jones AM**  
**First Minister of Wales**  
**April 2018**

**ANNEX 1 – LEGISLATIVE CONSENT MEMORANDUM: EUROPEAN UNION (WITHDRAWAL) BILL – CLAUSES FOR WHICH CONSENT IS REQUIRED - AMENDMENTS MADE IN THE HOUSE OF COMMONS**

Clause or Schedule amended	Effect
Clause 7(2) (Dealing with deficiencies arising from withdrawal).	Defines the scope of the Minister of the Crown’s powers to correct deficiencies in retained EU law with reference to an exhaustive list.
Clause 7(3) (Dealing with deficiencies arising from withdrawal).	Provides that there is a deficiency in retained EU law in circumstances where a Minister of the Crown considers it is of a similar category to any deficiency which falls within clause 7(2) or is of a kind described or provided for in regulations made by a Minister of the Crown.
Schedule 2, Part 1, paragraph 1(3) (Power to deal with deficiencies).	Confirms that the requirements in clauses 7(2) to (9) apply for the purposes of regulations made by a devolved authority under Part 1 of Schedule 2 with the exception of the reference to a Minister of the Crown in clause 7(3)(b).
Schedule 2, Part 1, paragraph 5 (Requirement for consultation in certain circumstances).	Removes the restriction which prevents a devolved authority from making regulations to correct deficiencies without the consent of a Minister of the Crown, by replacing it with a requirement to consult the Secretary of State instead.
Schedule 8, Part 4, Paragraph 27(5) and (6) (Retention of existing EU law).	Provides an exception from paragraph 3 of Schedule 1 which provides that there is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU

	<p>law. Paragraph 27(5) permits certain legal challenges to the validity of retained EU law to be brought where these relate to anything which happened before exit day, and are made within three months of exit day.</p>
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**ANNEX 2 – LEGISLATIVE CONSENT MEMORANDUM: EUROPEAN UNION (WITHDRAWAL) BILL – CLAUSES FOR WHICH CONSENT IS REQUIRED - AMENDMENTS TABLED FOR LORDS REPORT AND NON-GOVERNMENT AMENDMENTS AGREED AT LORDS REPORT**

**GOVERNMENT AMENDMENTS TABLED FOR LORDS REPORT**

<b>Clause/Schedule Number</b>	<b>Amendment(s) Number</b>	<b>Subject of Amendment</b>
After Clause 6	26	A new clause which provides for the status of different categories of retained EU law and how those categories of law are to be amended. The provision draws a distinction between retained direct principal EU legislation (for example, an EU regulation which forms part of domestic law on and after exit day under clause 3) and retained direct minor EU legislation (anything other than retained direct principal EU legislation)
Clause 7	32A, 32B, 33A and 34A - 34D	The amendments restrict the deficiencies power in clause 7 from being exercised in certain ways. The power cannot be exercised to establish a public authority, impose or increase fees or amend the Government of Wales Act 2006. Those restrictions also apply to the Welsh Ministers equivalent regulation making power in Part 1 of Schedule 2 (paragraph 1).
Clause 11	89DA	The original clause placed a broad restriction on the Assembly's competence which would generally have prevented it from modifying retained EU law (subject to certain exceptions). Clause 11 has been

		<p>replaced with a new provision which only restricts the Assembly's competence (and that of the other devolved legislatures) in circumstances where a Minister of the Crown has made regulations specifying a description of retained EU law which cannot be modified by the Assembly.</p> <p>No regulations are to be made by a Minister of the Crown unless the Assembly has made a consent decision in relation to the laying of the draft, or a period of 40 days has expired without the Assembly having made such a decision.</p> <p>The Minister of the Crown's power to make regulations is limited to a period of two years beginning with exit day and any regulations made using the power will be revoked at the end of five years beginning with the time at which the regulations came into force.</p>
Schedule 2, Part 1, new paragraph 3A and 23A	89ZZD	Places restrictions on the Welsh Ministers competence to modify retained direct EU legislation when exercising the powers to correct deficiencies in retained EU law (3A) and to implement the withdrawal agreement (23A). This includes modifications that would breach section 109A of the Government of Wales Act 2006 if the provision were made in an Assembly Act.
Schedule 2, Part 3, paragraph 21(4)	89B	The amendment prevents the power to implement the withdrawal agreement from being exercised by a devolved authority to establish a public authority.
Schedule 2, Part 3, paragraph 28	89D	Amends the definition of devolved competence that is to apply to any regulations made by the Welsh Ministers to Implement the Withdrawal agreement under Part 3 of

		Schedule 2.
Schedule 3, Part 1, paragraph 2	92AB	Provision amended to reflect the amendments made to clause 11. This includes that the Welsh Ministers will not have the competence to make, confirm or approve any subordinate legislation in circumstances where the law being modified is of a description specified in regulations made by a Minister of the Crown.
Schedule 3, Part 2, new paragraph 36A	92DB	Amendment inserts a new provision in the Government of Wales Act 2006 (section 157ZA) which provides for explanatory statements to be provided in regulations made by a Minister of the Crown under section 80(8) or 109A of the Government of Wales Act 2006.
Schedule 3, Part 2, new paragraph 39A	92E	Amends the technical standards reservation in Part 2 of Schedule 7A to the Government of Wales Act 2006 (section C7, paragraph 77).
Schedule 7, Part 1, new paragraph 3A	70C	Paragraph 3A makes provision for a Committee of the Assembly to sift certain regulations involving Welsh Ministers which are subject to the negative procedure in circumstances where the regulations have been laid before the Assembly, along with a memorandum setting out the statement and the reasons for the Welsh Ministers opinion. The regulations cannot be made unless a Committee of the Assembly has either made a recommendation as to the appropriate procedure for the instrument or a period of 14 days has elapsed without a recommendation being made.
Schedule 7, Part 1, new paragraph 4B	72ZC	Paragraph 4B provides an exception from the sifting committee provisions in paragraph 3A in respect of certain regulations made by the Welsh

		Ministers in urgent cases.
Schedule 7, Part 2, new paragraph 13A	77E	Provides that paragraph 3A (Committee of the Assembly to sift regulations involving Welsh Ministers) applies to regulations made by the Welsh Ministers under Part 3 of Schedule 2.
Schedule 7, Part 3, new paragraph 18A	82	Inserts a new paragraph which provides for the anticipatory exercise of powers in relation to retained EU law. It provides that any power to make regulations under the Act which modifies retained EU law is capable of being exercised before exit day so that the regulations come into force on or after exit day.
Schedule 8, Part 1, new paragraphs 3A to 3F	111	Defines the circumstances where certain existing powers to make, confirm or approve subordinate legislation can be exercised to modify retained EU law. The amendments also provide for the parliamentary procedure which is to apply to the subordinate legislation in question, which depends on such factors as the category of retained law and the nature of the modification. For example, subordinate legislation which amends or revokes any retained direct principal EU legislation is to be subject to the same procedure that would apply before Parliament and the devolved legislatures as it would apply to that legislation if it were amending or repealing primary legislation.
Schedule 8, Part 1, new paragraphs 5A to 5C	112	Defines the circumstances where future powers to make, confirm or approve subordinate legislation can be exercised to modify retained EU law and provides for the

		parliamentary procedure which is to apply to the subordinate legislation in question.
Schedule 8, Part 1, new paragraph 5D	112A	Imposes a requirement on a relevant authority to provide an explanatory statement for instruments amending or revoking regulations made under section 2(2) of the European Communities Act 1972. This includes a requirement to make a statement as to why, in the opinion of the relevant authority, there are “good reasons” for the amendment or revocation.

**NON-GOVERNMENT AMENDMENTS AGREED AT LORDS REPORT**

Clause 5	15	Replaces clause 5(4) and (5). The provision provides that the Charter of Fundamental Rights is to form part of domestic law on or after exit day with the exception of the Preamble and Chapter V.
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