

Agenda – External Affairs and Additional Legislation Committee

Meeting Venue:	For further information contact:
Committee Room 2 – Senedd	Alun Davidson
Meeting date: 25 September 2017	Committee Clerk
Meeting time: 14.00	0300 200 6565
	SeneddEAAL@assembly.wales

Private pre-meeting (13.45 – 14.00)

- 1 **Introductions, Apologies, Substitutions and Declarations of Interest**
(14.00)
- 2 **The European Union (Withdrawal) Bill and its implications for Wales – evidence session**
(14.00–15.30) (Pages 1 – 15)
Mark Drakeford, Cabinet Secretary for Finance and Local Government
Piers Bisson, Welsh Government
Hugh Rawlings, Welsh Government
- 3 **Papers to note**
(15.30–15.40)
 - 3.1 **Paper to note 1 – Correspondence from the Chair of the Finance Committee regarding the Welsh Government's draft budget 2017–18**
(Pages 16 – 18)
 - 3.2 **Paper to note 2 – Correspondence from the Secretary of State for Wales regarding the European Union (Withdrawal) Bill**
(Pages 19 – 20)



- 3.3 Paper to note 3 – Correspondence from the Chair of the Constitutional Affairs Committee to the Secretary of State for Wales regarding the European Union (Withdrawal) Bill**
(Pages 21 – 28)
- 3.4 Paper to note 4 – Correspondence from the Secretary of State for Wales regarding the Committee's report on the implications of Brexit for Welsh ports**
(Pages 29 – 30)
- 3.5 Paper to note 5 – Correspondence from Lord Jay of Ewelme regarding the report by the House of Lords EU Committee**
(Pages 31 – 32)
- 3.6 Paper to note 6 – Correspondence from the Cabinet Secretary for Finance and Local Government regarding 'Brexit and Fair Movement of People'**
(Pages 33 – 34)
- The Welsh Government's paper, 'Brexit and Fair Movement of People', can be accessed here: https://beta.gov.wales/sites/default/files/2017-09/Brexit%20and%20Fair%20Movement%20of%20People-%28EN%29main_WEB.pdf
- 3.7 Paper to note 7 – Correspondence from the Llywydd regarding the implementation of the Wales Act 2017**
(Pages 35 – 36)
- 3.8 Paper to note 8 – Correspondence from the Secretary of State for Wales to the Llywydd regarding the implementation of the Wales Act 2017**
(Pages 37 – 38)
- 3.9 Paper to note 9 – Correspondence from the First Minister regarding Welsh Government amendments to the European Union (Withdrawal) Bill**
(Page 39)
- 3.10 Paper to note 10 – Legislative Consent Memorandum – the European Union (Withdrawal) Bill**
(Pages 40 – 51)

- 4 Motion under Standing Order 17.42(vi) to resolve to exclude the public for the remainder of the meeting**
(15.40)

- 5 The implications for Wales of the UK's withdrawal from the European Union – monitoring the negotiations.**
(15.40–16.10) (Pages 52 – 68)

- 6 Forward work programme**
(16.10–16.30) (Pages 69 – 72)

Agenda Item 2

National Assembly for Wales External Affairs and Additional Legislation Committee: Written Evidence submitted by the Cabinet Secretary for Finance and Local Government

Introduction

The External Affairs and Additional Legislation Committee has invited me to give oral evidence to the committee on 25 September on matters associated with the UK's withdrawal from the European Union. The European Union (Withdrawal) Bill ("the Bill") will, I assume, be one of the matters central to the committee's concerns, and this memorandum sets out the Welsh Government's view of the Bill. The committee will also wish to have regard to the Legislative Consent Memorandum tabled in the Assembly by the Welsh Government earlier this month.

The Bill: overview

The Bill received its Second Reading in the House of Commons on 7th and 11th September. It will next be considered by a Committee of the Whole House in October, once Parliament resumes after the Party Conference Recess.

The Bill is quite short (as was the European Communities Act 1972): 19 clauses and 9 Schedules. The content generally is consistent with that outlined in the previous UK Government's White Paper published in March. So:

- Clause 1 repeals the 1972 Act
- Clauses 2-6 provide both for the continuation in force of "EU-derived domestic legislation" (ie primary and secondary legislation already in place in the UK giving effect to obligations flowing from EU membership), and for the incorporation into domestic law of "direct EU legislation" (ie EU legislation, such as Regulations, which by virtue of the UK's membership of the EU has formed part of domestic law without the need for implementing domestic legislation) and other EU law rights etc., such as general principles of EU law. These bodies of law, together with certain other materials, constitute "retained EU law"; the effect of the provisions is to convert the bulk of EU law into UK domestic law and give it effect on and after "exit day" (a date to be specified in regulations, but which is anticipated to be at the end of March 2019). The European Court of Justice's (ECJ) jurisdiction in respect of this body of law ceases to exist on and after exit day.
- Clauses 7-9 confer on Ministers of the Crown wide-ranging delegated legislative powers "to prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law,

arising from ...withdrawal..." (this is the so-called "correcting power", ensuring that domestic law can continue to work properly immediately after "exit day"); to ensure the UK's continuing compliance with its international obligations following withdrawal; and to make any provision in domestic law necessary to give effect before exit to any withdrawal agreement arising from the process of EU negotiations. These are all "Henry VIII powers", in that they will allow Ministers to modify existing primary, as well as secondary, legislation. The powers are time-limited – the "correcting power" and the international obligations power cease to be available to Ministers two years after "exit day" (ie on the anticipated timetable they will no longer be available from April 2021), and the withdrawal agreement power can only be exercised before exit day. They are subject to a number of specified limitations, for example they cannot be used to impose or increase taxation, amend the Human Rights Act or create new criminal offences. Schedule 7 to the Bill makes provision with respect to Parliamentary scrutiny and approval of instruments made or to be made by virtue of the powers in these clauses.

- Clauses 10-11, and Schedules 2-3, are concerned with the implications for the Devolved Administrations: they make provision with respect to the powers of Ministers of devolved administrations and place renewed limits on devolved legislatures' legislative competence in respect of "retained EU law". These provisions are discussed further below.
- Clauses 12-19 and Schedules 4-9 make a range of technical provision, make interpretation provision, and specify the jurisdictional extent of the Bill (it applies to all parts of the UK). Clause 19 is about commencement: the order making powers in clauses 7-9, and their equivalent provision for Ministers in devolved administrations, come into force on Royal Assent, whereas most of the other parts of the Bill, including clause 11, will be brought into force by regulations, which we anticipate would specify exit day as the date for provisions to come into force.

Looking in more detail at the conceptual framework in the Bill, for our purposes the key concept is "retained EU law". The Bill identifies as "retained EU law" after withdrawal:

- (i) 'EU-derived domestic legislation', which will be preserved, and so retained, under clause 2, which acts as a savings provision for (among other things) Statutory Instruments made since 1973 under the European Communities Act 1972;

- (ii) Direct EU legislation, which will be converted, and so retained in UK domestic law, under cl 3; and all other directly-enforceable EU law, which will also be converted, and so retained, under cl 4.

The importance of the concept of “retained EU law” is that it is used to help define the scope of new Ministerial powers to modify the existing law in the context of Brexit and that it will operate as a constraint on the National Assembly’s legislative competence post-Brexit.

The Bill provides three major delegated powers, each of which is drafted in terms of a Minister of the Crown making provisions by regulation that the Minister considers “appropriate”:

1. A correcting power in cl 7 to address 'any failure of retained EU law to operate effectively' or other deficiency (a term the Bill does not define);
2. A power to make provision to prevent or remedy any breach of international obligations arising from Brexit in cl 8; and
3. A power to implement the withdrawal agreement in cl 9.

And clause 11 places a new limitation on the competence of the devolved legislatures, to the effect that they cannot (unless they were able to do so before the date of withdrawal) “modify, or confer power by subordinate legislation to modify, retained EU law”.

Implications for Devolution

(a) Ministerial Powers

Clause 10 states that “Schedule 2 confers powers [on devolved administrations’ Ministers] to make regulations...which correspond to the powers conferred [on Ministers of the Crown] by sections 7 to 9”. By virtue of paragraph 1 of Schedule 2, the Welsh Ministers will apparently have the same “correcting powers” as Ministers of the Crown in respect of “retained EU law”.

These are Henry VIII powers to modify primary and secondary legislation (subject to the same limitations applying to the Minister of the Crown powers), and are time-limited – they will not be available for use after March 2021. Paragraph 2 makes clear that Welsh Ministers’ correcting powers extend (only) to modifying instruments within the National Assembly’s legislative competence, whether the instruments were made by Parliament or by the National Assembly, or by Ministers of the Crown or by Welsh Ministers.

But what is wholly unexpected, and unwelcome, is the limitation on devolved administrations’ Ministers’ powers provided by Schedule 2 paragraph 3. Welsh (and other devolved administrations’) Ministers can only make “correcting”-type orders in respect of domestic legislation . If the legislation currently in force falls into the category of “direct EU legislation” (for example Regulations made by the EU institutions themselves), that is correctable only by UK Ministers.

It is unclear why this limitation is being proposed but it would seem to have a significant impact on the scope of Welsh Ministers' powers. Our initial assessment is about 60% of instruments within devolved competence potentially requiring modification fall within the category of "direct EU legislation" and will therefore not be capable of correcting action by the Welsh Ministers. (That is not of course to say that they all require modification.)

The limitation also appears potentially to have perverse or unintended consequences. It may well be desirable to modify different instruments within one regulatory scheme in the same way to deal with a common problem, but the Bill potentially frustrates this. For example, the Habitats Directive and the Water Framework Directive (both implemented by domestic legislation) form part of the same regulatory scheme as the Eels Regulation (made by the EU). The first two elements of the scheme (plans for protected sites and water quality), having been implemented by domestic legislation, would be amendable by the Welsh Ministers, but the third (plans concerning eel conservation), which is a Regulation made by the EU, would not. This makes little sense.

The Welsh Ministers' hand is further weakened by the fact that any amendment proposed to be made needs to be consistent with provision made by Ministers of the Crown in relation to "direct EU legislation".

The powers conferred on devolved administrations' Ministers are, so far as they overlap with those of Ministers of the Crown, concurrent – either set of Ministers can make modifying provision. Sub-paragraph (2) of paragraph 1 of Schedule 2 makes specific provision for joint action by a Minister of the Crown and a devolved administration's Ministers. That may be useful, but it leads to another point. Part 1 of Schedule 7 to the Bill makes provision for scrutiny of instruments being made, or proposed to be made, under the Bill's delegated powers. It specifies those particular circumstances where the affirmative resolution procedure is required and, in effect, says that in all other cases the negative resolution procedure is to be followed.

Where a Minister of the Crown acting alone (not jointly with a devolved administration's Minister) is making the instrument, then it is for Parliament to apply the appropriate procedure; if it is the Welsh Ministers acting alone, that task is the National Assembly's. If there is joint action being taken under paragraph 1(2) of Schedule 2, then, by virtue of paragraph 2 of Schedule 7, both Parliament and the National Assembly apply the appropriate procedure.

But as noted above, Welsh Ministers' powers are more limited in respect of devolved matters than a Minister of the Crown's (because "direct EU legislation" is beyond their competence to modify) and such powers as they will have will be concurrent with those of a Minister of the Crown rather than exclusive to them. If a Minister of the Crown chooses to modify an EU Regulation, that would be an instrument solely within the scrutiny responsibilities of Parliament (no question of joint action with the

Welsh Ministers could arise in respect of this “direct EU legislation” even where the subject-matter is of an obviously devolved character), and while individual Assembly Members could of course make public comments, the National Assembly as a body formally would have no say. The same would apply if the Minister of the Crown unilaterally (rather than jointly) took corrective action with respect to a matter, even if it would be within the powers of the Welsh Ministers to deal with it. The scrutiny obligation would then be discharged by Parliament rather than the National Assembly, because the relevant action would be being taken by a Minister of the Crown.

Finally, the Committee should note that the new Schedule 7A to the Government of Wales Act (the list of reserved matters created by the Wales Act 2017) will require modification, because some of the definitions of reserved matters refer directly to EU documents. The “normal” way of amending Schedule 7A will be by way of an Order in Council under s.109 of the Government of Wales Act 2006; any such Order requires approval in draft by both the National Assembly and each House of Parliament before being made. But as the Withdrawal Bill is drafted, the amendments could equally be made by regulations made by a Minister of the Crown under clause 7, and such regulations would not require National Assembly approval before being made. In the Welsh Government’s view, any amendments made to Schedule 7A should be by way of a process that enables the National Assembly to have its say and decide whether to give its consent to the proposed amendments.

(b) The National Assembly’s Legislative Competence

This matter is dealt with in clause 11, and in a way that the Welsh Government considers wholly unacceptable and regressive. Our objections are first that the policy reflected in the clause is potentially extremely damaging to the principle of devolution and secondly, if implemented as drafted, the result would be a devolution settlement lacking clarity and of considerably greater complexity.

The policy in the Bill is summarised by Professor Elliott of Cambridge University:

“At the moment, devolved legislatures are forbidden from doing things that breach EU law, even if the thing they wish to do concerns a subject-matter that is devolved. When the UK leaves the EU, by default that restriction will go — in effect causing powers to flow from Brussels to the devolved capitals (as well as, in relation to non-devolved and English matters, London). But the Bill erects a diversion, providing that repatriated powers, even when they relate to devolved subjects, will instead go to London. The UK Government will then decide which of them to hand to the devolved institutions, the implication being that some will not be handed over.” (emphasis added).

The Welsh Government cannot accept it is appropriate for the legislative competence of the National Assembly to be constrained by this “diversion” of powers in policy areas hitherto considered as wholly appropriate for devolution. Such a

policy presents a direct threat to the principle of devolution as a fundamental feature of the UK constitution.

In our policy document *Brexit and Devolution*, we have acknowledged that, in respect of certain matters covered by specific policy “frameworks”, there may be a need for a coordinated and agreed approach between the four governments, for example to support effective functioning across the UK market and prevent barriers emerging which would unreasonably constrain businesses. We have made clear our willingness to engage constructively with other administrations on these matters. But the Bill envisages instead a new set of legal constraints on the competences of the devolved institutions in respect of these matters, which we consider wholly unacceptable.

The UK Government has contended that the “diversion” policy reflected in clause 11 is transitional in nature, and the provision is intended only to allow time and space for “intensive discussion and consultation with devolved authorities on where lasting common frameworks are needed”. It is, however, notable that, whereas the Ministerial powers discussed above are all in their different ways time-limited, there are no time limits on the operation of clause 11; its allegedly transitional character is in no way reflected or provided for on the face of the Bill. The committee may wish to draw its own conclusions as to the significance of this omission.

The Welsh Government rejects fundamentally the policy underpinning clause 11. But even if we accepted that approach, we would still have grave concerns about the implications for the clarity and complexity of the devolution settlement.

As the committee is aware, our current devolution settlement operates on the basis of “conferred powers” – legislative competence is conferred by Westminster on the National Assembly expressly in respect of a range of listed matters. The Wales Act 2017 will amend the Government of Wales Act to bring the Welsh settlement into line with Scotland by implementing a “reserved powers” model – the assumption will be that legislative competence lies with the National Assembly unless the Act says (by specifying a list of reserved matters) that competence is retained by Westminster.

Under the Withdrawal Bill, legislative competence in respect of “retained EU law” will lie with Westminster but Orders in Council may be made in accordance with cl.11 (2) which, by dis-applying the general rule to any extent will, in effect, confer legislative competence on the National Assembly in respect of the matters to which the disapplication applies – this is the “handing over” of powers to which Professor Elliott refers. (The UK Government describes this as a “release” of powers.)

The starting assumption is therefore that legislative power in respect of “retained EU law” lies at Westminster but legislative competence in respect of a set of matters within the general category of retained EU law will nevertheless be conferred on the National Assembly by Order in Council.

The overall result will be that in respect of law other than retained EU law, the National Assembly will operate under a reserved powers model but in respect of retained EU law, it will operate essentially under a type of conferred powers model – the conferred powers being in respect of those matters released by Order in Council from the general reservation of competence to Westminster in relation to retained EU law. If the UK Government is to have its way, those conferred powers might in turn be subject to exceptions, to allow Westminster to retain exclusive competence in respect of those matters where “frameworks” will operate.

In the Welsh Government’s view, this is an extremely complex and confusing basis on which to construct a properly-functioning system of legislative devolution. Even if we agreed with the policy behind clause 11, we would have strongly to oppose the way the Bill impacts on the structural foundations of devolution, reversing as it does many of the gains for devolution which adoption of the Wales Act reserved powers model aims to create.

The Welsh Government’s response to the Bill

The Committee will be aware that the Welsh Government laid a Legislative Consent Memorandum in respect of the Bill, on 12 September. The Memorandum sets out the Welsh Government’s view of the requirement for the legislative consent of the Assembly in respect of the relevant clauses of the Bill, and confirms that we will not be in a position to recommend consent unless the Bill is amended to address our concerns. Subsequently, we have also published, jointly with the Scottish Government, a series of proposed amendments which seek to address the concerns we have raised. The First Minister also made a Statement in Plenary on 19 September, explaining our rationale for the publication of these amendments, which focus on the Bill’s implications for the devolution settlements, but do not address wider issues about the UK’s withdrawal from the EU.

We hope that Parliamentarians will find these suggested amendments useful, as they begin their detailed scrutiny of the Bill.

Conclusion

The committee will wish to form its own view about the merits of the Withdrawal Bill. For its part, as our Legislative Consent Memorandum explains, for reasons set out in that document and in this written evidence the Welsh Government will not feel able to advise the National Assembly to give its legislative consent to the Bill as currently drafted. The committee is invited to note that conclusion.

Mark Drakeford AM

September 2017.

By virtue of paragraph(s) vi of Standing Order 17.42

Document is Restricted

Chair, Children, Young People and Education Committee
Chair, Climate Change, Environment and Rural Affairs Committee
Chair, Culture, Welsh Language and Communications Committee
Chair, Economy, Infrastructure and Skills Committee
Chair, Equality, Local Government and Communities Committee
Chair, External Affairs and Additional Legislation Committee
Chair, Health, Social Care and Sport Committee

20 July 2017

Dear Committee Chairs

Welsh Government Draft Budget 2018–19

At our meeting on 19 July, the Finance Committee agreed its approach to the budget scrutiny. I am writing to all Chairs of subject committees to share our thinking, and to encourage your committees to consider how you can contribute to delivering the most coherent and effective scrutiny of the Government's spending plans.

As you will be aware this is the first year we will be scrutinising the draft budget under the revised Standing Orders and accompanying protocol. I discussed this with the Committee Chairs at the Chairs forum on 12 July.

Budget focus

We have agreed to continue the approach followed in previous years, whereby budget scrutiny is centred on the four principles of financial scrutiny: affordability, prioritisation, value for money and process. The principles are:

- **Affordability** – to look at the big picture of total revenue and expenditure, and whether these are appropriately balanced;
- **Prioritisation** – whether the division of allocations between different sectors/programmes is justifiable and coherent;
- **Value for money** – Essentially, are public bodies spending their allocations well – economy, efficiency and effectiveness (i.e.) outcomes; and



- **Budget processes** – are they effective and accessible and whether there is integration between corporate and service planning and performance and financial management.

Following a stakeholder event in North Wales, we have identified a number of areas which we would like to see the focus of the scrutiny, these are:

- *Financing of local health boards and health and social care services*
- *Approach to preventative spending and how is this represented in resource allocation (Preventative spending = spending which focuses on preventing problems and eases future demand on services by intervening early)*
- *Sustainability of public services, innovation and service transformation*
- *Welsh Government policies to reduce poverty and mitigate welfare reform*
- *The Welsh Government’s planning and preparedness for Brexit*
- *How the Welsh Government should use new taxation and borrowing powers*
- *How evidence is driving Welsh Government priority setting and budget allocations*
- *How the Future Generations Act is influencing policy making*

We would encourage you to use some of these areas as the focus for your budget scrutiny.

Draft budget consultation

As has been the previous practice, we will be undertaking a consultation on behalf of all Committees over the summer recess and the responses will be shared with you in the Autumn in order to assist your scrutiny of the draft budget.

Timetable

As you will be aware by now the dates for the draft budget have been agreed and are:

- Outline Draft Budget Laid – 3 October
- Detailed Draft Budget Laid – 24 October
- Deadline for Finance Committee to Report – 28 November
- *Debate on the Draft Budget – 5 December*
- Annual Budget Motion tabled – 19 December



As you will be aware the provisions in relation to the reporting by policy committees has changed, and you are now able to report in your own right (if you so wish), and your reports can be used as a supporting document to the draft budget debate. As a Committee we are considering how we can maintain a strategic, oversight role of financial scrutiny, but in the meantime if you have any questions about any aspect of the draft budget process, please feel free to contact me or the Clerk to the Finance Committee, Bethan Davies, 0300 200 6372,
Bethan.Davies@assembly.Wales

Yours sincerely

A handwritten signature in black ink that reads "Simon Thomas". The signature is written in a cursive style with a large initial 'S'.

Simon Thomas

Chair



Agenda Item 3.2



Rt Hon Alun Cairns MP
Secretary of State for Wales
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David Rees AM
Chair
External Affairs and Additional Legislation Committee
National Assembly for Wales
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Ref: 340SUB 17

30th July 2017

Dear Mr Rees,

Thank you for your letter of 19 July regarding the European Union (Withdrawal) Bill which was introduced into the House of Commons on 13 July.

The Government is committed to ensuring that withdrawal from the EU is a successful and orderly process for Wales and for the whole of the UK. The European Union (Withdrawal) Bill is an essential Bill in delivering this. The Government discussed the Repeal Bill with the Welsh Government before the Bill's introduction and shared a copy of it two weeks in advance. I expect the introduction of the Bill to trigger an intensification of these discussions.

Officials from the UK Government and the Welsh Government have discussed the content of the Welsh Government's White Paper *Securing Wales' Future*. It is clear from those discussions that the UK Government and the Welsh Government share many common outcomes from EU exit. We agree on the need for the freest possible trade access to the EU, on the need to ensure continuity at the point at which the UK leaves the EU, and on the need for UK-wide or GB-wide frameworks in certain areas. These discussions have influenced the drafting of the Bill which supports each of these outcomes.

I am keen to work with the National Assembly for Wales including the External Affairs and Additional Legislation Committee to assist with consideration and scrutiny of the Bill. I would like to reiterate my offer to give evidence to your Committee as we take

this work forward. We would like all parts of the UK to come together in support of the legislation, which is crucial to delivering the referendum outcome

Ynys

Al

Rt Hon Alun Cairns MP
Secretary of State for Wales
Ysgrifennydd Gwladol Cymru

Rt Hon David Davis MP
Secretary of State for Exiting the European Union

31 July 2017

European Union (Withdrawal) Bill

At our last meeting on 17 July we gave some initial consideration to the European Union (Withdrawal) Bill, which received its first reading in the House of Commons.

We thought it would be helpful to highlight some initial concerns we have identified. As part of our work on the Bill with the Assembly's European and External Affairs Committee, we are seeking views on these concerns over the summer.

1. The powers of the National Assembly for Wales

Clause 11 of the Bill freezes the competence of the National Assembly for Wales in relation to EU law. The National Assembly for Wales must currently comply with EU law and the Bill says that, after exit, the National Assembly for Wales will still have to comply with the body of EU law that will be retained after exit.

The Explanatory Notes to the Bill say that this "is intended to be a transitional arrangement while decisions are taken on where common policy approaches are or are not needed. It provides that the devolved legislatures or administrations may only modify retained EU law to the extent that they had the competence to do so immediately before exit. This means that devolved institutions will still be able to act after exit as they could prior to exit in relation to retained EU law".



However, the Bill does not include any such freezing in relation to the Westminster Parliament, which means that the UK's withdrawal from the EU is having an uneven impact on the constituent countries that make up the UK. As for moving out of this transitional arrangement, the Explanatory Notes clearly say that the agreement of the National Assembly for Wales will be needed when deciding where responsibilities will be held in future.

We are therefore concerned about the appropriateness of this transitional arrangement and in particular that the National Assembly for Wales will still have to comply with retained EU law, while the Westminster Parliament will not.

2. Procedures for subordinate legislation

The Bill sets out the procedure that applies to regulations made under the Bill, including regulations made by the Welsh Ministers that will be laid before the National Assembly for Wales.

Paragraphs 1(2), 5(2) and 6(2) of Schedule 7 to the Bill set out the regulations that are subject to the affirmative resolution procedure. Any other regulations are subject to the negative procedure (but see also regulations made in urgent cases, for example under paragraph 3 of Schedule 7).

We are concerned that the Bill dictates to the National Assembly for Wales the procedure to be applied to regulations that are made by the Welsh Ministers in devolved areas and that are laid before, and scrutinised by, the National Assembly for Wales.

We are also concerned that the procedure chosen for some of the regulation-making powers in the Bill may not be appropriate.

3. Powers to make regulations under clauses 7, 8 and 9 and Schedule 2 – scope of the powers

The powers to make regulations under clauses 7, 8 and 9 and Schedule 2 set out a complex mix of rules as to when the powers can and cannot be used.

The powers in clauses 7, 8 and 9 and Schedule 2 are limited in various ways. For example, the clause 7 power must only be used to deal with any failure or deficiency in retained EU law arising from withdrawal. The clause 8 power must only be used to secure compliance



with international obligations arising from withdrawal. The clause 9 power must only be used for the purposes of implementing the withdrawal agreement.

There are also other limitations on what the regulations can do. For example, the power to make regulations in clauses 7, 8 and 9 and Schedule 2 cannot be used to impose a tax or to change the Human Rights Act 1998 (see clauses 7(6), 8(3) and 9(3) for the full list of such limitations).

However, the Bill says that the power to make regulations under clauses 7, 8 and 9 and Schedule 2 includes the power to do anything that could be done by an Act of Parliament. This means that regulations could be used to amend primary legislation, including primary legislation passed by the National Assembly for Wales. The Committee has taken a strong interest in the use of Henry VIII powers when scrutinising Bills and as a matter of principle believes that, where such powers are used, the affirmative procedure must apply.

In addition, UK Ministers (but not the Welsh Ministers) could use powers given to them in the Bill to make regulations that amend the Government of Wales Act 2006, in a way that changes the powers of the National Assembly for Wales. Any such regulations would be subject to the affirmative procedure (see paragraphs 1(2)(f), 5(2)(f) and 6(2)(f) of Schedule 7 to the Bill).

We are concerned about:

- **whether the powers to make regulations under the Bill are as clear as they could be;**
- **the extent of the powers and accordingly whether they should be subject to more limitations or fewer limitations;**
- **whether the extent of the powers in clauses 7, 8, 9, and Schedule 2 (and the consequential and transitional powers in clause 17) provide scope for them to be used inappropriately;**
- **whether it is appropriate for the Bill to give the UK Ministers and the Welsh Ministers the power to make regulations that could be used to amend primary legislation made by the National Assembly for Wales; and**



- **whether it is appropriate that the Bill gives the UK Ministers the power to make regulations that could change the powers of the National Assembly for Wales.**

4. Powers to make regulations under clause 7 and Schedule 2 – powers of UK Ministers compared to powers of the Welsh Ministers

Clause 7 of the Bill gives very broad powers to UK Ministers to make subordinate legislation in the form of regulations; those regulations will be able to do anything that an Act of Parliament can do, and therefore the regulations could be used to amend primary legislation.

The broad scope of such powers always raises constitutional concerns, but the Committee highlights certain aspects of these powers that are of particular concern to Wales.

The Bill creates the concept of “retained EU law” which will apply in the UK after exit day. Retained EU law is made up of:

- “EU-derived domestic legislation” (clause 2 of the Bill). This category of retained EU law includes all the regulations that have been made by the Welsh Ministers to implement EU law in Wales. For example, the Marketing of Fruit Plant and Propagating Material (Wales) Regulations 2017 were made by the Welsh Ministers to implement EU Directives on the marketing of fruit.¹
- “direct EU legislation” (clause 3 of the Bill). This category of retained EU law includes legislation made at EU level which has direct effect in Member States, meaning that the Member State does not have to do anything to implement the law because it applies automatically once it is made at EU level. For example, EU Regulation 1169/2011 was made by the European Parliament and the Council of the European Union (based on a proposal from the European Commission), and sets out requirements around food packaging and labelling. Other examples of direct EU legislation includes EU Regulations in areas such as fishing, agriculture, environment and medicines.

¹ For information, examples of EU-derived domestic legislation made by the Welsh Ministers are included in the Annex



- Other EU rights and obligations (clause 4). This category of retained EU law includes any other EU rights and obligations, not captured under clause 3 or 4. For example, article 18 of the Treaty on the Functioning of the European Union prohibits discrimination on the ground of nationality, and that right will form part of retained EU law (although the actual text of article 18 will not form part of retained EU law, the substance of the right will).

While UK Ministers are given very broad powers in relation to all three categories of retained EU law, the Welsh Ministers are given far narrower powers. In particular, the Welsh Ministers are not given any powers to modify retained EU law that comes within clause 3 or 4 of the Bill, even where the retained EU law applies in Wales and is in devolved areas such as fishing, agriculture and the environment. Also, while the Welsh Ministers are given powers to modify retained EU law that comes within clause 2, those powers are significantly narrower than the powers given to UK Ministers; Schedule 2 to the Bill sets out the constraints that apply to the powers given to the Welsh Ministers.

Notwithstanding our concerns at the breadth of powers generally, we are also concerned at the implications of giving powers to UK Ministers, including powers to modify direct EU legislation in devolved areas in Wales, which are much broader than the powers being given to the Welsh Ministers.

5. The Charter of Fundamental Rights

Clause 5(5) of the Bill says that the Charter of Fundamental Rights will not be part of domestic UK law on or after exit day, but clause 5(6) says that this does not affect the retention of fundamental rights or principles. So while the Charter itself will not form part of domestic UK law after exit, the underlying fundamental rights and principles will. The Explanatory Notes to the Bill say: "By converting the EU *acquis* into UK law, those underlying rights and principles will also be converted into UK law, as provided for in this Bill".

We are concerned about whether those underlying fundamental rights and principles are sufficiently safeguarded under the Bill. In particular, are there any fundamental rights and principles that will not be converted into domestic legislation?

I hope you find our initial views helpful as we consult over the summer and that they will be of use as you take the Bill through the UK Parliament.

I am copying this letter to the Secretary of State for Wales, the First Minister of Wales, the National Assembly's Chair of the External Affairs and Additional Legislation Committee, the



Llywydd of the National Assembly for Wales, the Chair of the House of Commons Public Administration and Constitutional Affairs Committee, the Chair of the House of Lords Constitution Committee, the Chair of the House of Lords EU Select Committee and the Chair of the Finance and Constitution Committee in the Scottish Parliament.

Yours sincerely

Huw Irranca-Davies

Huw Irranca-Davies

Chair

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.



Annex - Examples of EU-derived domestic legislation made by the Welsh Ministers

School Milk (Wales) Regulations 2017/724

Marketing of Fruit Plant and Propagating Material (Wales) Regulations 2017/691

Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2017/567

Environmental Impact Assessment (Agriculture) (Wales) Regulations 2017/565

Bathing Water (Amendment) (Wales) Regulations 2017/453

Building Regulations &c. (Amendment) (Wales) Regulations 2016/611

Animal Feed (Composition, Marketing and Use) (Wales) Regulations 2016/386

Animal Feed (Hygiene, Sampling etc. and Enforcement) (Wales) Regulations 2016/387

Common Agricultural Policy (Amendment) (No. 2) (Wales) Regulations 2016/217

Nitrate Pollution Prevention (Wales) (Amendment) Regulations 2015/2020

Natural Mineral Water, Spring Water and Bottled Drinking Water (Wales) Regulations 2015/1867

Planning (Hazardous Substances) (Wales) Regulations 2015/1597

Country of Origin of Certain Meats (Wales) Regulations 2015/1519

Environmental Damage (Prevention and Remediation) (Amendment) (Wales) Regulations 2015/1394

Common Agricultural Policy Basic Payment and Support Schemes (Wales) Regulations 2015/1252

Common Agricultural Policy (Integrated Administration and Control System and Enforcement and Cross Compliance) (Wales) Regulations 2014/3223

Rural Development Programmes (Wales) Regulations 2014/3222

Agricultural Subsidies and Grants Schemes (Appeals) (Wales) (Amendment) Regulations 2014/2894



Animal By-Products (Enforcement) (Wales) Regulations 2014/517

African Horse Sickness (Wales) Regulations 2013/1662

Animal Health (Miscellaneous Fees) (Wales) Regulations 2013/1241

Plant Health (Fees) (Wales) Regulations 2012/1493

Beef and Veal Labelling (Wales) Regulations 2011/991

Eggs and Chicks (Wales) Regulations 2010/1671

Air Quality Standards (Wales) Regulations 2010/1433

Animals (Divisional Veterinary Managers) (Wales) Regulations 2010/619

Private Water Supplies (Wales) Regulations 2010/66

European Fisheries Fund (Grants) (Wales) Regulations 2009/360

Bluetongue (Wales) Regulations 2008/1090

Export and Movement Restrictions (Foot-and-Mouth Disease) (Wales) Regulations 2007/3296

Environmental Noise (Wales) Regulations 2006/2629



Agenda Item 3.4



Rt Hon Alun Cairns MP
Secretary of State for Wales
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David Rees AM
Chair, External Affairs Committee
National Assembly for Wales
Cardiff Bay
Cardiff
CF99 1NA

59SOS 17

29th August 2017

From Mr Rees,

Report by the National Assembly for Wales's External Affairs Committee on its inquiry into the implications of Brexit for Welsh ports

Thank you for providing me with a copy of your Committee's report on the impact on Welsh ports of the UK's exit from the European Union.

The importance of ports such as Milford Haven and Holyhead to the economy of Wales, and the UK more widely, should never be underestimated. I recognise this, and earlier this year I visited the Port of Holyhead to discuss the challenges and opportunities for the port arising from the vote to leave the EU, and Guto Bebb MP, Parliamentary Under Secretary of State for Wales, also recently met with representatives of Irish Ferries to have similar discussions.

You will be aware that the UK Government recently published the first in a series of papers on the Government's approach to the future partnership we want with the EU, covering the Government's goals for the UK's future customs arrangements. Given the role of our ports this will of course be of great importance to Wales.

As the UK leaves the EU and its customs union, we will be guided by what delivers the greatest economic advantage to the UK. We want our new customs arrangements to meet three objectives:

- To keep trade with the EU as frictionless as possible;
- To avoid a 'hard border' between Ireland and Northern Ireland;
- To establish an independent international trade policy.

And of course we must avoid any arrangement that creates customs barriers within the UK.

The Government is actively engaging with the devolved administrations, including the Welsh Government, and will continue to do so as we seek a deal that secures the specific interests of England, Scotland and Northern Ireland, as well as those of all parts of Wales.

Handwritten signature in blue ink, appearing to read 'Alun Cairns'.

Rt Hon Alun Cairns MP
Secretary of State for Wales
Ysgrifennydd Gwladol Cymru



David Rees AM
Chair
External Affairs and Additional Legislation Committee
National Assembly for Wales
Cardiff Bay, CF99 1NA

19 July 2017

Dear David

Brexit: devolution - new House of Lords EU Committee report

On behalf of the Committee Chairman, Lord Boswell of Aynho, who is currently unwell, I am pleased to enclose a copy of the new report by the House of Lords EU Committee, published today, on *Brexit: devolution*.

The report concludes that the UK Government needs to work with the devolved governments to achieve an outcome that protects the interests of all parts of the UK. No durable solution will be possible without the consent of all the nations of the UK. Our report sets out in detail the particular circumstances in Scotland, Wales and Northern Ireland, the impact upon devolved competences, legislating for Brexit and legislative consent, and engagement with the devolved institutions.

We have been particularly grateful in the course of our work to meet colleagues from our equivalent Committees in the devolved legislatures, both before and after the referendum, and I am pleased to note that our officials are in regular contacts. In order to build on these mechanisms for collaboration, we propose in our report "more regular joint meetings with members of cognate Committees with responsibility for Brexit-related issues in the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly, and in the House of Commons, for the duration of the Brexit negotiations. These joint meetings could provide an opportunity to hear informally from UK and devolved Government Ministers, and to discuss issues of mutual interest and concern."

In order to facilitate this, and having consulted with the Senior Deputy Speaker of the House of Lords, Lord McFall of Alcluith, who chairs the House's Informal Brexit Liaison Group, we would like to propose quarterly informal meetings of representatives of Committees involved in scrutinising Brexit in the devolved legislatures, the House of Commons and the House of Lords for the duration of the Brexit negotiations. These meetings would provide a means to share information on issues of common interest, hear from experts and stakeholders on the Implications of Brexit, and, most important, provide an opportunity to hear from the UK and devolved Governments on the progress of negotiations and their discussions through the JMC (EN) and other fora.

We would like to keep the arrangements for such meetings as flexible as possible. However, we envisage inviting attendees from Committees in our legislatures scrutinising EU matters,

constitutional issues and delegated/ secondary legislation, with four or five participants in total from each legislature. We would also envisage a rotating venue for these meetings, although we are happy to host the meeting in the House of Lords whenever this is helpful.

We would like to begin our dialogue at an early point in the autumn, in order to maximise our ability to influence and scrutinise the Brexit negotiations. Accordingly, we would like to invite you to the first meeting in the House of Lords, in the week of **Monday 9 October**. I have invited our officials to liaise to finalise the date of the meeting.

I do hope you are willing to participate in this dialogue, which I am sure will be mutually beneficial in our respective efforts to scrutinise the Brexit process and hold our Governments to account. If you have any questions or comments about the proposal, please do not hesitate to contact me or my officials.

I have written in similar terms to the Committees with responsibility for EU Affairs, constitutional issues, and delegated/ secondary legislation in each of the devolved legislatures, and to relevant Committees in the House of Commons.

Yours Sincerely



Lord Jay of Ewelme

On behalf of Lord Boswell of Aynho

Mark Drakeford AM/AC
Ysgrifennydd y Cabinet dros Gyllid a Llywodraeth Leol
Cabinet Secretary for Finance and Local Government



Llywodraeth Cymru
Welsh Government

David Rees AM
Chair
External Affairs and Additional Legislation Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

David.Rees@assembly.wales

7 September 2017

Dear David,

Following the publication of our White Paper 'Securing Wales' Future' in January, we signalled our intention to publish a series of further policy documents to extend the debate both here in Wales and the UK. The first of these policy documents, 'Brexit and Devolution', was published in June.

Today, the Welsh Government has published its second policy document in this series, 'Brexit and Fair Movement of People' which is enclosed. You will have received the Written Statement issued this morning, and I intend to make an Oral Statement to the Assembly during Plenary on 19 September.

This evidence based policy document builds on the high level policy approach to future migration that was outlined initially in our White Paper, 'Securing Wales' Future'. The document proposes a way forward in which Wales, and the UK, could continue to benefit from the huge contribution that people from other countries make to the economy and public services in Wales, alongside responding to concerns about aspects of inward migration. In doing so, it sets out a pragmatic and principled future migration policy, linked closely to employment and in which exploitation of workers is tackled properly. It has been informed by extensive stakeholder engagement on the importance of inward migration to the economy and public services in Wales, as well as expert advice and analysis on migration and tackling the exploitation of workers.

Our policy document is intended as a constructive contribution to the open debate that is needed across the UK on the UK's future immigration policy. I believe the approach it outlines is one that could command wide support from people across Wales and the whole UK, and would provide a good basis for the UK's negotiations with the EU on future migration between the UK and the EU.

Bae Caerdydd • Cardiff Bay
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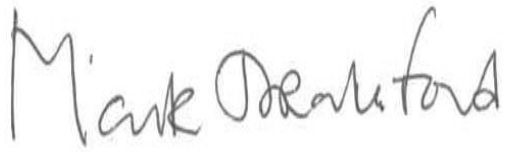
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Gohebiaeth.Mark.Drakeford@llyw.cymru
Correspondence.Mark.Drakeford@gov.wales

Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

I look forward to discussing our proposals with you and your Committee in the near future.

A handwritten signature in black ink that reads "Mark Drakeford". The signature is written in a cursive, slightly slanted style.

Mark Drakeford AM/AC

Ysgrifennydd y Cabinet dros Gyllid a Llywodraeth Leol
Cabinet Secretary for Finance and Local Government



Elin Jones AC, Llywydd

Cynulliad Cenedlaethol Cymru

Elin Jones AM, Presiding Officer

National Assembly for Wales

Agenda Item 3.7

Committee Chairs
National Assembly for Wales
Cardiff Bay
CF99 1NA

18 August 2017

Dear Committee Chair

Implementation of the Wales Act 2017

Thank you for the consideration by your Committee of the Secretary of State for Wales' consultation on the above.

Please find attached my response to the Secretary of State for Wales. In light of comments received from the Finance Committee and discussions with Welsh Government officials, I have suggested changing the day on which the reserved powers model will come into effect from 6 April 2018 to 1 April 2018, to coincide with the date on which the new devolved taxes will come on stream. The Secretary of State for Wales will specify the Principal Appointed Day in Regulations.

I will keep you informed of any further correspondence from the Secretary of State for Wales on this matter.

Yours sincerely

Elin Jones AM
Llywydd

Enc

Croesewir gohebiaeth yn Gymraeg neu Saesneg / We welcome correspondence in Welsh or English

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Elin Jones AC, Llywydd

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Elin Jones AM, Presiding Officer

National Assembly for Wales

The Rt Hon Alun Cairns MP
Secretary of State for Wales
1 Caspian Point
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CF10 4DQ

Your ref: 250SUB 17
Our ref: PO210/EJ/HG

18 August 2017

Dear Alun

Thank you for your letter dated 10 July proposing 6 April 2018 as the Principal Appointed Day on which the reserved powers model for Wales will come into effect.

I have considered the proposals you put forward, and consulted the Assembly's committees. On this basis, I agree with you that the new arrangements should come into effect in April 2018 on the same date as the new devolved taxes take effect - the Land Transaction Tax and Landfill Disposals Tax. I am advised that this will happen on 1 April 2018. I would therefore suggest that the PAD should be 1 April 2018. This would mean that the reserved powers model would come into effect on Easter Sunday.

You also indicated in your letter that your officials were considering whether the two year parliamentary session would give rise to any implications for the Legislative Consent Motions which might be required. I look forward to receiving this further information in due course.

Yours sincerely

Elin Jones AM
Llywydd

cc Chairs of Assembly Committees

Croesewir gohebiaeth yn Gymraeg neu Saesneg / We welcome correspondence in Welsh or English

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Pack Page 36

Agenda Item 3.8



Rt Hon Alun Cairns MP
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Y Swyddfa Breifat

18 SEP 2017

PO 262

Private Office

Elin Jones AM
Presiding Officer
National Assembly for Wales
Cardiff Bay
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Ref: 414SUB 17

17^{fed} September 2017

Wales Act 2017: Principal Appointed Day (PAD)

Further to your letter of 18 August, I am writing to confirm that I am content for the Principal Appointed Day (PAD) to be the 1 April 2018. I have instructed my officials to proceed on that basis. They will of course work closely with your officials to ensure a smooth transition to the new devolution settlement.

I am copying this letter to the First Minister and have written to him in similar terms.

Rt Hon Alun Cairns MP
Secretary of State for Wales
Ysgrifennydd Gwladol Cymru



UK Government
Llywodraeth y DU

Rt Hon Alun Cairns MP
Secretary of State for Wales
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The Rt Hon Carwyn Jones AM
First Minister of Wales
Welsh Government
Tŷ Hywel
Cardiff Bay
CF99 1NA

Ref: 414SUB 17

17 September 2017

Alun Cairns

Wales Act 2017: Principal Appointed Day (PAD)

Further to your letter of 25 August, I am writing to confirm that I am content for the Principal Appointed Day (PAD) to be the 1 April 2018. I have instructed my officials to proceed on that basis. They will of course work closely with yours to ensure a smooth transition to the new devolution settlement.

I am copying this letter to the Presiding Officer and have written to her in similar terms.

Xams,
Alun

Rt Hon Alun Cairns MP
Secretary of State for Wales
Ysgrifennydd Gwladol Cymru



David Rees AM
Chair
External Affairs and Additional Legislation Committee
National Assembly for Wales
SeneddEAL@assembly.wales

19 September 2017

Dear David

I am writing to let you know that the Welsh and Scottish Governments have today jointly published a set of proposed amendments to the European Union (Withdrawal) Bill.

The First Minister of Scotland and I have also written to the Prime Minister, setting out our rationale for the amendments we have developed. The amendments if taken up would enable us to consider recommending to the Assembly that it gives legislative consent to the Bill, and I would welcome your continued support as we press the case for the deficiencies in this Bill to be addressed.

Yours sincerely

CARWYN JONES

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Agenda Item 3.10

LEGISLATIVE CONSENT MEMORANDUM

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.
2. The European Union (Withdrawal) Bill (the “Bill”) was introduced in the House of Commons on 13 July 2017. The Bill can be found at: [Bill documents — European Union \(Withdrawal\) Bill 2017-19 — UK Parliament](#)
3. This Memorandum relates to the Bill as introduced on 13 July 2017.

Policy Objective(s)

4. 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

5. The Bill is sponsored by the Department for Exiting the European Union.
6. 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.

7. The clauses of particular relevance to devolved matters are:

- Clauses 2 – 6 (which preserve and retain EU law in domestic law, including in areas within devolved competence)
- Clauses 7 – 9 (which provide powers for UK Ministers to correct retained EU law and implement international obligations and the withdrawal agreement with the EU, including in devolved areas)
- Clause 10 and Schedule 2 (which provide powers for Welsh Ministers to correct retained EU law and implement international obligations and the withdrawal agreement with the EU);
- Clause 11 and Schedule 3 (which constrain the competence of the National Assembly for Wales and the Welsh Ministers); and
- Schedule 7 (which sets out legislative procedures to be followed for various secondary legislation provisions in the Bill, including powers of Welsh Ministers and UK Ministers acting in devolved areas).

Provisions in the Bill for which consent is required

8. The full list of clauses which are within or modify the legislative competence of the National Assembly for Wales (“the Assembly”) are set out in the table at Annex A. The Government notes that the Scottish Government takes a similar view of the provisions requiring legislative consent from the Parliament.

Provisions which modify the legislative competence of the Assembly

9. These are:

- Clause 1 (repeal of the European Communities Act 1972). This provision modifies the Assembly’s competence by removing the requirement for the Assembly to legislate compatibly with EU law.
- Clause 11 amends section 108A of the Government of Wales Act 2006 to define the Assembly’s competence by reference to EU law retained in domestic law by the Bill’s provisions. The provision modifies the Assembly’s competence because it would prevent the Assembly from modifying retained EU law in a way which would not have been within competence immediately before exit day.
- Clause 17 and Schedule 8 and 9 confer broad powers on a Minister of the Crown to make consequential provision. Those powers could be exercised in such a way as to modify the legislative competence of the Assembly.

Provisions which are legislating for a purpose within the Assembly's legislative competence

Clauses 2 – 6

10. These provisions (subject to certain exceptions) convert the body of existing EU law into domestic law and preserve the laws made in the UK to implement EU obligations. The relevant provisions are summarised below:

- Clause 2 and Schedule 1 provides that EU-derived domestic legislation continues to have effect in domestic law after the UK leaves the EU. For example, secondary legislation made under section 2(2) of the European Communities Act 1972.
- Clause 3 makes separate provision for the incorporation of direct EU legislation (i.e. EU Regulations).
- Clause 4 ensures that any remaining direct EU rights and obligations continue to be recognised and available in domestic law after exit, such as directly effective Treaty rights.
- Clause 5 and Schedule 1 sets out exceptions to the saving and incorporation of EU law. These include the ending of the principle of supremacy of EU law and a provision which confirms that the Charter of Fundamental Rights will no longer have effect in domestic law from the date of EU exit.
- Clause 6 explains how retained EU law is to be interpreted from the date of EU exit. It confirms that the jurisdiction of the Court of Justice of the European Union (“CJEU”) will be brought to an end and makes provision for the treatment of CJEU decisions by the domestic courts when interpreting retained EU law after EU exit.

11. It is the Welsh Government's view that consent is required for these provisions. The Assembly has competence to enact EU-derived rules into domestic law at the point of EU exit and to define how that law is to be interpreted, insofar that those rules relate to one or more subjects in Part 1 of Schedule 7 to the Government of Wales Act 2006. For example, the “environmental protection” subject under paragraph 6 of that Schedule in circumstances where the EU-derived rules to be enacted provide for the protection of the environment.

Clauses 7- 10 and 16

12. These provisions confer powers on Ministers of the Crown and the Welsh Ministers to amend retained EU law, and comprise as follows:

- Clause 7 allows a Minister of the Crown to make provision by regulations to prevent, remedy or mitigate any failure of retained EU

law to operate effectively or any other deficiency in retained EU law arising from EU withdrawal.

- Clause 8 confers a power on a Minister of the Crown to make regulations to enable continued compliance with the UK's international obligations.
- Clause 9 confers a power on a Minister of the Crown to implement a withdrawal agreement concluded between the UK and the EU.
- Clause 10 and Schedule 2 confer corresponding powers on the Welsh Ministers, but are restricted in a number of ways. For example, they only extend to correcting EU law that has been given effect via domestic legislation and cannot be used to modify direct EU legislation such as EU Regulations.
- Clause 16 and Schedule 7 make provision for the scrutiny of regulations made under the Bill.

13. It is the Welsh Government's view that consent is required for all of these provisions. Although certain powers are conferred on the Welsh Ministers to make regulations which can amend legislation within the Assembly's competence (clause 10 and Schedule 2), a Minister of the Crown can still exercise the powers in clauses 7-9 to modify legislation which is within the Assembly's competence.

14. It is within the Assembly's competence to confer regulation making powers upon the Welsh Ministers to address deficiencies arising from EU exit in circumstances where the law being modified relates to one or more subjects in Part 1 of Schedule 7 to the Government of Wales Act 2006.

Clause 12 and Schedule 4 – Financial provision

15. These provisions confer powers on a Minister of the Crown and devolved authorities to make secondary legislation to enable public authorities to charge fees or other charges.

16. It is the Welsh Government's view that consent is required for this provision. It is within the Assembly's competence to make provision for the charging of fees by public authorities, insofar that those authorities/their functions relate to one or more subjects in Part 1 of Schedule 7 to the Government of Wales Act 2006.

Clause 13 and Schedule 5 – Publication and rules of evidence.

17. This clause makes provision for the publication of retained direct EU legislation by the Queen's Printer within the National Archives. Schedule 5 contains further provision about the rules of evidence that are to apply to EU instruments.

18. It is the Welsh Government's view that consent is required for this provision. It is within the Assembly's competence to make provision for the publication of retained EU law and how that law is to be interpreted insofar that the content of that law relates to one or more subjects in Part 1 of Schedule 7 to the Government of Wales Act 2006.

Scrutiny of Welsh Ministers' subordinate legislation powers

19. By giving effect to Schedule 2, clause 10 provides Welsh Ministers with powers corresponding to those provided to Ministers of the Crown in clauses 7 -9 as set out above. The procedures for parliamentary scrutiny of these correcting powers are set out at Parts 1 and 2 of Schedule 7.

20. For each power, the Schedule lists a series of provisions, the inclusion of which within a statutory instrument ("SI") will make that SI subject to the affirmative resolution procedure in Parliament. The Schedule then provides that an SI of the Welsh Ministers which includes any of these provisions is subject to the affirmative resolution procedure in the Assembly. Where an SI containing these provisions is made by a Minister of the Crown and the Welsh Ministers acting jointly, the affirmative resolution procedures apply in respect of both Parliament and the Assembly. Any SI not containing any of the listed provisions is subject to the negative resolution procedure.

21. The provisions which will engage the requirement for affirmative resolution for each power are listed at Annex B.

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

22. 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 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. 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 introduced

23. The Welsh Government will not be able to recommend to the Assembly that it gives consent to the Bill as currently drafted.

24. The Welsh Government's position is set out in the [Written Statement](#) I published when the Bill was introduced in the House of Commons on 13

July, and in the [joint statement](#) I made with the First Minister of Scotland, on the same day.

25. The Welsh Government's principal objections relate to clauses 7-9 (which give Ministers of the Crown unacceptably wide regulation-making powers, including the ability to amend devolved law and the devolution settlement without consent), clause 10 (which gives effect to Schedule 2 and unreasonably restricts Welsh Ministers' correcting powers to domestic EU law) and clause 11 which introduces a new constraint on legislative competence.

Powers for UK and Welsh Ministers to amend devolved law

26. The Bill gives powers to Ministers of the Crown in clause 7 (to deal with deficiencies arising from withdrawal), in clause 8 (to enable continued compliance with the UK's international obligations, and clause 9 (to implement the withdrawal agreement). These powers would allow a Minister of the Crown to unilaterally amend legislation that is within the legislative competence of the Assembly, to include legislation where the Welsh Ministers exercise functions. The scrutiny obligation would then be discharged by Parliament rather than the Assembly. Those powers could also be used to amend the Government of Wales Act 2006, without any requirement for the Assembly's approval.
27. By giving effect to Schedule 2, clause 10 provides Welsh Ministers with powers corresponding to those provided to Ministers of the Crown in clauses 7-9. But the corresponding powers for devolved administrations' Ministers' extend only to correcting orders in respect of legislation which has been made by domestic institutions. Direct EU legislation (such as EU Regulations) can only be amended by a Minister of the Crown, and would fall to be scrutinised by Parliament even if the subject was one that was devolved to the Assembly.

New constraints on the legislative competence of the Assembly

28. Clause 11 introduces a new provision that will mean it will be outside the Assembly's competence to modify retained EU law in a way which would not have been compatible with EU law immediately before exit. This replaces the provision in section 108A of the Government of Wales Act 2006 which requires the Assembly to legislate compatibly with EU law.
29. It is common ground that, unless new legislative provision is made by Parliament, legislative competence for devolved matters which are currently subject to EU restrictions or obligations would remain with the devolved legislatures post-exit, with those legislatures able to exercise their competence without the limitations currently imposed in consequence of the UK's membership of the EU.
30. The Welsh Government's policy statement, [Brexit and Devolution](#), published in June, made clear our willingness to negotiate UK frameworks

in certain areas previously covered by EU law. This could be, for example, to support effective functioning of the UK market and prevent barriers emerging which would unreasonably constrain businesses, or to facilitate the management of common environmental resources.

31. The process of agreeing where frameworks are required, and what they should contain, must be one based on agreement, not imposition. But the Bill proposes instead a new set of legal constraints on the competences of the devolved institutions in respect of these matters, which we consider wholly unacceptable in principle. Moreover, in introducing a new constraint on competence defined in respect of 'retained EU law', the Bill would add complexity and uncertainty to the devolution settlement post EU exit.
32. The UK Government has suggested that the restriction imposed by clause 11 is transitional in nature, intended to allow time and space for discussion and consultation with devolved authorities on where frameworks are needed. However, in contrast to the various sunset provisions included in the Ministerial powers, there are no time limits on the operation of clause 11.
33. The Welsh Government's position is that the clause should be deleted from the Bill. We propose the alternative approach which respects devolution, as outlined above, and stand ready to work closely with the UK Government and the other devolved administrations to achieve this, in the interests of the UK as a whole.
34. The imposition of this new restriction on competence on the Assembly represents an unnecessary and unacceptable centralisation of powers at the UK level, to which the Welsh Government cannot agree.
35. The Welsh Government is working with the Scottish Government to propose amendments to the Bill which will address our concerns. These will be made public to inform debate on the Bill in the Assembly, at Westminster and more widely. I hope in due course to be able to lay a supplementary memorandum, to reflect amendments agreed by Parliament which are essential if the Welsh Government is to be able to recommend legislative consent is given.

Financial implications

36. While there are no direct financial implications for the Welsh Government or the Assembly arising from the powers under the Bill, there will be significant financial implications for Wales from withdrawing from the EU, both in its overall economic effect and in areas of funding currently deriving from the EU, as set out in *Securing Wales' Future*.

Conclusion

37. This memorandum sets out the Welsh Government's view of the requirement for the legislative consent of the Assembly in respect of the EU (Withdrawal) Bill, and confirms that we will not be in a position to recommend consent unless the Bill is amended to address our concerns.

Rt Hon Carwyn Jones AM
First Minister of Wales
September 2017

Annex A Clauses requiring legislative consent of the Assembly

Clause/ Schedule	Effect
1	repeals the European Communities Act 1972 on exit day
2	provides that existing domestic legislation which implements EU law obligations remains on the domestic statute book after the UK leaves the EU
3	converts 'direct EU legislation' into domestic legislation at the point of exit from the EU, so that where appropriate, EU legislation continues to have effect post-exit
4	ensures that any remaining EU rights and obligations which do not fall within clauses 2 and 3 continue to be recognised and available in domestic law after exit
5	sets out certain exceptions to the saving and incorporation of EU law provided for by clauses 2-4, including that the Charter of Fundamental Rights will not form part of domestic law on or after exit day
6	sets out how retained EU law will be read and interpreted on and after exit day
7	gives Ministers of the Crown the power to make regulations which amend deficiencies in retained EU law so that it continues to operate effectively after exit
8	gives Ministers of the Crown the power to make provision in regulations for continued compliance with the UK's international obligations
9	gives Ministers of the Crown powers to make regulations to implement a withdrawal agreement
10 & Schedule 2	provides powers to the devolved administrations (including Welsh Ministers) corresponding to those given to Ministers of the Crown, as set out in Schedule 2
11 & Schedule 3	replaces the existing requirement that the Assembly may only legislate in a way which is compatible with EU law, with a new provision that will mean it will be outside the Assembly's competence to modify retained EU law in a way which would not have been compatible with EU law immediately before exit. Exceptions to this test may be prescribed by Order in Council, which must be approved by both Houses and by the Assembly
12 & Schedule 4	gives effect to Schedule 4 which provides powers in connection with fees and charges, and provides that devolved authorities may incur expenditure in preparation for the making of statutory instruments under the Bill
13 & Schedule 5	makes provision for the publication of retained EU legislation by the Queen's Printer
16 & Schedule 7	gives effect to Schedule 7 on how the powers to make regulations in the Bill are exercisable
17	Power to make consequential provision

Annex B Delegated powers: provisions requiring affirmative resolution procedures

Schedule 7 lists a series of provisions, the inclusion of which within a statutory instrument will make that SI subject to the affirmative resolution procedure in the relevant legislature(s).

For regulations dealing with deficiencies arising from withdrawal, the provisions are those which:

- (a) establish a public authority in the United Kingdom,
- (b) provide for any function of an EU entity or public authority in a member State to be exercisable instead by a public authority in the United Kingdom established by regulations under section 7, 8 or 9 or Schedule 2,
- (c) provide for any function of an EU entity or public authority in a member State of making an instrument of a legislative character to be exercisable instead by a public authority in the United Kingdom,
- (d) impose, or otherwise relate to, a fee in respect of a function exercisable by a public authority in the United Kingdom,
- (e) create, or widen the scope of, a criminal offence, or
- (f) create or amend a power to legislate.

For regulations to enable continued compliance with the UK's international obligations, the provisions are those which:

- (a) establish a public authority in the United Kingdom,
- (b) provide for any function of an EU entity or public authority in a member State to be exercisable instead by a public authority in the United Kingdom established by regulations under section 7, 8 or 9 or Schedule 2,
- (c) provide for any function of an EU entity or public authority in a member State of making an instrument of a legislative character to be exercisable instead by a public authority in the United Kingdom,
- (d) impose, or otherwise relate to, a fee or charge in respect of a function exercisable by a public authority in the United Kingdom,
- (e) create, or widen the scope of, a criminal offence, or
- (f) create or amend a power to legislate.

For regulations to implement the withdrawal agreement, the provisions are those which:

- (a) establish a public authority in the United Kingdom,
- (b) provide for any function of an EU entity or public authority in a member State to be exercisable instead by a public authority in the United Kingdom established by regulations under section 7, 8 or 9 or Schedule 2,
- (c) provide for any function of an EU entity or public authority in a member State of making an instrument of a legislative character to be exercisable instead by a public authority in the United Kingdom,
- (d) impose, or otherwise relate to, a fee in respect of a function exercisable by a public authority in the United Kingdom,
- (e) create, or widen the scope of, a criminal offence,

- (f) create or amend a power to legislate, or
- (g) amend this Act.

Any SI not containing any of the listed provisions is subject to the negative resolution procedure.

Agenda Item 5

By virtue of paragraph(s) vi of Standing Order 17.42

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