

# Scrutiny of regulations arising from the UK's exit from the European Union - Protocol<sup>1</sup> between the Welsh Government and the Legislation, Justice and Constitution Committee of Senedd Cymru

## Background and purpose

1. This Protocol has been agreed within the context of the United Kingdom's exit from the European Union and the Welsh Ministers' powers to make regulations under the European Union (Withdrawal) Act 2018 ("the 2018 Act") to contribute to the establishment of a fully functioning statute book for Wales at the point of exit.
2. The Legislation, Justice and Constitution Committee<sup>2</sup> ("the LJC Committee") will play a significant role in the scrutiny of regulations made or to be made under the 2018 Act.
3. This Protocol recognises the objective of ensuring a fully functioning statute book, shared between:
  - i. the Welsh Government, with responsibility to bring forward an appropriate programme of regulations to implement exit, and
  - ii. the Senedd (and in particular the LJC Committee) with responsibility to effectively scrutinise that programme of regulations.
4. This objective is intended to provide certainty in relation to the law for citizens and businesses.
5. The Protocol therefore sets out an understanding between the LJC Committee and the Welsh Government of the administrative arrangements for the scrutiny of regulations that are to be made by the Welsh Ministers under the powers conferred by Part 1 of Schedule 2 to the 2018 Act, as recommended by the LJC Committee in its report Scrutiny of regulations made under the European Union (Withdrawal) Act 2018: operational matters:

"We recommend that the Welsh Government enters into an agreement with us as the sifting committee to cover:

- an early warning system to assist with managing the scrutiny of all subordinate legislation until the end of this Assembly (in 2021);
- the optimum day of laying of proposed negative regulations under the 2018 Act; and

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<sup>1</sup> Revised in November 2020

<sup>2</sup> The name of the Constitutional and Legislative Affairs Committee was changed to the Legislation, Justice and Constitution Committee on 29 January 2020 following a motion agreed in the Senedd.



- any other matter that will aid the effective and efficient scrutiny of regulations made under the 2018 Act, especially regulations correcting deficiencies in retained EU law.”
6. This recommendation reflected:
- the commitment given by the Leader of the House to the LJC Committee on 11 June 2018 that the Welsh Government is keen to give as early a warning as possible to both the Senedd and its committees in order for smooth and efficient scrutiny work to take place;
  - the assumption that the LJC Committee is the sifting committee for the purposes of the 2018 Act,
- and is intended to complement the revised Standing Order provisions in relation to the scrutiny of regulations under the 2018 Act.

## **The Protocol**

7. This Protocol represents the agreed position of the LJC Committee and the Welsh Government on the management of all regulations made under the 2018 Act and laid before the Senedd.
8. The LJC Committee and Welsh Government recognise that the scrutiny and quality of regulations made under the 2018 Act will be best served by an approach where a consistent flow of regulations is maintained, to a schedule of which notice is given in advance.
9. An early warning system will enable appropriate planning to take place. An even flow of regulations, appropriately prioritised will help avoid peaks and troughs, and ensure the most efficient use of resources.
10. The LJC Committee acknowledge that the programme of subordinate legislation brought forward by Welsh Ministers may be affected by decisions and events outside of the control of the Welsh Government, and that EU exit is one of a number of Welsh Government priorities to be delivered through subordinate legislation. Both the Welsh Government and the LJC Committee will endeavour to take mitigating action to reduce the risk of bottlenecks in the process.
11. As part of this process the Welsh Government will seek to ensure a steady and even flow of regulations for both sifting and for the scrutiny process.
12. The Welsh Government will provide early warning to the LJC Committee of all regulations to be brought forward under the 2018 Act. The LJC Committee will, in turn, share the information with other Senedd committees as appropriate.



13. A rolling early warning system will reflect the update provided in July 2018 by the then Leader of the House to the LJC Committee on the number of regulations that will be required to correct deficiencies in retained EU law.
14. The early warning system, agreed by the LJC Committee and the Welsh Government, will consist of the Welsh Government providing to the LJC Committee the following information regarding regulations derived from the 2018 Act once every two weeks:
  - a list of forthcoming proposed negative regulations subject to the sift procedure, with the target date of laying of each;
  - a list of forthcoming regulations to be subject to the negative procedure, with the target date of laying of each;
  - a list of forthcoming regulations to be subject to the affirmative procedure, with the target date of laying of each;
  - where appropriate, notification of any forthcoming complex regulations;
  - where appropriate, notification of any forthcoming lengthy regulations;
  - any other information that the Welsh Government considers will aid the effective and efficient scrutiny of regulations made under the 2018 Act.
15. As part of the update once every two weeks, the Welsh Government will also aim to provide information regarding the volume of business as usual regulations to be scrutinised under Standing Orders 21.2 and 21.3 (i.e. the LJC Committee's normal statutory instrument workload and which derives from purely domestic legislation).
16. The LJC Committee currently meets every Monday in a sitting week. The Welsh Government acknowledges that laying proposed negative regulations on a Tuesday will provide the LJC Committee with the best use of the 14 calendar day sifting period in the 2018 Act as it will generally provide two opportunities to consider regulations. The Welsh Government also acknowledges that laying proposed negative regulations on a Thursday or Friday will in practice only provide a single committee meeting to consider. For that reason, the Welsh Government will seek to avoid laying proposed negative regulations on a Thursday and Friday.

## **Monitoring**

17. The LJC Committee and Welsh Government will routinely monitor the application and interpretation of the Protocol, and each will draw any issues to the attention of the other at the earliest opportunity. If considered appropriate, either the LJC Committee or the Welsh Government, or both, may draw any



issues to the attention of the Business Committee, the Llywydd, or the Senedd, as appropriate.

18. The LJC Committee and the Welsh Government will keep under review the Protocol's application to the scrutiny of regulations made or to be made under other relevant Brexit-related Acts at the relevant time.
19. The LJC Committee and the Welsh Government will respond to any issues raised in a timely manner. As per current practice, should the LJC Committee consider it necessary they may invite Welsh Ministers to attend a committee meeting.
20. The LJC Committee or the Welsh Government may propose revisions to the protocol and both will need to agree to any revisions made.

### **Review of the Protocol – July to November 2020**

21. On 23 July 2020, the Chair of the LJC Committee [wrote](#) to the First Minister requesting that the Protocol continue to have effect until the end of the Fifth Senedd.
22. The Chair also proposed that the Protocol:
  - be expanded to apply to relevant regulations made under the European Union (Withdrawal Agreement) Act 2020 ("the 2020 Act"), and other key EU exit related primary legislation, particularly the Agriculture, Fisheries, Environment and Trade Bills, once enacted;
  - be used as a vehicle for the Welsh Government to commit to abide by the principle of Standing Order 30C when making relevant regulations under the 2020 Act, and the Agriculture, Fisheries, Environment and Trade Bills once enacted.
23. The First Minister [responded](#) to the LJC Committee on 16 September 2020, and agreed that the expanded, revised Protocol should have effect until the end of the Fifth Senedd.
24. The First Minister also agreed that:
  - in light of the transition period and in expectation of further EU exit related legislation, the Protocol should continue to apply, as originally drafted, to regulations made by the Welsh Ministers under the 2018 Act, while at the same time expanding its terms to apply to relevant regulations made under the 2020 Act (or the 2018 Act as amended by the 2020 Act), and also to regulations made by the Welsh Ministers under the Agriculture, Fisheries, Environment and Trade Bills once enacted;



- the resurrected Protocol could be a vehicle for the Welsh Government to commit to following the principle of the Standing Order 30C process when Welsh Ministers consent to relevant regulations under the 2020 Act, the 2018 Act as amended by the 2020 Act and, following further review, the Agriculture, Fisheries, Environment and Trade Bills once enacted.

25. As a result of the 2020 exchange between the First Minister and the Chair of the LJC Committee regarding the revised Protocol, it has been agreed that:

- the Protocol will continue to apply, as originally drafted, to regulations made by the Welsh Ministers under Part 1 of Schedule 2 to the 2018 Act<sup>3</sup>, while at the same time expanding its terms to apply to regulations made under:
  - o sections 12, 13 and 14 of the 2020 Act;
  - o Parts 1A, 1B or 1C of Schedule 2 to the 2018 Act (as amended by the 2020 Act); and
  - o the Agriculture, Fisheries, Environment and Trade Bills once enacted.
- the Protocol is the vehicle by which the Welsh Government commits to following the principle of the Standing Order 30C process when the Welsh Ministers consent to regulations made under:
  - o sections 12, 13 and 14 of the 2020 Act;
  - o Sections 8A, 8B or 8C of the 2018 Act (as amended by the 2020 Act); and
  - o the Agriculture, Fisheries, Environment and Trade Bills once enacted;where the UK Government has committed to not normally legislating in devolved areas before seeking the Welsh Ministers' consent.

## **Timeframe**

26. This Protocol ceases to have effect at the end of the Fifth Senedd.

## **4November 2020**

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<sup>3</sup> NB It is only regulations made under Part 1 of Schedule 2 to which the existing Protocol applies that are subject to sifting. However, the extension of the early warning system as detailed would be beneficial to aid scrutiny.

<sup>4</sup> First version – October 2018; Second version – November 2020

