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Ein cyf/Our ref: MA/RE/1163/22

Huw Irranca-Davies MS
Chair
Legislation, Justice and Constitution Committee
Senedd Cymru
Cardiff Bay
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22 April 2022

WELSH TAX ACTS etc. (POWER TO MODIFY) BILL

Dear Huw,

Thank you for the Legislation, Justice and Constitution Committee's report which was published on 08 April 2022 in relation to the Welsh Tax Acts etc. (Power to Modify) Bill ("the Bill"). Please see below my response to your request for information in advance of the Stage 1 General Principles Debate.

I have also written today to the Chair of the Finance Committee in response to a recommendation requesting information in advance of the Stage 1 General Principles Debate.

Recommendation 3: The Minister should provide in advance of the Stage 1 debate, examples of circumstances in which the Minister would be prevented from using the power proposed in section 1 of the Bill as a result of the "appropriate" test.

The aim of including the phrase "necessary or appropriate" in section 1(1) of the Bill is to strike a balance between placing sufficient restraint upon the use of the power, whilst also providing a certain degree of flexibility for the Welsh Ministers to ensure the response is right for our citizens and taxpayers.

Given that the "necessary or appropriate" test is a subjective one, it is difficult to determine with any certainty, what Welsh Ministers might consider appropriate in the future. To provide a general example, if the power were to be used to introduce very substantial changes to Land Transaction Tax in response to a minor change by the UK government to the predecessor tax, then this may at face value not be considered an appropriate use of the power.

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Ultimately, all decisions to use the power, and whether the use is appropriate, would still be open to legal challenge, in addition to requiring approval by the Senedd. Individual sets of regulations will be scrutinised by the Senedd and their consideration of whether the subjective 'appropriate' test is met will form part of that consideration. Furthermore, it is possible that the courts, over time and in response to challenges by taxpayers, may be required to consider whether the making of the regulations was 'necessary or appropriate'. Those decisions will then shape the scope of the Welsh Ministers power provided by the Bill.

Equally, it is important to emphasise again that a change by the UK government should not, where the respective UK and Welsh legislation are similar, necessitate a mimicking of the UK changes. That would undermine the purpose of devolution. Rather, the Welsh changes would, in relation to a trigger event under section 1(1)(c), need to broadly replicate the effect on the Consolidated Fund, or at least not result in significantly increasing the tax burden on our taxpayers. Therefore, a response that had, broadly the same financial impact as the UK government change would be appropriate, even if effected differently, whereas one that resulted in a significantly different financial impact, especially where that increases the tax payable by Welsh taxpayers, would not.

I have previously provided an example of where changes would be appropriate, but perhaps not necessary. This is where regulations have been made (whether by draft or made affirmative procedure) and during the scrutiny or, importantly, after that scrutiny period and vote, it is found that the new rules could work better. This could occur if, perhaps a category of taxpayer was included within a new charge that was not desirable or fair. It would therefore not be necessary to exclude them from the tax charge, but it may be appropriate.

Recommendation 9: The Minister in advance of the Stage 1 debate should set out likely scenarios in which regulations to be made in respect of each of the purposes listed in paragraphs (a) to (d) of section 1(1) of the Bill could:
- **impose landfill disposals tax or land transaction tax by virtue of section 2(1)(a);**
- **impose or extend a liability to a penalty by virtue of section 2(1)(b)**

Please see my response to the Chair of the Finance Committee on a similar recommendation that the Welsh Government provide examples of the specific circumstances in which it envisages the regulation-making power in section 1(1) being used to amend each part of the Tax Collection and Management (Wales) Act 2016 (other than Part 2), the Land Transaction Tax and Anti-Avoidance of Devolved Taxes (Wales) Act 2017 and the Landfill Disposals Tax (Wales) Act 2017.

That response sets out a number of examples in respect of the three Welsh Tax Acts for each of the four purpose tests and how they may impact the amount of landfill disposals tax or land transaction tax payable. In relation to the imposing of a penalty, that will in all likelihood be triggered primarily by a response to a court case (section 1(1)(d)) or, less likely, to protect against tax avoidance, perhaps the introduction of a new penalty targeted at a particular activity or behaviour by taxpayers or their advisers (section 1(1)(b). Penalties do not impact the amount paid into the Consolidated Fund (section 1(1)(c)), and are unlikely to be impacted by international obligations (section 1(1)(a)).

Recommendation 13: The Minister should, in advance of the Stage 1 debate, explain why a super affirmative procedure was not included in the Bill to enable Senedd Committees to have enough time to take evidence when scrutinising regulations that may be made under section 1 of the Bill.

There is no super affirmative procedure provided for in Standing Orders. As such it is difficult to appreciate with any certainty the specific type of procedure that the Committee envisages. In any event, I am of the view that there is sufficient scrutiny time built into the Bill procedures to allow for the Senedd Committees to take evidence as part of the scrutiny process.

In the case of made affirmative regulations, Section 4(5) of the Bill already provides additional time for scrutiny, up to a maximum of 60 days, to ensure evidence can be gathered, reports written and debate and discussions held where the regulations are particularly complex for example. As such, we have considered and included a requirement for the regulations to be laid for a longer period above and beyond the usual 28 day process for made affirmative procedure regulations.

Recommendation 14: The Minister should, in advance of the Stage 1 debate, clarify what would constitute "by reason of urgency" when choosing to use the made affirmative procedure under section 4 of the Bill.

This is a subjective test and it is for the Welsh Ministers to determine whether an amendment is needed by reason of urgency, based on the individual circumstances at the time. Urgency is not defined in the Bill, nor is it defined within paragraph 1 of Schedule 1 to the Interpretation Act 1978. As such I consider that "urgency" must take its ordinary meaning, which is "*the quality of needing to be dealt with or happen immediately: importance requiring swift action."*

Yours sincerely,

Rebecca Evans.

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Minister for Finance and Local Government

CC: Chair of the Finance Committee