

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

