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Prìomh Mhinistear na h-Alba



Llywodraeth Cymru
Welsh Government

Rt Hon Theresa May MP
Prime Minister
10 Downing Street
London

19th September 2017

Dear Theresa,

The Scottish and Welsh Governments recognise our responsibility to prepare our laws for the upheaval of EU withdrawal. The governments of these islands have much work to do to ensure that stability and continuity can be achieved on exit day, and all governments will have to work together if that is to be done most effectively. So we stand ready to work in a cooperative and coordinated way with others to prepare for Brexit. But the approach of the UK Government to devolution in the EU (Withdrawal) Bill is preventing this essential cooperation and coordination.

We have been clear since the Bill was first introduced that our governments could not recommend it as currently drafted to our legislatures for their consent. We have now set out our reasons for that, in detail, in legislative consent memorandums laid before each of the Scottish Parliament and the National Assembly for Wales. And, as we have indicated, we have begun to consider the scope for preparing alternative devolved legislation to provide for continuity of law on withdrawal from the EU. That is not, however, our preferred option. We want a European Union (Withdrawal) Bill that can be made to work with, not against, devolution. The current Bill will need to be substantially amended for us to be able to recommend to our respective legislatures that they give their consent to it.

Our Governments have therefore prepared a set of amendments which, if made, would make the Bill one which we could consider recommending to the Scottish Parliament and the National Assembly for Wales. We have made these amendments widely available, and in particular to chairs/conveners of the relevant committees in the National Assembly for Wales and the Scottish Parliament. We hope that they will be received in the way they are intended: as a constructive contribution by the devolved administrations, which would enable progress to be made among the governments in a way which respects the hard-won devolution settlements of the UK.

NICOLA STURGEON

CARWYN JONES

European Union (Withdrawal) Bill

UK GOVERNMENT FIXING ETC. POWERS: MODIFICATION THE SCOTLAND ACT 1998 OR THE GOVERNMENT OF WALES ACT 2006

Clause 7

- 1** In clause 7, page 6, line 13, after <it,> insert—
- <() modify the Scotland Act 1998 or the Government of Wales Act 2006,>

Clause 8

- 2** In clause 8, page 6, line 38, at end insert <, or
- () modify the Scotland Act 1998 or the Government of Wales Act 2006.>

Clause 9

- 3** In clause 9, page 7, line 8, at end insert—
- <() The consent of the Scottish Ministers is required before any provision is made in regulations under this section that modifies the Scotland Act 1998.
- () The consent of the Welsh Ministers is required before any provision is made in regulations under this section that modifies the Government of Wales Act 2006.>

UK GOVERNMENT FIXING ETC. POWERS: REQUIREMENT FOR CONSENT OF SCOTTISH MINISTERS OR WELSH MINISTERS IF MAKING PROVISION WITHIN DEVOLVED COMPETENCE

Clause 7

- 4** In clause 7, page 6, line 25, at end insert—
- <() The consent of the Scottish Ministers is required before any provision is made in regulations under this section so far as the provision would be within the devolved competence of the Scottish Ministers within the meaning given in paragraph 9 of Schedule 2.
- () The consent of the Welsh Ministers is required before any provision is made in regulations under this section so far as the provision would be within the devolved competence of the Welsh Ministers within the meaning given in paragraph 10 of Schedule 2.>

Clause 8

- 5** In clause 8, page 6, line 40, at end insert—

- <() The consent of the Scottish Ministers is required before any provision is made in regulations under this section so far as the provision would be within the devolved competence of the Scottish Ministers within the meaning given in paragraph 18 of Schedule 2.
- () The consent of the Welsh Ministers is required before any provision is made in regulations under this section so far as the provision would be within the devolved competence of the Welsh Ministers within the meaning given in paragraph 19 of Schedule 2.>

Clause 9

6 In clause 9, page 7, line 9, at end insert—

- <() The consent of the Scottish Ministers is required before any provision is made in regulations under this section so far as the provision would be within the devolved competence of the Scottish Ministers within the meaning given in paragraph 18 of Schedule 2.
- () The consent of the Welsh Ministers is required before any provision is made in regulations under this section so far as the provision would be within the devolved competence of the Welsh Ministers within the meaning given in paragraph 19 of Schedule 2.>

LEGISLATIVE AND EXECUTIVE COMPETENCE: REMOVAL OF “RETAINED EU LAW” RESTRICTION / UK FRAMEWORKS PROVISION

Clause 11

7 In clause 11, page 7, line 16, leave out subsections (1) and (2) and insert—

- <(1) In section 29(2)(d) of the Scotland Act 1998 (no competence for Scottish Parliament to legislate incompatibly with EU law), omit “or with EU law”.
- (2) In section 108A(2)(e) of the Government of Wales Act 2006 (no competence for National Assembly for Wales to legislate incompatibly with EU law), omit “or with EU law”.>

Schedule 3

8 In schedule 3, page 25, line 37, leave out paragraphs 1 and 2 and insert—

<Scotland Act 1998

- 1 In section 57(2) of the Scotland Act 1998 (no power for members of the Scottish Government to make subordinate legislation, or otherwise act, incompatibly with EU law or Convention rights), omit “or with EU law”.

Government of Wales Act 2006

- 2 In the Government of Wales Act 2006, omit section 80 (EU law).>

SCOTTISH MINISTERS AND WELSH MINISTERS FIXING ETC. POWERS: REMOVAL
OF RESTRICTIONS AND CONSENT REQUIREMENT

Schedule 2

- 9** In schedule 2, page 16, line 30, at end insert—
- <() Sub-paragraph (4)(b) does not apply to regulations made under this Part by the Scottish Ministers or the Welsh Ministers.>
- 10** In schedule 2, page 17, line 9, at end insert—
- <() This paragraph does not apply to regulations made under this Part by the Scottish Ministers or the Welsh Ministers.>
- 11** In schedule 2, page 17, line 13, at end insert—
- <() This paragraph does not apply to regulations made under this Part by the Scottish Ministers or the Welsh Ministers.>
- 12** In schedule 2, page 17, line 20, at end insert—
- <() This paragraph does not apply to regulations made under this Part by the Scottish Ministers or the Welsh Ministers.

Requirement for consultation in certain circumstances

- 5A** No regulations may be made under this Part by the Scottish Ministers or the Welsh Ministers acting alone so far as the regulations—
- (a) are to come into effect before exit day, or
- (b) remove (whether wholly or partly) reciprocal arrangements of the kind mentioned in section 7(2)(c) or (e),
- unless the regulations are, to that extent, made after consulting with a Minister of the Crown.>
- 13** In schedule 2, page 22, line 10, at end insert—
- <() Sub-paragraph (4)(d) does not apply to regulations made under this Part by the Scottish Ministers or the Welsh Ministers.>
- 14** In schedule 2, page 22, line 32, at end insert—
- <() This paragraph does not apply to regulations made under this Part by the Scottish Ministers or the Welsh Ministers.>
- 15** In schedule 2, page 23, line 11, at end insert—
- <() This paragraph does not apply to regulations made under this Part by the Scottish Ministers or the Welsh Ministers.

Requirement for consultation in certain circumstances

- 16A (1)** No regulations may be made under this Part by the Scottish Ministers or the Welsh Ministers acting alone so far as the regulations—

- (a) are to come into force before exit day,
- (b) are for the purpose of preventing or remedying any breach of the WTO Agreement, or
- (c) make provision about any quota arrangements or are incompatible with any such arrangements,

unless the regulations are, to that extent, made after consulting with a Minister of the Crown.

(2) In sub-paragraph (1)—

“the WTO Agreement” has the meaning given in paragraph 16(2),

“quota arrangements” has the meaning given in paragraph 16(3).>

16 In schedule 2, page 24, line 33, at end insert—

<() Sub-paragraph (4)(d) does not apply to regulations made under this Part by the Scottish Ministers or the Welsh Ministers.>

17 In schedule 2, page 25, line 11, at end insert—

<() This paragraph does not apply to regulations made under this Part by the Scottish Ministers or the Welsh Ministers.>

18 In schedule 2, page 25, line 15, at end insert—

<() This paragraph does not apply to regulations made under this Part by the Scottish Ministers or the Welsh Ministers.>

19 In schedule 2, page 25, line 28, at end insert—

<() This paragraph does not apply to regulations made under this Part by the Scottish Ministers or the Welsh Ministers.

Requirement for consultation in certain circumstances

25A (1) No regulations may be made under this Part by the Scottish Ministers or the Welsh Ministers acting alone so far as the regulations make provision about any quota arrangements or are incompatible with any such arrangements unless the regulations are, to that extent, made after consulting with a Minister of the Crown.

(2) In sub-paragraph (1), “quota arrangements” has the meaning given in paragraph 25(2).>

CONSEQUENTIAL AMENDMENTS

Schedule 2

20 In schedule 2, page 19, line 47, leave out <and retained EU law>

21 In schedule 2, page 20, line 23, leave out <and retained EU law>

22 In schedule 2, page 23, line 21, leave out <and retained EU law>

23 In schedule 2, page 23, line 25, leave out <and section 57(4) and (5) of that Act>

- 24 In schedule 2, page 23, line 31, leave out <and retained EU law>
- 25 In schedule 2, page 23, line 35, leave out <80(8)> and insert <80>

Schedule 3

- 26 In schedule 3, page 28, line 2, leave out from <, and> to end of line 3
- 27 In schedule 3, page 28, line 38, leave out from <for> to end of line 39 and insert <omit “or with EU law”>
- 28 In schedule 3, page 29, line 5, leave out paragraph 21
- 29 In schedule 3, page 29, line 28, leave out from <(4)(d)> to end of line 29 and insert <(4), omit paragraph (d).>
- 30 In schedule 3, page 30, line 4, leave out <before “EU” insert “Retained”> and insert <for “EU law, human” substitute “Human”>
- 31 In schedule 3, page 30, line 5, leave out paragraph 31

Schedule 8

- 32 In schedule 8, page 50, line 19, leave out <section 57(4) of the Scotland Act 1998, section 80(8) of the Government of Wales Act 2006 or>
- 33 In schedule 8, page 51, line 1, leave out <section 57(4) of the Scotland Act 1998, section 80(8) of the Government of Wales Act 2006 or>
- 34 In schedule 8, page 55, leave out lines 8 to 13 and insert—
 <(a) in paragraph (a), omit sub-paragraph (ii), and
 (b) in paragraph (b), omit “or with EU law”.>
- 35 In schedule 8, page 59, leave out lines 10 to 16
- 36 In schedule 8, page 59, leave out lines 23 to 29
- 37 In schedule 8, page 59, line 47, leave out from beginning to end of line 8 on page 60
- 38 In schedule 8, page 60, leave out lines 13 to 23

ANNEX: THE PROPOSED AMENDMENTS

A. UK GOVERNMENT FIXING ETC. POWERS: MODIFICATION OF THE SCOTLAND ACT 1998 OR THE GOVERNMENT OF WALES ACT 2006

The established methods for modifying the 1998 and 2006 Acts which provide for the devolution settlements for Scotland and Wales are by new Parliamentary legislation, for which the devolved legislatures' consent is required in accordance with the Sewel Convention, or by orders under those Acts, which again require the consent of the relevant legislature. But as currently drafted, UK Ministers' powers to make statutory instruments in clauses 7 to 9 of the Bill can be used to make amendments to the statutes containing the principles of the devolution settlements for Scotland and Wales, without any requirement for consent.

Proposed amendments 1 and 2 would prevent the power to correct deficiencies in retained EU law and the power to ensure compliance with international obligations being used to amend the Scotland Act 1998 and the Government of Wales Act 2006. Where however amendments to these Acts becomes necessary (perhaps urgently) in order to implement the withdrawal agreement, **proposed amendment 3** would continue to allow such amendments to the 1998 and 2006 Acts to be made, but with consent from the relevant devolved administration.

B. UK GOVERNMENT FIXING ETC. POWERS: REQUIREMENT FOR CONSENT OF SCOTTISH MINISTERS OR WELSH MINISTERS IF MAKING PROVISION WITHIN DEVOLVED COMPETENCE

As currently drafted, UK Ministers' powers to make statutory instruments under clauses 7 to 9 of the Bill could be used to make provision in policy areas which are the responsibility of Scottish or Welsh Ministers. The Scottish Government and Welsh Government acknowledge that there may be circumstances justifying amendments to laws in devolved areas being made on a UK-wide basis, but they consider that this should only be possible with the consent of the devolved administrations

Proposed amendments 4 to 6 would mean that UK Ministers would be required to secure the consent of the Welsh Ministers or the Scottish Ministers, before making provision which would be within those Ministers' devolved competence. Devolved Ministers would then be accountable to their legislatures for any decision to consent to the UK Ministers legislating on such a basis.

C. LEGISLATIVE AND EXECUTIVE COMPETENCE: REMOVAL OF "RETAINED EU LAW" RESTRICTION / UK FRAMEWORKS PROVISION

As currently drafted, clause 11 of the Bill amends both devolution acts by inserting a new restriction on the competence of the devolved legislatures which would prevent the Scottish Parliament and the National Assembly for Wales from passing

legislation which modifies retained EU law, even in areas of devolved responsibility. And provision in Part 1 of Schedule 3 to the Bill has the effect that Scottish or Welsh Ministers would have no powers to make, confirm or approve any subordinate legislation so far as it modifies retained EU law.

The Welsh Government and Scottish Government consider that these provisions fundamentally cut across the principles of the devolution settlements, and they are strongly opposed to them.

Proposed amendments 7 and 8 would remove these new restrictions in clause 11 and Schedule 3.

D. SCOTTISH MINISTERS AND WELSH MINISTERS FIXING ETC. POWERS: REMOVAL OF RESTRICTIONS AND CONSENT REQUIREMENT

As currently drafted, there are a number of restrictions placed on devolved Ministers' use of the powers in the Bill which are not placed on UK Ministers. We are aware that there are significant concerns in Parliament about the very broad scope of the Henry VIII powers proposed in the Bill, and would be supportive of amendments which sought to define these more narrowly. However, we also believe, as a matter of principle, that devolved Ministers should have the same powers in respect of matters falling within devolved competence as UK Ministers are being given.

Proposed amendments 9, 13 and 16 remove the restrictions preventing the powers being used to confer a power to legislate, bringing the powers into line with those being given to UK Ministers.

Proposed amendments 10, 11, 14, 17 and 18 remove the restrictions placed on the Scottish and Welsh Ministers' ability to amend directly applicable EU law incorporated into UK law, again bringing the powers into line with those being given to UK Ministers.

Proposed amendments 12, 15 and 19 replace requirements imposed on Scottish and Welsh Ministers to seek UK Ministers' consent in certain circumstances with a requirement to consult UK Ministers before making certain types of provision.

CONSEQUENTIAL AMENDMENTS

Proposed amendments 20 to 38 are consequential on the principal amendments described above.