

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



Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

10 January 2017

Dear Huw,

LAND TRANSACTION TAX AND ANTI-AVOIDANCE OF DEVOLVED TAXES (WALES) BILL

I would like to thank you and the Constitutional and Legislative Affairs Committee for your report on the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Bill.

I have considered the recommendations of the Committee and will refer to these during today's Plenary debate on the general principles of the Bill. However, in advance of the debate I wanted to provide some further information and points of clarification. I hope the information provided in this letter provides the clarity sought by Committee members.

Recommendation 1. We recommend that during the Stage 1 debate the Cabinet Secretary clarifies whether regulations made under section 34(6) that change a person's tax liability could also increase that person's liability as a consequence or impose a liability on a person not currently subject to a liability. If that is the case, the Cabinet Secretary should explain why the affirmative procedure is not being applied to the making of these regulations in such circumstances.

I previously indicated to the Committee that the technical nature of regulations made under this section meant that it would be appropriate to make them subject to the negative procedure. Importantly, I highlighted that the regulations would not have the effect of increasing the amount of tax charged in respect of a particular transaction, and that regulations made under the comparable powers in UK and Scottish legislation are subject to the negative procedure.

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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.

My subsequent letter to the Committee in November provided some further explanation of the effect of regulations made under section 34(6). A unit trust scheme listed in regulations made under this section would not be subject to the rule in section 34, which would mean that the person liable to pay the tax would change from the trustees of the unit trust, to the individual unit holders. Although this would represent a change in the person liable to the tax, in practice I would expect the individual unit holders to pay the tax indirectly via the trustees as part of the arrangements for the management of the scheme.

I am committed to ensuring that the correct procedure is assigned to regulations. Whilst these regulations cannot be used to increase the amount of tax collected, I acknowledge that changing the person liable to pay the tax could merit the additional scrutiny afforded by the affirmative procedure. Taking this into consideration, and the Committee's continued request for clarity, I am content to look into this further, and to consider whether regulations made under this section should be subject to the affirmative procedure.

Recommendation 2. We recommend that the Cabinet Secretary, during the Stage 1 debate clearly states what evidence, information or modelling he will use to make a judgement about whether the regulations have the effect of imposing or increasing a tax liability and accordingly about whether to apply the affirmative procedure.

The Committee will be aware that the scope of regulations made under section 76 is limited to giving effect to the provisions in the Bill (or regulations made under it) to make sure the provisions work properly. Importantly, the power cannot be used to make new, substantive provision in this Bill, or make fundamental changes to other legislation.

During my evidence to the Committee, I explained the general approach to determining the appropriate legislation procedure for this Bill depended on whether the regulations could have a substantive effect on a person's tax liability. I welcome the Committee's conclusion that this approach is sensible and logical.

I am keen to ensure that this general approach is maintained for regulations made under section 76. The question of whether regulations made under this section will have a substantive effect on an individual's tax liability can only be considered on a case-by-case basis. Before reaching a decision, Ministers will have particular regard to the purpose of the regulations, their overall effect, as well as whether the regulations are being made in conjunction with any other power.

The choice of procedure will be a decision of the Welsh Ministers, which will be subject to the usual public law obligations and may therefore be subject to challenge in the courts. In addition, if a Member considers that the choice of procedure is inappropriate, there will be an opportunity to challenge the decision by tabling a motion to resolve that the regulations be annulled.

I remain committed to providing as much information as possible to the Assembly to ensure legislation is subject to sufficient scrutiny and I therefore accept this recommendation. For this reason, I have agreed to explain how the Welsh Ministers have reached this decision in the explanatory memorandum accompanying any regulations made under this section.

Recommendation 3. We recommend that the Cabinet Secretary should table an amendment to the Bill to ensure that regulations made under section 76(1) in accordance with section 76(2) are subject to the affirmative procedure

I have noted the view of this Committee – along with its predecessor - on the broader issue relating to the use of the negative procedure for regulations which amend primary legislation. During the last Assembly, the First Minister explained in a letter¹ to the Committee that the choice between the negative and affirmative procedure is considered on the merits of each case, and ultimately informed by a variety of factors, including the nature of the power, its likely scope, and the circumstances in which the power is to be used.

Aligned to this, I have set out previously that, importantly, this power cannot be used to make regulations containing new, substantive provisions, or to make fundamental changes to other legislation or to extend the scope of this Bill “by the back door”. As already noted, regulations made under this section would be limited to making the necessary changes to ensure that the provisions of this Bill work properly, for example, by making changes to other legislation needed in consequence of the provisions of this Bill, or to deal with unforeseen details arising out of the implementation of the new system.

Given the scope and circumstances in which the powers in sections 76(1) may be used, I remain of the view that the appropriate procedure should depend on the substance of the regulations – that is, whether the regulations could have a substantive effect on a person’s tax liability, rather than a single prescriptive rule which focuses on whether the regulations amend primary legislation. I am not therefore convinced to table an amendment in this instance and on that basis will be unable to support this recommendation.

I hope the information provided in this letter provides the clarity sought by Committee members.

I am copying this letter to the Chair of the Finance Committee.



Mark Drakeford AM/AC

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¹ Letter from the First Minister to the Chair regarding amending primary legislation, November 2015:
<http://www.senedd.assembly.wales/documents/s46407/Letter%20from%20the%20First%20Minister%20to%20the%20Chair%20regarding%20amending%20primary%20legislation.pdf>