

## **The European Union (Withdrawal) Bill and its implications for Wales**

### **Background and General Response to the Bill**

1. NFU Cymru is pleased to have the opportunity to submit written evidence as part of a joint enquiry between the National Assembly's Constitutional and Legislative Affairs Committee and the External Affairs and Additional Legislation Committee, into the implications for Wales of the European Union (Withdrawal) Bill
2. Welsh agriculture is a strategically important industry. It has a gross output of £1.5bn and provides employment for some 58,000 people. It is also the cornerstone of Wales' £6.1bn food and drink industry.
3. Agriculture is also one of the sectors which has been most exposed to EU law-making over the last 40 plus years of EU membership. The Cabinet Secretary, Lesley Griffiths has estimated that there may be as many as 5000 pieces of EU derived legislation in her portfolio alone.<sup>1</sup>
4. NFU Cymru acknowledges the need to legislate for Brexit. We consider the European Union Withdrawal Bill to be part of the vital process of legislating for Brexit is to assure legal certainty and continuity by providing for the on-going legal effect of the significant body of EU law, which is of course a well-established part of our legal system.
5. The importance of preserving the bulk of EU law is also of particular practical significance. The greater the level of regulatory harmonisation between nations, the easier it should be to allow trade to flow between them, whilst greater regulatory divergence weighs against the facilitation of trade.
6. NFU Cymru also recognises the need to avoid setting up internal distortions within the UK market for the production and sale of agricultural produce. It is therefore important to ensure that the same basic regulatory requirements are in place in each

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<sup>1</sup> <http://www.senedd.assembly.wales/documents/s54016/14%20September%202016.pdf>

of the UK home nations in order to ensure that the playing field for the agricultural sector.

7. NFU Cymru is very much alive to the political and constitutional tensions that the process of legislating for Brexit has already produced, and is likely to continue to produce going forward.
8. The constitutional landscape is radically different to that which existed when the UK joined the EEC. We have moved from an arrangement in the 1970s in which power was concentrated in London, to one in which devolved legislatures have law making responsibility in relation to certain matters, and have become permanent features of the UK's constitutional arrangements
9. NFU Cymru's view has been that where common frameworks are needed, then they are not imposed, but rather they are arrived at by mutual agreement between the UK and Devolved Governments<sup>2</sup>
10. The Union and its members are also acutely aware of the fact that in 19 months' time the UK will be outside of the EU and its Common Agricultural Policy, and between now and then it is essential that a domestic replacement to the Common Agricultural Policy is developed and implemented.
11. EU legislation governing the operation of the Common Agricultural Policy is enormously complex and highly integrated with the structures and processes of the European Union. Implanting this legislation into UK law, so that it continues to operate in its current form will require significant legal expertise and capacity.
12. NFU Cymru's consideration of the Bill and its provisions are of course based on our thoughts on the Bill as introduced to Parliament on 13<sup>th</sup> July 2017. The final scope and extent of the powers contained within it are almost certain to have changed between the Bill's introduction and Royal Assent.

### **The Bill's treatment of devolution – Clause 11 – Retaining EU Restrictions in devolution legislation**

13. We know from the judgment in the Article 50 litigation that upon the UK's departure from the EU, in the absence of Parliamentary legislation to the contrary, powers currently exercised at EU level, relating to matters within devolved competence would flow back to the devolved legislatures.<sup>3</sup>
14. Clause 11 of the Bill is the means by which those powers, which would by default, upon EU exit, be absorbed by the devolved legislatures, are diverted to Westminster and Whitehall. It is proposed to achieve this by amending the Government of Wales

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<sup>2</sup> <https://www.nfu-cymru.org.uk/nfu-cymru/documents/domestic-agricultural-policy-cymru-online/>

<sup>3</sup> <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>

Act 2006 to introduce a prohibition on legislating contrary to the body of *retained EU law* created by the Bill, to replace the current prohibition on legislating contrary to EU law

15. The effect of Clause 11 has been characterised as a land grab on the part of the UK Government. An alternative view to this characterisation is that a prohibition on legislating incompatibly to EU law has merely been substituted with a prohibition on modifying *retained EU law*, and in effect there has been no diminution of devolved competence.
16. It is implicit from the European Union Withdrawal Bill that the Sewel Convention is engaged, as in accordance with its requirements the legislative consent of the National Assembly will be sought in relation to a number of the Bill's provisions.
17. NFU Cymru welcomes the fact that the bill sets out to seek the consent of the National Assembly in relation to those of the Bill's provisions which impinge on devolved competence.
18. Although consent will be sought, it is far from certain whether consent will be granted. It is of course very unusual for legislative consent to be denied by the devolved legislatures, and the usual approach has been for Westminster to offer concessions in order to secure consent, or amend the draft legislation so that the Sewel convention is no longer engaged.
19. Whilst it is laudable and constitutionally correct that legislative consent will be sought, what will be a greater signifier of the UK Government's approach to devolution will be its course of action should such consent be denied.
20. The explanatory notes state that it is the UK Government's intention that the prohibition on modifying retained EU law can be amended via the Orders in Council procedure, so that it does not apply in relation to certain matters. Essentially this will release discrete areas from the wider prohibition on modifying retained EU law, where common frameworks are not required.
21. The Bill does not provide a mechanism for determining where common frameworks are required, nor does it set out any timetable for making a determination as to whether a common framework is required. We consider both the lack of mechanism and timetable to be deficiencies on the face of the Bill.
22. Although the Bill's explanatory notes speak of working closely with the devolved administrations in order to identify those powers which can be released via the Orders in Council procedure, it is almost certainly UK Government Ministers who will drive and determine the pace for this process.
23. Whilst it is to be welcomed that such powers can be released from the limits on modifying retained EU law and returned to the devolved administrations, it is of course to be noted that the Orders in Council procedure has in the past, in relation to devolution, shown itself to be an unwieldy and time consuming procedure. It is therefore very possible that the transfer of powers back to Cardiff, Edinburgh and Belfast will not occur particularly quickly.

24. NFU Cymru would assume that when powers are released, the same powers will be released to each of the devolved legislatures, that is to say the release of powers will be symmetrical, and furthermore that this release of powers to the devolved legislatures will be done concurrently. NFU Cymru would welcome clarification on this point.

### **Delegated Powers and their control – Clauses 7-10**

25. Powers conferred upon UK Government Ministers by Clause 7 to deal with deficiencies in retained EU law are wide, with clause 7 (4) conferring on Ministers powers to enact regulations which make ‘*any provision that could be made by an Act of Parliament*’ in order to prevent, remedy or mitigate any failure of retained EU law to operate effectively or any other deficiency in retained EU law.

26. Powers contained in Clause 7 are also not particularly well-defined. Although Clause 7(2) sets out a non-exhaustive list of possible deficiencies in EU law that may need remediating, there will inevitably be an element of subjectivity and personal judgment on the part of Ministers as to whether a piece of retained EU law is ‘deficient’ and in need of correction.

27. The width of the powers conferred by 7(4), taken in conjunction with the latitude granted by what may constitute a ‘deficiency’ means that Clause 7 confers on the executive powers to implement changes which could typically only be achieved via primary legislation, following full Parliamentary debate and scrutiny.

28. Schedule 7 of the EU Withdrawal Bill categorises regulations made under Clause 7 according to whether they are to be subject to the affirmative or the negative procedure in Parliament. The attempt made on the face of the Bill to pre-determine whether regulations made under section 7 is to be subject to the negative or the affirmative procedure is in our view regrettable.

29. A better approach might have been to adopt the recommendation of the House of Lords’ Constitution Committee, which in its report on the ‘Great Repeal Bill’, recommended that a Parliamentary Committee(s) decide on the appropriate level of scrutiny for each statutory instrument laid under the ‘Great Repeal Bill’.<sup>4</sup>

30. We would also agree with the Lords’ Constitution Committee’s recommendation that where a Parliamentary Committee determines that a statutory instrument amends retained EU law in matters of significant policy interest or principle, then it should undergo a strengthened scrutiny procedure. We would develop this further and suggest that this should include allowing Departmental Select Committees to consider and take evidence on secondary legislation falling within their policy areas.

31. The UK Government needs to consult with and fully involve the devolved institutions in any amendments that it makes to retained EU law, using its Clause 7 powers,

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<sup>4</sup> <https://publications.parliament.uk/pa/ld201617/ldselect/ldconst/123/123.pdf>

where the retained EU law would normally fall within the competence of the National Assembly.

32. NFU Cymru welcomes the fact that Clause 7 powers are subject to a sunset clause and are time limited to two years after exit day. In the absence of such a clause the body of retained EU law would otherwise, in theory at least, be susceptible to never-ending amendment on the part of UK Government Ministers.
33. Powers granted to Welsh Ministers under Clause 10 to correct deficiencies in retained EU law are far more modest than those granted to UK Government Ministers for the same purpose. They are subject to some very significant qualifications, including in relation to the type and subject matter of the retained EU law that these powers may be used to modify, and the fact that Welsh Ministers cannot make modifications which would be inconsistent with UK modifications to retained direct EU law. We note that paragraph 1(2) of Schedule 2 makes provision for deficiencies to be corrected jointly by devolved Ministers and UK Government.
34. The powers that will be granted to UK Government Ministers under Clause 7 are pretty much unprecedented in terms of their extensive breadth and reach, and as a corollary the exercise of these powers needs to be subject to the most vigorous scrutiny.

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