

National Assembly for Wales External Affairs and Additional Legislation Committee: Written Evidence submitted by the Cabinet Secretary for Finance and Local Government

Introduction

The External Affairs and Additional Legislation Committee has invited me to give oral evidence to the committee on 25 September on matters associated with the UK's withdrawal from the European Union. The European Union (Withdrawal) Bill ("the Bill") will, I assume, be one of the matters central to the committee's concerns, and this memorandum sets out the Welsh Government's view of the Bill. The committee will also wish to have regard to the Legislative Consent Memorandum tabled in the Assembly by the Welsh Government earlier this month.

The Bill: overview

The Bill received its Second Reading in the House of Commons on 7th and 11th September. It will next be considered by a Committee of the Whole House in October, once Parliament resumes after the Party Conference Recess.

The Bill is quite short (as was the European Communities Act 1972): 19 clauses and 9 Schedules. The content generally is consistent with that outlined in the previous UK Government's White Paper published in March. So:

- Clause 1 repeals the 1972 Act
- Clauses 2-6 provide both for the continuation in force of "EU-derived domestic legislation" (ie primary and secondary legislation already in place in the UK giving effect to obligations flowing from EU membership), and for the incorporation into domestic law of "direct EU legislation" (ie EU legislation, such as Regulations, which by virtue of the UK's membership of the EU has formed part of domestic law without the need for implementing domestic legislation) and other EU law rights etc., such as general principles of EU law. These bodies of law, together with certain other materials, constitute "retained EU law"; the effect of the provisions is to convert the bulk of EU law into UK domestic law and give it effect on and after "exit day" (a date to be specified in regulations, but which is anticipated to be at the end of March 2019). The European Court of Justice's (ECJ) jurisdiction in respect of this body of law ceases to exist on and after exit day.
- Clauses 7-9 confer on Ministers of the Crown wide-ranging delegated legislative powers "to prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law,

arising from ...withdrawal..." (this is the so-called "correcting power", ensuring that domestic law can continue to work properly immediately after "exit day"); to ensure the UK's continuing compliance with its international obligations following withdrawal; and to make any provision in domestic law necessary to give effect before exit to any withdrawal agreement arising from the process of EU negotiations. These are all "Henry VIII powers", in that they will allow Ministers to modify existing primary, as well as secondary, legislation. The powers are time-limited – the "correcting power" and the international obligations power cease to be available to Ministers two years after "exit day" (ie on the anticipated timetable they will no longer be available from April 2021), and the withdrawal agreement power can only be exercised before exit day. They are subject to a number of specified limitations, for example they cannot be used to impose or increase taxation, amend the Human Rights Act or create new criminal offences. Schedule 7 to the Bill makes provision with respect to Parliamentary scrutiny and approval of instruments made or to be made by virtue of the powers in these clauses.

- Clauses 10-11, and Schedules 2-3, are concerned with the implications for the Devolved Administrations: they make provision with respect to the powers of Ministers of devolved administrations and place renewed limits on devolved legislatures' legislative competence in respect of "retained EU law". These provisions are discussed further below.
- Clauses 12-19 and Schedules 4-9 make a range of technical provision, make interpretation provision, and specify the jurisdictional extent of the Bill (it applies to all parts of the UK). Clause 19 is about commencement: the order making powers in clauses 7-9, and their equivalent provision for Ministers in devolved administrations, come into force on Royal Assent, whereas most of the other parts of the Bill, including clause 11, will be brought into force by regulations, which we anticipate would specify exit day as the date for provisions to come into force.

Looking in more detail at the conceptual framework in the Bill, for our purposes the key concept is "retained EU law". The Bill identifies as "retained EU law" after withdrawal:

- (i) 'EU-derived domestic legislation', which will be preserved, and so retained, under clause 2, which acts as a savings provision for (among other things) Statutory Instruments made since 1973 under the European Communities Act 1972;

- (ii) Direct EU legislation, which will be converted, and so retained in UK domestic law, under cl 3; and all other directly-enforceable EU law, which will also be converted, and so retained, under cl 4.

The importance of the concept of “retained EU law” is that it is used to help define the scope of new Ministerial powers to modify the existing law in the context of Brexit and that it will operate as a constraint on the National Assembly’s legislative competence post-Brexit.

The Bill provides three major delegated powers, each of which is drafted in terms of a Minister of the Crown making provisions by regulation that the Minister considers “appropriate”:

1. A correcting power in cl 7 to address 'any failure of retained EU law to operate effectively' or other deficiency (a term the Bill does not define);
2. A power to make provision to prevent or remedy any breach of international obligations arising from Brexit in cl 8; and
3. A power to implement the withdrawal agreement in cl 9.

And clause 11 places a new limitation on the competence of the devolved legislatures, to the effect that they cannot (unless they were able to do so before the date of withdrawal) “modify, or confer power by subordinate legislation to modify, retained EU law”.

Implications for Devolution

(a) Ministerial Powers

Clause 10 states that “Schedule 2 confers powers [on devolved administrations’ Ministers] to make regulations...which correspond to the powers conferred [on Ministers of the Crown] by sections 7 to 9”. By virtue of paragraph 1 of Schedule 2, the Welsh Ministers will apparently have the same “correcting powers” as Ministers of the Crown in respect of “retained EU law”.

These are Henry VIII powers to modify primary and secondary legislation (subject to the same limitations applying to the Minister of the Crown powers), and are time-limited – they will not be available for use after March 2021. Paragraph 2 makes clear that Welsh Ministers’ correcting powers extend (only) to modifying instruments within the National Assembly’s legislative competence, whether the instruments were made by Parliament or by the National Assembly, or by Ministers of the Crown or by Welsh Ministers.

But what is wholly unexpected, and unwelcome, is the limitation on devolved administrations’ Ministers’ powers provided by Schedule 2 paragraph 3. Welsh (and other devolved administrations’) Ministers can only make “correcting”-type orders in respect of domestic legislation . If the legislation currently in force falls into the category of “direct EU legislation” (for example Regulations made by the EU institutions themselves), that is correctable only by UK Ministers.

It is unclear why this limitation is being proposed but it would seem to have a significant impact on the scope of Welsh Ministers' powers. Our initial assessment is about 60% of instruments within devolved competence potentially requiring modification fall within the category of "direct EU legislation" and will therefore not be capable of correcting action by the Welsh Ministers. (That is not of course to say that they all require modification.)

The limitation also appears potentially to have perverse or unintended consequences. It may well be desirable to modify different instruments within one regulatory scheme in the same way to deal with a common problem, but the Bill potentially frustrates this. For example, the Habitats Directive and the Water Framework Directive (both implemented by domestic legislation) form part of the same regulatory scheme as the Eels Regulation (made by the EU). The first two elements of the scheme (plans for protected sites and water quality), having been implemented by domestic legislation, would be amendable by the Welsh Ministers, but the third (plans concerning eel conservation), which is a Regulation made by the EU, would not. This makes little sense.

The Welsh Ministers' hand is further weakened by the fact that any amendment proposed to be made needs to be consistent with provision made by Ministers of the Crown in relation to "direct EU legislation".

The powers conferred on devolved administrations' Ministers are, so far as they overlap with those of Ministers of the Crown, concurrent – either set of Ministers can make modifying provision. Sub-paragraph (2) of paragraph 1 of Schedule 2 makes specific provision for joint action by a Minister of the Crown and a devolved administration's Ministers. That may be useful, but it leads to another point. Part 1 of Schedule 7 to the Bill makes provision for scrutiny of instruments being made, or proposed to be made, under the Bill's delegated powers. It specifies those particular circumstances where the affirmative resolution procedure is required and, in effect, says that in all other cases the negative resolution procedure is to be followed.

Where a Minister of the Crown acting alone (not jointly with a devolved administration's Minister) is making the instrument, then it is for Parliament to apply the appropriate procedure; if it is the Welsh Ministers acting alone, that task is the National Assembly's. If there is joint action being taken under paragraph 1(2) of Schedule 2, then, by virtue of paragraph 2 of Schedule 7, both Parliament and the National Assembly apply the appropriate procedure.

But as noted above, Welsh Ministers' powers are more limited in respect of devolved matters than a Minister of the Crown's (because "direct EU legislation" is beyond their competence to modify) and such powers as they will have will be concurrent with those of a Minister of the Crown rather than exclusive to them. If a Minister of the Crown chooses to modify an EU Regulation, that would be an instrument solely within the scrutiny responsibilities of Parliament (no question of joint action with the

Welsh Ministers could arise in respect of this “direct EU legislation” even where the subject-matter is of an obviously devolved character), and while individual Assembly Members could of course make public comments, the National Assembly as a body formally would have no say. The same would apply if the Minister of the Crown unilaterally (rather than jointly) took corrective action with respect to a matter, even if it would be within the powers of the Welsh Ministers to deal with it. The scrutiny obligation would then be discharged by Parliament rather than the National Assembly, because the relevant action would be being taken by a Minister of the Crown.

Finally, the Committee should note that the new Schedule 7A to the Government of Wales Act (the list of reserved matters created by the Wales Act 2017) will require modification, because some of the definitions of reserved matters refer directly to EU documents. The “normal” way of amending Schedule 7A will be by way of an Order in Council under s.109 of the Government of Wales Act 2006; any such Order requires approval in draft by both the National Assembly and each House of Parliament before being made. But as the Withdrawal Bill is drafted, the amendments could equally be made by regulations made by a Minister of the Crown under clause 7, and such regulations would not require National Assembly approval before being made. In the Welsh Government’s view, any amendments made to Schedule 7A should be by way of a process that enables the National Assembly to have its say and decide whether to give its consent to the proposed amendments.

(b) The National Assembly’s Legislative Competence

This matter is dealt with in clause 11, and in a way that the Welsh Government considers wholly unacceptable and regressive. Our objections are first that the policy reflected in the clause is potentially extremely damaging to the principle of devolution and secondly, if implemented as drafted, the result would be a devolution settlement lacking clarity and of considerably greater complexity.

The policy in the Bill is summarised by Professor Elliott of Cambridge University:

“At the moment, devolved legislatures are forbidden from doing things that breach EU law, even if the thing they wish to do concerns a subject-matter that is devolved. When the UK leaves the EU, by default that restriction will go — in effect causing powers to flow from Brussels to the devolved capitals (as well as, in relation to non-devolved and English matters, London). But the Bill erects a diversion, providing that repatriated powers, even when they relate to devolved subjects, will instead go to London. The UK Government will then decide which of them to hand to the devolved institutions, the implication being that some will not be handed over.” (emphasis added).

The Welsh Government cannot accept it is appropriate for the legislative competence of the National Assembly to be constrained by this “diversion” of powers in policy areas hitherto considered as wholly appropriate for devolution. Such a

policy presents a direct threat to the principle of devolution as a fundamental feature of the UK constitution.

In our policy document *Brexit and Devolution*, we have acknowledged that, in respect of certain matters covered by specific policy “frameworks”, there may be a need for a coordinated and agreed approach between the four governments, for example to support effective functioning across the UK market and prevent barriers emerging which would unreasonably constrain businesses. We have made clear our willingness to engage constructively with other administrations on these matters. But the Bill envisages instead a new set of legal constraints on the competences of the devolved institutions in respect of these matters, which we consider wholly unacceptable.

The UK Government has contended that the “diversion” policy reflected in clause 11 is transitional in nature, and the provision is intended only to allow time and space for “intensive discussion and consultation with devolved authorities on where lasting common frameworks are needed”. It is, however, notable that, whereas the Ministerial powers discussed above are all in their different ways time-limited, there are no time limits on the operation of clause 11; its allegedly transitional character is in no way reflected or provided for on the face of the Bill. The committee may wish to draw its own conclusions as to the significance of this omission.

The Welsh Government rejects fundamentally the policy underpinning clause 11. But even if we accepted that approach, we would still have grave concerns about the implications for the clarity and complexity of the devolution settlement.

As the committee is aware, our current devolution settlement operates on the basis of “conferred powers” – legislative competence is conferred by Westminster on the National Assembly expressly in respect of a range of listed matters. The Wales Act 2017 will amend the Government of Wales Act to bring the Welsh settlement into line with Scotland by implementing a “reserved powers” model – the assumption will be that legislative competence lies with the National Assembly unless the Act says (by specifying a list of reserved matters) that competence is retained by Westminster.

Under the Withdrawal Bill, legislative competence in respect of “retained EU law” will lie with Westminster but Orders in Council may be made in accordance with cl.11 (2) which, by dis-applying the general rule to any extent will, in effect, confer legislative competence on the National Assembly in respect of the matters to which the disapplication applies – this is the “handing over” of powers to which Professor Elliott refers. (The UK Government describes this as a “release” of powers.)

The starting assumption is therefore that legislative power in respect of “retained EU law” lies at Westminster but legislative competence in respect of a set of matters within the general category of retained EU law will nevertheless be conferred on the National Assembly by Order in Council.

The overall result will be that in respect of law other than retained EU law, the National Assembly will operate under a reserved powers model but in respect of retained EU law, it will operate essentially under a type of conferred powers model – the conferred powers being in respect of those matters released by Order in Council from the general reservation of competence to Westminster in relation to retained EU law. If the UK Government is to have its way, those conferred powers might in turn be subject to exceptions, to allow Westminster to retain exclusive competence in respect of those matters where “frameworks” will operate.

In the Welsh Government’s view, this is an extremely complex and confusing basis on which to construct a properly-functioning system of legislative devolution. Even if we agreed with the policy behind clause 11, we would have strongly to oppose the way the Bill impacts on the structural foundations of devolution, reversing as it does many of the gains for devolution which adoption of the Wales Act reserved powers model aims to create.

The Welsh Government’s response to the Bill

The Committee will be aware that the Welsh Government laid a Legislative Consent Memorandum in respect of the Bill, on 12 September. The Memorandum sets out the Welsh Government’s view of the requirement for the legislative consent of the Assembly in respect of the relevant clauses of the Bill, and confirms that we will not be in a position to recommend consent unless the Bill is amended to address our concerns. Subsequently, we have also published, jointly with the Scottish Government, a series of proposed amendments which seek to address the concerns we have raised. The First Minister also made a Statement in Plenary on 19 September, explaining our rationale for the publication of these amendments, which focus on the Bill’s implications for the devolution settlements, but do not address wider issues about the UK’s withdrawal from the EU.

We hope that Parliamentarians will find these suggested amendments useful, as they begin their detailed scrutiny of the Bill.

Conclusion

The committee will wish to form its own view about the merits of the Withdrawal Bill. For its part, as our Legislative Consent Memorandum explains, for reasons set out in that document and in this written evidence the Welsh Government will not feel able to advise the National Assembly to give its legislative consent to the Bill as currently drafted. The committee is invited to note that conclusion.

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