

CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE INQUIRY INTO THE POWERS IN THE EU (WITHDRAWAL) BILL TO MAKE SUBORDINATE LEGISLATION

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Capacity Issues and Institutional Organisation

1.1 The process for withdrawal from EU is set to place unprecedented demands on the governance machinery of the UK state and the devolved administrations. The UK Government is seeking to ensure as much continuity and certainty as possible by rolling over existing EU law through the EU (Withdrawal) Bill. Nonetheless, this process will require considerable activity to remedy deficiencies in the law and to correct measures which do not operate effectively, alongside measures needed to implement any agreement reached with the EU. This process of readying the statute book for post-EU membership will take place through primary legislation, and, to a significant degree, through subordinate legislation.

1.2 This subordinate legislation may come from three sources, and we submit there is a need for appropriate scrutiny by the relevant Assembly Committee over all three. First, subordinate legislation may be introduced for Wales, in areas falling within devolved competence, by Welsh Government ministers. Second, subordinate legislation may be introduced jointly by Welsh and UK ministers, and third, it may be introduced by UK ministers on a UK wide basis. The EU Withdrawal Bill provides powers in these three circumstances, whilst placing time limits their availability through sunset clauses. There are a series of additional and problematic restrictions applying to the use of delegated powers by devolved ministers, which will see U.K. ministers playing a considerable role in the introduction of subordinate legislation in devolved areas. The first, and most significant restriction is that Welsh ministers cannot amend directly applicable EU law falling within devolved competence. Additionally, there are requirements that SIs made in Wales are consistent with UK ministerial interpretations, and in some circumstances, Welsh ministers will need U.K. ministerial consent to act.

1.3 Issues regarding the capacity of the Assembly to scrutinise legislation (both primary and subordinate) are well known to the Committee and have been addressed most recently in the report of the Expert Panel on Assembly Electoral Reform. The need for extra scrutiny measures in light of withdrawal from the EU should be read in conjunction with the overall capacity questions of the Assembly that may be resolved, or at least partially resolved by the recommendations of that report.

1.4 Additionally, in the context of any reorganisation of the Assembly's Committee structure ahead of the sixth Assembly term in 2021, we would recommend a reorganisation of the existing External Affairs and Additional Legislation Committee and the Constitutional and Legislative Affairs Committee. Given the expected increase in the number of statutory instruments that the Assembly will need to scrutinise, consideration should be given to splitting off a dedicated Delegated Legislation Committee. Remaining responsibilities could fall to two reformulated committees, one on Constitutional Affairs and Additional Legislation and the other on External Affairs.

Scrutiny procedures outlined in the EU (Withdrawal) Bill

2.1 The EU (Withdrawal) Bill provides a model set of provisions for the Assembly which set out the mode of scrutiny to be deployed to Statutory Instruments. A top down imposition of rules to be followed would infringe the right for the Assembly to have control over its own procedures, formally reflected in new Schedule 7B Part 2 of Government of Wales Act 2006. Variation to the procedures set out in the Withdrawal Bill may be made by Assembly Act.

2.2 Scrutiny of the regulations made by Welsh Ministers.

The EU (Withdrawal) Bill provides (in Schedule 7, Part 1(1)) for a negative procedure, which requires ministers to lay before the Assembly subordinate legislation amending deficiencies. This legislation will come into effect immediately, and subsequently remain in force unless there is an objection raised within time limits. This is the standard procedure that will apply. For a variety of specified matters, the Bill provides for the draft affirmative procedure (including for instruments that transfer EU functions to a newly created public authority or transfers an EU legislative function to a UK body). This procedure necessitates prior approval by the Assembly of a draft measure before it comes into effect.

2.3 While the Bill in its amended form includes a sifting mechanism for regulations involving UK Ministers, the same is not true for devolved Ministers. A sifting mechanism could be considered for introduction in the Assembly for any Statutory Instruments dealing with deficiencies relating to withdrawal be upgraded to the affirmative procedure from the negative procedure for matters of legal or political significance.

2.4 The Hansard Society has noted that in the absence of an obligation on Government to adopt the recommendation of the sifting committee to upgrade the scrutiny procedure for any given Instrument, the sift can only be 'persuasive' in nature. If a sifting mechanism is introduced or made-in-Wales instruments, consideration should be given to whether the Government is placed under an obligation to give effect to the request.

3.1 Scrutiny of the regulations made by UK and Welsh Ministers acting jointly.

Scrutiny procedures to regulations made jointly are also outlined in EU (Withdrawal) Bill Schedule 7, Part 1, and include both the negative and affirmative procedures. There will be a need to ensure that the time limit for the annulment procedure is aligned so that the London and Cardiff based legislatures have equal opportunity to scrutinise and submit a resolution if necessary. The Committee should consider whether joint working and scrutiny arrangements with Westminster committees could be appropriately used. We discuss this further below in para 4.3. Although this may imply some Westminster control on Assembly proceedings, this would be on the basis of the consent of the Assembly for circumstances, and for as long, as such arrangements are required.

4.1 Scrutiny of regulations made by UK ministers

No provision is made for scrutiny of measures made by UK Ministers. Given the reach of U.K. Ministerial powers into areas of devolved competence as a consequence of the provisions in the Withdrawal Bill, the development of scrutiny arrangements here is particularly pressing. This Assembly has its own procedure under Standing Order 30A to

consent to Statutory Instruments made by UK government ministers that amend primary legislation within the legislative competence of the Assembly. The Assembly may choose to make wider use of this procedure as those Ministers begin their work of correcting 'deficiencies' to directly applicable retained EU law as per the EU (Withdrawal) Bill. Previous SI Consent Memoranda have been considered by CLAC even though there is flexibility in the Standing Orders regarding assigning them to subject committees and regarding the time limit for reporting. Such memoranda could suitably be part of the workload of a new Delegated Legislation Committee.

4.2 The Statutory Instrument consent procedure is unique to the Assembly. There is no equivalent in the Scottish Parliament and it is not built into the mechanisms of the EU (Withdrawal) Bill. It, therefore, lacks constitutional force as it is not established in law and is difficult to interpret as a constitutional convention. For the Statutory Instrument Consent Motion to have real bite, it would be necessary for a reciprocal arrangement be built in at Westminster level as well as introduced in the Scottish Parliament.

4.3 The Assembly could also consider drawing on practice and procedures already in place which involve ongoing coordination between UK Gov, the House of Commons, and the Assembly. Standing Order 21 on Subsidiarity monitoring provides an example of such coordination. Effective coordination would require the Assembly receiving early sight of proposals for delegated legislation issued by UK ministers, and a mechanism for it to provide scrutiny more directly into the process. This would allow for amendments or concerns to be raised in advance, in the hope of achieving a better finalised version when the instrument returns to the Committee for final approval.

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