

Mark Drakeford AM
First Minister
Welsh Government

21 February 2019

Dear Mark

Correspondence from the Welsh Government:

- **Interpretation of the European Union (Withdrawal) Act 2018 and the Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks**
- **Scrutiny of regulations arising from the European Union (Withdrawal) Act 2018**

Thank you for your letter of 7 February 2019.

I am also grateful for replies to our correspondence that we have also received from the Minister for Finance and Trefnydd on 7 February related to the scrutiny of regulations under the 2018 Act and specific regulations on plant breeders rights, nutrition and environment and wildlife.

We remain dissatisfied with the explanations we have received in response to our original correspondence.

In your letter you state, “a policy choice is not necessarily a substantive change to the policy itself” and “The question is what degree of policy change constitutes a new policy, and we do not consider that threshold to be met”.

We remain of the view that a change in policy is a new policy. The degree of policy change and the implications of that change may well determine the legislative approach but the starting point must be a recognition that there is a change of policy.



Once this is done, the valid question arises as to how that policy change should be accommodated legislatively with regard to administrative efficiency. In many cases the policy change will be minor in nature. However, the starting point must be the identification of a policy change. As a Committee we are not satisfied with the test that you have stated is applied.

The Intergovernmental Agreement states that “the powers will not be used to enact new policy in devolved areas; the primary purpose of using such powers will be administrative efficiency.”

We believe our approach derives from a more accurate interpretation of the ordinary meaning of the words in the Intergovernmental Agreement.

In November 2018 the National Assembly for Wales repealed the *Law Derived from the European Union (Wales) Act 2018* based on the content of the Intergovernmental Agreement.

In the debate repealing the 2018 Act, you said:

“The agreement we reached has ensured that not a single devolved responsibility has left this Assembly. Areas already devolved remain devolved, and the necessary safeguards are in place to ensure that this continues to be the case. Devolution is entrenched in the inter-governmental agreement, not diluted by it, and not undermined by it as the EU withdrawal Bill, as originally enacted, certainly would have done.”

This brings me to the letter of 7 February 2019 from the Welsh Government and the explanation as to why the written statements under Standing Order 30C do not detail to which parts of Welsh SIs the Welsh Ministers are consenting. Our concern is that we do not accept the explanations and reasons being put forward for the approach adopted.

It was therefore surprising to read the following statement:

“Logically, it follows that the priority for analysis of competence is whether an SI is within competence or not, at least in part. Issues of competence are often not clear-cut. The devolved and non-devolved elements of an SI are, in many cases, so intertwined that it can become artificial to draw rigorous distinctions between them. Taking a proportionate approach that focuses on the impact of the SI means the exact boundary of devolution within the SI is not of immediate relevance, as long as we are confident that it falls within competence to an extent.”



We are unclear how the Welsh Ministers can give consent to the UK Ministers acting in devolved areas without knowing precisely what is being consented to, a point we first raised in our original letter to the former Leader of the House Julie James AM on 15 November 2018 and which we have recently discussed in a meeting with the Counsel General, the Minister for Finance and Trefnydd and officials.

This is particularly important given your interpretation of the Intergovernmental Agreement and our observation, as we highlight in our report *Scrutiny of Regulations made under the European Act 2018: Progress report*, that the impact of the Welsh Government's approach has been in some instances to restrict the National Assembly's competence.

We note that the Welsh Government has accepted this to be the case in the final paragraph of its letter of 7 February 2109 regarding the plant breeders regulations:

“Welsh Government officials are in contact with the Wales Office about the **unintended restrictions** (our emphasis) on the Assembly's competence created by powers conferred in EU Exit SIs and other legislation, which engages paragraphs 8, 10 and 11 of Schedule 7B of the Government of Wales Act. Officials are examining the issue in detail and considering how it can best be resolved. The Welsh Government will keep the National Assembly, including the Constitutional and Legislative Affairs Committee, informed about the progress of these discussions.” [*Our emphasis*].

Respectfully, this paragraph would appear to be at odds with your comments referred to above.

This paragraph also highlights our concern: the Welsh Government may be consenting to regulations without fully considering the implications of the regulations for the National Assembly's legislative competence; the Welsh Government is then having to resolve the consequences *after* consent has been given with no guarantee of a positive outcome; and the National Assembly as legislature is being by-passed in decisions about its own legislative powers.

We do not wish to add unnecessarily to the already heavy workload being placed on both executive and legislature at the current time, or to exacerbate the time pressures and capacity issues we all face. However, as I am sure you will appreciate, that cannot be a material consideration in the approach of this



Committee to scrutiny; our responsibility to the National Assembly of Wales is to carry out our functions diligently, to scrutinise legislation and accordingly, to hold the Welsh Government properly to account.

I am copying this letter to the Minister for Finance and Trefnydd and Counsel General.

Yours sincerely

A handwritten signature in black ink that reads "Mick Antoniw". The signature is written in a cursive style with a horizontal line underneath the name.

Mick Antoniw
Chair

Croesewir gohebiaeth yn Gymraeg neu Saesneg.
We welcome correspondence in Welsh or English.

