

Scrutiny of regulations made under the European Union (Withdrawal) Bill

February 2018



The National Assembly for Wales is the democratically elected body that represents the interests of Wales and its people, makes laws for Wales, agrees Welsh taxes and holds the Welsh Government to account.

An electronic copy of this document can be found on the National Assembly website: www.assembly.wales/SeneddCLA

Copies of this document can also be obtained in accessible formats including Braille, large print, audio or hard copy from:

Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

Tel: **0300 200 6565**

Email: **SeneddCLA@assembly.wales**

Twitter: **@SeneddCLA**

© National Assembly for Wales Commission Copyright 2018

The text of this document may be reproduced free of charge in any format or medium providing that it is reproduced accurately and not used in a misleading or derogatory context. The material must be acknowledged as copyright of the National Assembly for Wales Commission and the title of the document specified.

Scrutiny of regulations made under the European Union (Withdrawal) Bill

February 2018



About the Committee

The committee was established on 15 June 2016 to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the Assembly or the Welsh Ministers, including the quality of legislation.

Committee Chair:



Mick Antoniw AM

Welsh Labour
Pontypridd

Current Committee membership:



Mandy Jones AM

UKIP Wales
North Wales



Dai Lloyd AM

Plaid Cymru
South Wales West



David Melding AM

Welsh Conservative
South Wales Central

Contents

Recommendations	5
1. Introduction.....	6
The Committee’s remit.....	6
Our terms of reference and approach.....	6
2. Scrutiny of the European Union (Withdrawal) Bill.....	9
Passage through the UK Parliament	9
Reports on the Bill	9
Our work to date	11
The regulation-making powers in the Bill.....	11
3. Our recommendations for change.....	14
Legislating for withdrawing from the EU	14
The importance of scrutinising broad powers.....	14
The sifting mechanism in the Bill	16
The sift mechanism and regulations in devolved areas.....	16
The sifting committee in the National Assembly.....	20
Applying the sift mechanism to regulations made under the Bill in devolved areas.....	21
Sift committees working together	23
Scrutiny in urgent cases	23
Amendments to regulations containing devolved provisions	24

Recommendations

Recommendation 1. We recommend that the sifting mechanism currently included in the Bill should be extended to cover all regulations that are made under the Bill and are laid before the National Assembly, and that a committee of the National Assembly is responsible for making a recommendation as to the appropriate procedure for the regulations..... Page 19

Recommendation 2. The recommendation made by the sifting committee under recommendation 1 should be binding, save where the National Assembly resolves otherwise. This requirement should be reflected on the face of the Bill.
..... Page 19

Recommendation 3. We recommend that the sifting criteria set out in paragraph 35(b) of this report are applied to all regulations that are made under the Bill and are laid before the National Assembly, and that the criteria should be set out in the Standing Orders of the National Assembly..... Page 19

Recommendation 4. We recommend that the Bill is amended in line with paragraphs 44 to 46 of this report, which include endorsements of recommendations made by the House of Lords Constitution Committee and the House of Lords Delegated Powers and Regulatory Reform Committee.....Page 20

Recommendation 5. We recommend that this Committee—the Constitutional and Legislative Affairs Committee—should be the sifting committee for the National Assembly for Wales and that the Assembly’s Standing Orders are amended accordingly..... Page 21

Recommendation 6. We recommend that the sifting mechanism should apply to regulations under Categories 1, 2 and 3 identified in this report, namely all regulations made under the Bill containing devolved provisions that are laid before the National Assembly..... Page 21

Recommendation 7. We recommend that the made affirmative procedure for urgent cases should also apply to regulations made by the Welsh Ministers (whether acting alone or acting with UK Ministers in composite regulations or acting with UK Ministers in joint regulations) in order for there to be consistent treatment of ministers of all governments..... Page 23

1. Introduction

The Committee's remit

1. The remit of the Constitutional and Legislative Affairs Committee (the Committee) is to carry out the functions of the responsible committee set out in Standing Order 21¹ (with the exception of Standing Order 21.8²) and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the National Assembly or the Welsh Ministers, including the quality of legislation.

2. In our scrutiny of Bills introduced in the National Assembly, our approach is to consider:

- matters relating to the competence of the National Assembly, including compatibility with the European Convention on Human Rights (ECHR);
- the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
- whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation; and
- any other matter we consider relevant to the quality of legislation.

Our terms of reference and approach

3. In October 2017, we started an inquiry into the powers contained in the UK Government's European Union (Withdrawal) Bill (the Bill) to make subordinate legislation³ (delegated powers). The terms of reference for this work were to consider:

- i) the appropriateness of:
 - the scope and nature of delegated powers provided in the Bill to UK and Welsh Ministers, including the use of Henry VIII powers;

¹ National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, October 2017

² Functions under Standing Order 21.8 are the responsibility of the External Affairs and Additional Legislation Committee

³ Subordinate legislation is often referred to as secondary or delegated legislation

- the procedures to be used to scrutinise delegated legislation under the Bill.

- ii) the reports of other parliamentary committees across the UK on the delegated powers within the Bill;
- iii) any other relevant matter relating to the making of subordinate legislation as a consequence of the Bill.

4. The inquiry followed:

- a joint consultation exercise on the Bill with the External Affairs and Additional Legislation Committee over the summer of 2017,⁴ which included responses commenting on the delegated powers contained in the Bill;⁵ and
- a stakeholder event on 18 September 2017 with representatives from across the private and public sectors in Wales on the Bill's implications for devolution, which involved discussion on delegated powers.

5. We provided a further opportunity for stakeholders to comment on the delegated powers contained in the Bill in October 2017⁶ and received responses from the RSPB Cymru⁷ and Cytûn⁸.

6. On 29 January 2018, we held an expert panel session⁹ to assist with our work. The panel comprised:

- Michael Carpenter CB, former Speaker's Counsel, House of Commons;
- Professor Thomas Glyn Watkin, FLSW, Honorary Professor of Law, Bangor University;

⁴ Details of the consultation exercise are available on our [website](#).

⁵ Written evidence, EUWB 01, Professor John Bell, University of Cambridge; Written evidence, EUWB 07, Cytûn;

Written evidence, EUWB 08, Wales Environment Link; Written evidence, EUWB 09, Institute of Welsh Affairs; Written evidence, EUWB 10, Learned Society of Wales; Written evidence, EUWB 12, RSPB Cymru; Written evidence, EUWB 20, Wales Council for Voluntary Action; Written evidence, EUWB 21, BMA Cymru Wales; Written evidence, EUWB 22, NFU Cymru.

⁶ Details of the consultation exercise are available on our [website](#).

⁷ Written evidence, DP 1, RSPB Cymru

⁸ Written evidence, DP 2, Cytûn

⁹ Papers provided to us by the expert panel are available on our [website](#).

- Ruth Fox, Director Hansard Society;
- Hedydd Phylip, Wales Governance Centre;
- Rhodri Williams QC, Thirty Park Place Chambers.

7. Our report has been informed by all the views we have heard on the Bill. Given the Bill's current passage through the House of Lords, our report focuses predominantly on amendments we believe should be made to the Bill. In so doing they address the questions raised by the Secretary of State for Wales in Annex A of a letter sent to the Llywydd on 16 January 2018.¹⁰

8. We may also report at a later date on more operational matters that relate to the scrutiny of subordinate legislation made under the Bill. The final Bill approved by the UK Parliament is also likely to influence these matters.

¹⁰ Letter from The Rt Hon Alun Cairns MP, Secretary of State for Wales, to Elin Jones AM, Presiding Officer, National Assembly for Wales, *European Union (Withdrawal) Bill*, 16 January 2018

2. Scrutiny of the European Union (Withdrawal) Bill

Passage through the UK Parliament

9. On 13 July 2017, the Bill¹¹ received its first reading in the House of Commons. The Bill sets out how the current body of European Union (EU) law will be converted into UK law upon the UK's withdrawal from the EU (known as retained EU law). The Bill completed its passage through the House of Commons on 17 January 2018 and received its first reading in the House of Lords on 18 January 2018.¹² Following its second reading, it is scheduled to start its Committee stage on 21 February 2018.

10. The UK Government has produced a range of documents in support of the Bill,¹³ including and of particular relevance to our inquiry, a memorandum explaining the use of delegated powers in the Bill.¹⁴

Reports on the Bill

11. In September 2017, the Hansard Society produced its report *Taking Back Control for Brexit and Beyond, Delegated Legislation, Parliamentary Scrutiny and the European Union (Withdrawal) Bill*. It advocated that amendments to the Bill should circumscribe ministerial powers more tightly and strengthen the scrutiny procedure for the exercise of the widest delegated powers.¹⁵

12. Parliamentary committees have produced a range of reports on the UK's withdrawal from the EU and the Bill; we highlight below some of those that are of particular relevance to our inquiry.

¹¹ European Union (Withdrawal) Bill, Bill 5 2017-2019

¹² European Union (Withdrawal) Bill, HL Bill 79, 2017-2019

¹³ Bill documents – European Union (Withdrawal) Bill 2017-19, available on the UK Parliament [website](#).

¹⁴ UK Government, European Union (Withdrawal) Bill, *Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee*, July 2017 and January 2018

¹⁵ Hansard Society, *Taking Back Control for Brexit and Beyond, Delegated Legislation, Parliamentary Scrutiny and the European Union (Withdrawal) Bill*, September 2017, Executive Summary

13. In November 2017, the Procedure Committee of the House of Commons published its report, *Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report*,¹⁶ recommending “the establishment of a committee to examine the legislative changes the Government proposes and identify those of political and/or legal importance”.¹⁷ During committee proceedings in the House of Commons on 12 and 13 December 2017, amendments 392 to 398 tabled by the Chair of the Committee, Charles Walker MP, (and supported by Committee members of all parties) were considered in Committee of the Whole House and made to the Bill.¹⁸ The amendments introduced a sifting mechanism for delegated legislation in the House of Commons only. That sifting mechanism is discussed further in Chapter 3.

14. The House of Lords Constitution Committee’s report, *the European Union (Withdrawal) Bill*, was published in time for second reading in the House of Lords and contains a comprehensive analysis of the Bill, making recommendations on how it believes the Bill needs to be improved.¹⁹

15. Given its constitutional significance, the Delegated Powers and Regulatory Reform Committee of the House of Lords reported earlier than usual on the Bill in September 2017²⁰ and reported again on 1 February 2018²¹ following the Bill’s arrival in the House of Lords. Its 2018 report included the following points:

“The European Union (Withdrawal) Bill gives excessively wide law-making powers to Ministers.

The Bill even allows Ministers to make regulations that amend or repeal the European Union (Withdrawal) Act itself.

¹⁶ House of Commons Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report*, First Report of Session 2017-19, HC 386, November 2017

¹⁷ House of Commons Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report*, First Report of Session 2017-19, HC 386, November 2017, Summary

¹⁸ House of Commons Procedure Committee website [accessed 15 February 2018]

¹⁹ House of Lords Constitution Committee, *European Union (Withdrawal) Bill*, 9th Report of Session 2017-19, HL Paper 69, January 2018

²⁰ House of Lords Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill*, 3rd Report of Session 2017-19, HL Paper 22, September 2017

²¹ House of Lords, Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill*, 12th Report of Session 2017-19, HL Paper 73, February 2018

The Bill contains insufficient parliamentary scrutiny of many of the law-making powers given to Ministers.

Parliament should be given a greater say on the procedure applicable to regulations made by Ministers under the Bill.”²²

Our work to date

16. The outcome of our work to date on the UK Government’s approach to withdrawing from the EU has been set out in correspondence with:

- the Procedure Committee in the House of Commons;²³
- the External Affairs and Additional Legislation Committee (which includes our *Declaratory Statement on the Impact of exiting the European Union on the Devolution Settlement for Wales*);²⁴ and
- the Parliamentary Under Secretary of State at the Department for Exiting the EU, Robin Walker MP.²⁵

17. In addition, we reported in December 2017 on the Welsh Government’s Legislative Consent Memorandum on the Bill.²⁶

The regulation-making powers in the Bill

18. The Bill splits retained EU law into three types:

- EU-derived domestic legislation (under clause 2 of the Bill);
- Direct EU legislation (under clause 3 of the Bill);

²² House of Lords, Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill*, 12th Report of Session 2017-19, HL Paper 73, February 2018, Summary

²³ Letter to Charles Walker MP, Chair of the House of Commons Procedure Committee, *Delegated powers in the “Great Repeal Bill” inquiry*, 25 April 2017

²⁴ Letter to David Rees AM, Chair of the External Affairs and Additional legislation Committee, *UK Government White Paper: Legislating for the United Kingdom’s withdrawal from the European Union*, 7 June 2017

²⁵ Letter to The Rt Hon David Davis MP, Secretary of State for Exiting the European Union, *European Union (Withdrawal) Bill*, 31 July 2017; Letter from Robin Walker MP, Parliamentary Under Secretary of State for Exiting the European Union, *European Union (Withdrawal) Bill*, 24 October 2017

²⁶ Constitutional and Legislative Affairs Committee, *The Welsh Government’s Legislative Consent Memorandum on the European Union (Withdrawal) Bill*, December 2017

- Rights, powers, liabilities etc. that arise under the European Communities Act 1972 (under clause 4 of the Bill).

19. As currently drafted, the Bill gives the Welsh Ministers powers to amend one type of retained EU law, i.e. EU-derived domestic legislation. While the Bill was amended at Report Stage in the House of Commons to allow the Welsh Ministers also to amend direct EU legislation in devolved areas, that power is only exercisable where it has been agreed that a common framework in a particular devolved area is not needed.

20. With regard to making regulations in devolved areas, the Bill includes a complex mix of concurrent and joint powers. The nature of the concurrent and joint powers in the Bill can be summarised in the table below, which includes a summary of when the sift mechanism set out in the Bill applies.

21. With regard to that sift mechanism, it will not apply to regulations that must follow the affirmative procedure. Paragraphs 1 and 6 of Schedule 7 to the Bill set out the circumstances where regulations must follow the affirmative procedure (for example, where regulations establish a public authority in the UK or create a criminal offence).

Table: Powers to make regulations in the Bill (as introduced in the House of Lords)

Power	Can be exercised by	Clause or Schedule	Laid before	Does the sifting process apply under the Bill
To correct deficiencies in retained EU law in devolved areas	UKMs acting alone	Clause 7	UKP	Yes
	WMs acting alone	Part 1 of Schedule 2	NAW	No
	UKMs and WMs acting jointly	Part 1 of Schedule 2	UKP and NAW	No
	UKMs and WMs using concurrent powers in a composite instrument	Clause 7 (UKMs) Part 1 of Schedule 2 (WMs)	UKP and NAW	Yes
To implement international obligations in devolved areas	UKMs acting alone	Clause 8	UKP	Yes
	WMs acting alone	Part 2 of Schedule 2	NAW	No
	UKMs and WMs acting jointly	Part 2 of Schedule 2	UKP and NAW	No
	UKMs and WMs using concurrent powers in a composite instrument	Clause 8 (UKMs) Part 2 of Schedule 2 (WMs)	UKP and NAW	Yes
To implement withdrawal agreement in devolved areas	UKMs acting alone	Clause 9	UKP	Yes
	WMs acting alone	Part 3 of Schedule 2	NAW	No
	UKMs and WMs acting jointly	Part 3 of Schedule 2	UKP and NAW	No
	UKMs and WMs using concurrent powers in a composite instrument	Clause 9 (UKMs) Part 3 of Schedule 2 (WMs)	UKP and NAW	Yes
Consequential and transitional provisions in devolved areas	UKMs acting alone	Clause 17	UKP	No

Key:

WMs = the Welsh Ministers. UKMs = UK Ministers. NAW = National Assembly for Wales. UKP = UK Parliament.

3. Our recommendations for change

Legislating for withdrawing from the EU

22. In some of our initial statements on the implications of legislating to leave the EU, we have set out some important constitutional principles we believe should apply to the role of the National Assembly. This includes the National Assembly passing primary legislation in devolved areas, delegating powers to the Welsh Ministers to make subordinate legislation as the National Assembly considers appropriate, and the procedure to be applied to scrutiny of that subordinate legislation.

23. We recognise that the UK's withdrawal from the EU represents a unique as well as complex legislative challenge that must be achieved within a short timeframe. In these circumstances, and for practical reasons, we accept that the Bill will need to delegate powers to the Welsh Ministers to make subordinate legislation and that accordingly it will need to set the procedure attached to those powers.

24. We emphasise that this approach should not be regarded as conceding these important principles or our general concerns about the Bill's approach to devolution. Rather, this is a pragmatic response to the scale and challenge of the unique task ahead to ensure a functioning statute book.

25. We set out below ways in which we believe the Bill needs to be amended, which includes ways in which the National Assembly can retain some control of the procedure attached to the making of subordinate legislation.

The importance of scrutinising broad powers

26. We accept that the legislative challenge posed by exiting the EU is huge and unprecedented. We accept that government ministers require regulation-making powers to deal with that challenge. However, we do not believe that is a reason to ignore some basic constitutional principles. In particular:

- regulation-making powers must not be used to shift the balance of power excessively towards governments and away from legislatures (in particular, the devolved legislatures as we believe happens under the Bill).
- regulation-making powers that allow primary legislation to be amended (Henry VIII powers) must be clearly justified and, at the very least, be

subject to the affirmative procedure; this is a long-standing view we have held.

27. We are concerned by the way these basic principles are eroded under the Bill. Much of the evidence we have received and heard has also expressed concern about the extent of the powers provided in the Bill and also the provisions relating to the scrutiny of subordinate legislation.²⁷

28. It is therefore more crucial than ever that there is proper scrutiny of the use of the regulation-making powers in the Bill.

29. We repeat the first principle set out in our Declaratory Statement on the Impact of exiting the European Union on the Devolution Settlement for Wales, that the whole process of exiting the EU must always ensure respect for the rule of law. This includes the need for proper parliamentary scrutiny of legislation.

30. We note similar concerns about the Bill have been raised by the House of Lords Constitution Committee:

“We do not consider that it is appropriate for the Henry VIII powers in this Bill to be exercisable by the negative procedure, particularly as they might be used to make legislation of substantive policy significance. The Government has not offered sufficient justification for the widespread application of the negative procedure in this context, given the constitutional implications for the separation of powers.”²⁸

and

“In our view, the Bill as drafted proposes scrutiny measures that are inadequate to meet the unique challenge of considering the secondary legislation that the Government will introduce once the Bill is passed.”²⁹

31. It is clear to us that the Bill must be amended to provide for effective parliamentary scrutiny of regulations made under the Bill.

²⁷ For example, Written evidence, EUWB 01, Professor John Bell, University of Cambridge and Written evidence, EUWB 09, Institute of Welsh Affairs

²⁸ House of Lords Constitution Committee, *European Union (Withdrawal) Bill*, 9th Report of Session 2017-19, HL Paper 69, January 2018, paragraph 215

²⁹ House of Lords Constitution Committee, *European Union (Withdrawal) Bill*, 9th Report of Session 2017-19, HL Paper 69, January 2018, paragraph 228

The sifting mechanism in the Bill

32. The sifting mechanism now contained in the Bill for the scrutiny of delegated legislation in the House of Commons is as follows:

- All regulations proposed to be made under the powers in clauses 7, 8 or 9 of the Bill, and which Ministers consider ought to be made under the negative procedure, shall be laid before the House of Commons.
- During the ten sitting days after laying the Minister responsible may not make the instrument (i.e. sign it into law).
- Within that period the Commons sifting committee may consider each instrument and report its recommendation that the instrument should be proceeded with under the affirmative procedure.
- After the statutory ten days have elapsed the Minister may proceed with the instrument under either:
 - the affirmative procedure (i.e. the instrument requires a debate and a vote in both Houses before it may be made and brought into force), or
 - the negative procedure (i.e. the instrument is made and may be brought into force, but it will be annulled if either House passes a motion to annul it within 40 days of it being laid).³⁰

The sift mechanism and regulations in devolved areas

33. We believe that the sifting mechanism for the House of Commons now contained within the Bill is a positive step towards improving the level of scrutiny attached to subordinate legislation to be made under the Bill. We consider that the same sifting mechanism should apply in the National Assembly.

34. However, we share the concerns of the House of Lords Delegated Powers and Regulatory Reform Committee that the current mechanism “lacks teeth”.³¹ The sift mechanism must amount to a meaningful exercise that will result in changes to the procedure that applies to regulations in devolved areas where such changes are considered appropriate.

³⁰ House of Commons Procedure Committee website [accessed 15 February 2018]

³¹ House of Lords, Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill*, 12th Report of Session 2017-19, HL Paper 73, February 2018, paragraph 58

35. The sift mechanism set out in the Bill needs to be more robust. Therefore, we believe:

- (a) that sifting criteria should be adopted to give clarity to the sifting committee as to what criteria to apply when coming to a decision about what procedure should apply (and giving clarity to the relevant government minister around what to include in the memorandum that is laid in accordance with condition 1³² in the Bill);
- (b) the following sifting criteria should be adopted (some of which will naturally overlap):
 - (i) whether there is sufficient clarity and transparency in the memorandum as to why the minister is of the opinion that the negative resolution procedure should apply. If the memorandum is not sufficiently clear and transparent as to why the negative resolution procedure should apply, the sifting committee should be cautious about proceeding with the negative resolution procedure. We note that the clarity and transparency of explanatory material is often a hit or miss experience – where there is a hit, the scrutiny process can be efficient and effective, but where there is a miss, the scrutiny process can be slow and, at times, less robust. We see this as an opportunity to raise standards in explanatory material in general;
 - (ii) whether the memorandum is sufficiently clear and transparent as to the changes that are being made by the regulations. We would expect the memorandum to be clear and transparent as to what is being changed, why it is being changed and the impact that the change will have;
 - (iii) whether there has been adequate consultation. Again, we would expect the memorandum to be clear and transparent around consultation;
 - (iv) whether the memorandum is sufficiently clear and transparent about the impact the regulations may have on equality and human rights. Again, a lack of clarity and transparency will naturally raise suspicion of a proposal to follow the negative resolution procedure;

³² Condition 1 as set out in paragraphs 3 and 13 of Schedule 7 to the Bill.

- (v) whether the regulations raise matters of public, political or legal importance. This gives the committee a general ability to consider the regulations as a whole and to use its experience and expertise to determine the procedure that should apply;
- (c) using the sifting criteria above, the sifting committee makes the final decision as to what procedure will apply to the regulations. It should be clearly stated on the face of the Bill that whatever procedure upon which the committee decides, is the procedure that will apply to the regulations (subject always to the National Assembly resolving otherwise). This reflects the recommendations made by the House of Lords Constitution Committee³³ and the House of Lords Delegated Powers and Regulatory Reform Committee.³⁴
- (d) the committee makes its final decision as to what procedure is to apply within 10 days of the draft regulations being laid, and if no such decision is made within those 10 days then the relevant government minister can make the regulations which will follow the negative resolution procedure. Again, this should be set out on the face of the Bill.

36. We believe that these criteria will help the committee come to an informed decision as to what procedure should apply to regulations made under the Bill. The emphasis on clarity and transparency will help the committee come to a decision in an effective and efficient way (while also helping with the committee's general scrutiny of the regulations).

37. A lack of clarity and transparency around things like what changes are being made, what consultation has been carried out and what is the impact on equality and human rights will only serve to keep the committee in the dark and make the whole sift mechanism slower and less robust.

38. Further, the same 10 day time limit applies as is currently set out in the Bill. This means that this robust sift mechanism need not slow down the process of making regulations under the Bill.

³³ House of Lords Constitution Committee, *European Union (Withdrawal) Bill*, 9th Report of Session 2017-19, HL Paper 69, January 2018. paragraph 227

³⁴ House of Lords, Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill*, 12th Report of Session 2017-19, HL Paper 73, February 2018, paragraph 58

39. The approach we outline ensures that the National Assembly can have the final say as to what procedure will apply to the making of subordinate legislation laid before the National Assembly.

Recommendation 1. We recommend that the sifting mechanism currently included in the Bill should be extended to cover all regulations that are made under the Bill and are laid before the National Assembly, and that a committee of the National Assembly is responsible for making a recommendation as to the appropriate procedure for the regulations.

Recommendation 2. The recommendation made by the sifting committee under recommendation 1 should be binding, save where the National Assembly resolves otherwise. This requirement should be reflected on the face of the Bill.

40. While we would prefer the sifting criteria to be included on the face of the Bill (in order to give the criteria as much authority as possible) we do not see merit in the Bill setting out detailed criteria that will apply to a sift committee of the National Assembly while at the same time not setting out such detail in respect of a sift committee at Westminster.

41. Therefore, we propose that the sifting criteria we outline in paragraph 35(b) above should be set out in the National Assembly's Standing Orders. Those criteria will then send a clear message as to the kind of information that must be included in explanatory memorandums that accompany regulations made under the Bill.

Recommendation 3. We recommend that the sifting criteria set out in paragraph 35(b) of this report are applied to all regulations that are made under the Bill and are laid before the National Assembly, and that the criteria should be set out in the Standing Orders of the National Assembly.

42. Recommendations 1 to 3 should be read in conjunction with paragraphs 50 and 51 and Recommendation 6 which explain the different categories of regulations that may be made in devolved areas.

43. The robust sift mechanism will help counter the limited circumstances set out in the Bill as to when the affirmative procedure applies (see paragraphs 1(2) and 6(1) of Schedule 7 to the Bill). However, a sift mechanism, no matter how robust, is no substitute for a clear declaration on the face of the Bill as to when the affirmative procedure applies.

44. Therefore, in addition to adopting a robust sift mechanism, we believe that the circumstances where the affirmative procedure automatically applies under

the Bill are broadened. In this regard, we agree with the House of Lords Constitution Committee that the “narrowly-circumscribed set of circumstances for which the affirmative procedure is required is constitutionally unacceptable” and that “the Bill should provide for an application of the affirmative procedure in relation to any measure which involves the making of policy”.³⁵

45. We also agree with the recommendation of the Delegated Powers and Regulatory Reform Committee that “the affirmative procedure should apply to regulations under clauses 7, 8, 9 and 17 that amend or repeal primary legislation”.³⁶ In our view, the same should apply to regulations made by the Welsh Ministers.

46. However, we do not believe that the Henry VIII powers contained in the Bill should be used to amend the *Government of Wales Act 2006*. As a result, the *Government of Wales Act 2006* should be included in the list of enactments in clause 7(7) that cannot be amended by regulations.

Recommendation 4. We recommend that the Bill is amended in line with paragraphs 44 to 46 of this report, which include endorsements of recommendations made by the House of Lords Constitution Committee and the House of Lords Delegated Powers and Regulatory Reform Committee.

The sifting committee in the National Assembly

47. Recommendation 1 indicates that a committee of the National Assembly should be responsible for making a recommendation as to the appropriate procedure for the regulations. We believe this committee is the most appropriate committee to perform that task.

48. We have experience and expertise in respect of regulation-making powers and the various procedures that can apply through our consideration of all Bills introduced for scrutiny in the National Assembly. In addition we also perform technical and merits scrutiny of all statutory instruments laid before the National Assembly in accordance with Standing Order 21. This can often include making judgements on whether the appropriate use of the negative or affirmative procedure has been made by the Welsh Ministers where the parent Act allows a choice of procedure to be made.

³⁵ House of Lords Constitution Committee, *European Union (Withdrawal) Bill*, 9th Report of Session 2017-19, HL Paper 69, January 2018, paragraph 219

³⁶ House of Lords, Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill*, 12th Report of Session 2017-19, HL Paper 73, February 2018, paragraph 53

49. In our view this would represent the most efficient and pragmatic approach to dealing with this huge and time-pressured legislative task.

Recommendation 5. We recommend that this Committee—the Constitutional and Legislative Affairs Committee—should be the sifting committee for the National Assembly for Wales and that the Assembly’s Standing Orders are amended accordingly.

Applying the sift mechanism to regulations made under the Bill in devolved areas

50. We have identified four categories of regulations that may be made under the Bill containing devolved provisions.

- Category 1: regulations made by the Welsh Ministers acting alone using their powers under Schedule 2, laid before the National Assembly for Wales only;
- Category 2: regulations made by the Welsh Ministers and UK Ministers acting jointly under Schedule 2, laid before both the National Assembly for Wales and the UK Parliament;
- Category 3: regulations made by the Welsh Ministers and UK Ministers using their concurrent powers (under Schedule 2 and clauses 7, 8 and 9, respectively) in composite regulations, laid before both the National Assembly for Wales and the UK Parliament;
- Category 4: regulations made by UK Ministers acting alone using their powers under clauses 7, 8, 9 and 17, laid before the UK Parliament only.

51. As drafted, the Bill provides that the sift mechanism applies to Categories 3 and 4 (except for regulations made under clause 17) but not Categories 1 and 2.

Recommendation 6. We recommend that the sifting mechanism should apply to regulations under Categories 1, 2 and 3 identified in this report, namely all regulations made under the Bill containing devolved provisions that are laid before the National Assembly.

52. With regard to regulations laid before both the National Assembly and the UK Parliament, we recognise that there would be at least two sifting committees sifting the same regulations, one committee of the National Assembly and one committee of the House of Commons.

53. In these cases, it will be vital that both committees work together to come to an agreement as to the procedure that will apply. We consider this to be the most pragmatic approach.

54. It is important to note that UK Ministers could, acting alone, use their broad powers to make regulations in devolved areas. This could lead to regulations of the kind the National Assembly sees on a day-to-day basis being laid before the UK Parliament only.

55. UK Ministers could, acting alone, also use their broad powers in a way that affects the legislative competence of the National Assembly. For example, UK Ministers could use their powers to transfer any function of an EU public authority to a UK public authority.³⁷ Where such a UK body is a “reserved authority” (as defined in new Schedule 7B to the Government of Wales Act 2006) then the National Assembly will not have power to legislate in respect of the functions of that reserved authority unless the UK Government consents.

56. In written evidence to us, Professor Watkin said:

“...regarding the transfer of current EU functions to UK public authorities, the content of the subordinate legislation made at Westminster can have significant consequences for the devolved administrations...To ensure that the exercise of these powers by UK Ministers does not have detrimental consequences for devolved administrations, some scrutiny of such statutory instruments by them would be required.”³⁸

57. This is one of two examples of executive action controlling the scope of the powers of a legislature under the Bill. The other example being that UK Ministers can use their broad powers to amend retained EU law when the National Assembly’s competence is confined to not breaching retained EU law. So if UK Ministers use their regulation-making powers to make Change X to retained EU law, then the National Assembly cannot pass primary legislation that is incompatible with Change X. The constitutional impropriety of this is clear.

58. Therefore, with regard to Category 4, we believe that the sift committee at the National Assembly should be given some role in the scrutiny of regulations made by UK Ministers in devolved areas that are laid before the UK Parliament

³⁷ Regulations achieving such a transfer would be subject to the affirmative procedure, see for example paragraph 1(2) of Schedule 7 to the Bill.

³⁸ Paper from Professor Thomas Glyn Watkin for expert panel session on 29 January 2018,

only. At the very least, the National Assembly committee should be made aware of any such regulations at the same time as the House of Commons committee is made aware of them. The National Assembly committee can then make representations to, or advise, the House of Commons committee where appropriate.

Sift committees working together

59. With regard to a sift committee of the National Assembly working with a sift committee of the House of Commons, there would be operational matters to consider.

60. Applying the sifting criteria outlined above would resolve one such matter, i.e. both committees could apply the same or similar sifting criteria. This would also help harmonise the kind of information that the relevant government ministers would have to provide (as noted above, the sifting criteria would provide clarity to the governments as much as to the committees).

61. We believe that the detailed operational matters associated with this approach—such as how external stakeholders can make representations to the committees and how the committees work together in coming to decisions etc—are best left for the committees to agree between themselves as they consider appropriate.

Scrutiny in urgent cases

62. We note that in his letter of 5 February 2018 to the Secretary of State for Wales, the First Minister said that the “made affirmative” procedure that applies in urgent cases under the Bill should, in principle, “be available to Welsh Ministers and the Assembly, to match the flexibility available to UK Ministers”.³⁹

63. We agree that the made affirmative procedure should be available to the National Assembly and the Welsh Ministers in urgent cases.

Recommendation 7. We recommend that the made affirmative procedure for urgent cases should also apply to regulations made by the Welsh Ministers (whether acting alone or acting with UK Ministers in composite regulations or acting with UK Ministers in joint regulations) in order for there to be consistent treatment of ministers of all governments.

³⁹ Letter from The Rt Hon Carwyn Jones AM, First Minister, to The Rt Hon Alun Cairns MP, Secretary of State for Wales, , 5 February 2018

64. However, we echo the concerns raised by the Hansard Society⁴⁰ in respect of the scrutiny procedure that applies in certain urgent cases. Those concerns are:

- (a) that the Bill does not impose a statutory duty on the Minister of the Crown to explain the urgency. In this context, we note the common law duty to give reasons is relevant but having a clear statutory duty to give reasons that explain the urgency would be far more satisfactory;
- (b) there are no defined limits to the cases which may or may not be urgent;
- (c) the sift mechanism can be by-passed completely, again without the Minister of the Crown having to give reasons for by-passing the sift mechanism.

65. We believe there should be safeguards included on the face of the Bill to address each of these concerns.

66. Those safeguards need not unnecessarily slow down the process of making urgent regulations under the Bill. For example, when deciding whether a case is urgent, the relevant government should know exactly why it is urgent and therefore it will be able to give reasons for the urgency very easily.

Amendments to regulations containing devolved provisions

67. We endorse the suggestion made by the House of Commons Procedure Committee⁴¹ (also recommended by the Hansard Society⁴²) in respect of a committee making recommendations for regulations made under the Bill to be amended.

68. We note that any sift committee at the National Assembly will be able to make such recommendations, and exercising that power is not dependent on including such a power on the face of the Bill.

⁴⁰ Hansard Society, *Scrutiny of SIs: further amendments are needed to EU (Withdrawal) Bill*, Blog, 15 January 2018

⁴¹ House of Commons Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report*, First Report of Session 2017-19, HC 386, November 2017, paragraph 28

⁴² Hansard Society, *Scrutiny of SIs: further amendments are needed to EU (Withdrawal) Bill*, Blog, 15 January 2018