

Report on the Law Derived from the European Union (Wales) Bill

March 2018

Background¹

1. The UK Government's European Union (Withdrawal) Bill ("the EU (Withdrawal) Bill") was introduced to the House of Commons on 13 July 2017. The Bill repeals the *European Communities Act 1972*, retains the vast majority of EU law currently in force in the UK and gives UK Ministers and Devolved Ministers the powers to make changes to that body of retained EU law. The powers given to Devolved Ministers to make changes are more restricted than the powers given to UK Ministers. The Bill also makes changes to the devolution settlement and the National Assembly's competence.
2. Following the introduction of the EU (Withdrawal) Bill to the UK Parliament, the First Minister published a statement on 13 July 2017 in which he said that there had been minimal attempts by Whitehall to work co-operatively with devolved governments and that parts of the Bill were completely unacceptable to the Welsh Government.²
3. In November 2017, the First Minister gave evidence to a joint session of the Constitutional and Legislative Affairs Committee and External Affairs and Additional Legislation Committee where he confirmed that a Continuity Bill had been drafted to protect Welsh devolution should the EU (Withdrawal) Bill not be amended. The Committees published reports on the EU (Withdrawal) Bill

¹ National Assembly for Wales, *Research and Legal Briefing Bill Summary: Law Derived from the European Union (Wales) Bill*, March 2018

² Welsh Government Written Statement, *European Union (Withdrawal) Bill*, 13 July 2017



Legislative Consent Memorandum on 15³ and 18⁴ December 2017; both concluded that the National Assembly should withhold its consent for the EU (Withdrawal) Bill in its current form.

4. On 27 February 2018, the Cabinet Secretary for Finance, Mark Drakeford AM (the Cabinet Secretary), made a Plenary statement on the JMC (EU Negotiations) Meeting held on 22 February 2018.⁵ He reported that, while the meeting had been constructive, the UK proposals still fell short of what would be acceptable to the Welsh Government or to the Scottish Government. The Cabinet Secretary confirmed that steps were being taken towards the introduction of Welsh Government proposed continuity legislation. The Welsh Government issued a press release on the same day, which explained that its preference continued to be for the UK Government to amend the EU (Withdrawal) Bill but, without agreement between the governments on the amendments required, the Welsh Government needed to proceed with its Continuity Bill as a fall-back option to protect Welsh devolution.⁶

The Emergency Bill procedure and introduction of the Bill

5. Standing Order 26.95 makes provision for the passing of emergency legislation if approved by a motion in the National Assembly. An Emergency Bill is a Government Bill that needs to be enacted more quickly than the National Assembly's usual legislative process allows.

6. On 6 March 2018, the National Assembly agreed a motion allowing the Law Derived from the European Union (Wales) Bill ("the LDEU Bill") to be treated as a Government Emergency Bill. It also agreed a motion under Standing Order 26.98(ii) confirming the timetable for scrutiny of the LDEU Bill.⁷

³ National Assembly for Wales External Affairs and Additional Legislation Committee, *European Union (Withdrawal) Bill: Interim report on the Legislative Consent Memorandum*, December 2017

⁴ National Assembly for Wales Constitutional and Legislative Affairs Committee, *The Welsh Government's Legislative Consent Memorandum on the European Union (Withdrawal) Bill*, December 2017

⁵ Plenary Statement by the Cabinet Secretary for Finance: JMC (EU Negotiations) Meeting, 22 February 2018

⁶ Welsh Government press release, *New law proposed to protect Welsh devolution*, Tuesday 27 February 2018

⁷ Plenary, Motion under Standing Order 26.95 that a Bill to be known as the Law Derived from the European Union (Wales) Bill be treated as a Government Emergency Bill and Motion under

7. On 7 March 2018, the Cabinet Secretary introduced the LDEU Bill. Before introduction, on 27 February 2018, the Llywydd issued a statement on legislative competence confirming that, in her view, the provisions of the Bill would be within the legislative competence of the National Assembly for Wales.⁸ The Presiding Officer also issued a note to Assembly Members summarising the issues that she considered in relation to competence.⁹

8. The LDEU Bill, as introduced, is intended to preserve EU law covering subjects devolved to Wales on withdrawal of the UK from the EU. The Explanatory Memorandum notes that the Bill will enable the Welsh Ministers to ensure that legislation covering these subjects works effectively after the UK leaves the EU and the *European Communities Act 1972* is repealed by the European Union (Withdrawal) Bill. The Explanatory Memorandum further suggests that the LDEU Bill enables the Welsh Ministers to legislate to maintain regulatory alignment with the EU in order to facilitate continued access to the EU market for Welsh Businesses, and creates a default position in law whereby the consent of the Welsh Ministers will be required before any changes are made by UK Ministers to devolved legislation within the scope of EU law.¹⁰

9. We took evidence from the Cabinet Secretary, and two Welsh Government officials on 12 March 2018.¹¹

Legislative competence

10. The Llywydd has stated that, in her opinion, the LDEU Bill is within the legislative competence of the National Assembly. We note the legislative competence issues raised by the Presiding Officer of the Scottish Parliament¹² and

Standing Order 26.98(ii) to agree a timetable for the Bill to be known as the Law Derived from the European Union (Wales) Bill, 6 March 2018

⁸ Presiding Officer's Statement on Legislative Competence, Law Derived from the European Union (Wales) Bill, 27 February 2018

⁹ Presiding Officer's Statement: Note to Assembly Members, 27 February 2018

¹⁰ Explanatory Memorandum, paragraphs 1-2

¹¹ All comments in this report attributed to the Cabinet Secretary and Welsh Government officials, in the context of them giving evidence to us, derive from the Record of Proceedings for the 12 March 2018 meeting of the Constitutional and Legislative Affairs Committee

¹² Withdrawal from the European Union (Legal Continuity) (Scotland) Bill: Statements on Legislative Competence, 27 February 2018

the Lord Advocate in respect of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill.¹³

11. The Welsh Government has also stated their view that the LDEU Bill is within the legislative competence of the National Assembly. We note the Welsh Government's views that nothing under the LDEU Bill can have legal effect before exit day and, therefore, nothing under the LDEU Bill can conflict with EU law while EU law applies in Wales.

Need for the Bill

12. We accept that there is a need for the LDEU Bill.

13. Exiting the EU has raised serious constitutional questions as to which legislature should exercise powers in devolved areas, once the UK leaves the EU. In its current form, the EU (Withdrawal) Bill fails to protect the powers of the National Assembly in devolved areas. Therefore, until we see changes to the EU (Withdrawal) Bill (in particular, to clause 11), we accept that there is a need for the LDEU Bill to protect the powers of the National Assembly in devolved areas.

14. In addition, we note that the LDEU Bill provides a means of filling the legislative void in the event that the National Assembly does not provide consent to the EU (Withdrawal) Bill and that the UK Government respects the National Assembly's decision. In our view, in the absence of any alternative plan for dealing with a decision of the National Assembly to withhold consent, this represents a sensible and responsible approach.

15. We welcome the Welsh Government's preferred option to protect devolution via the EU (Withdrawal) Bill, and that the LDEU Bill is the Welsh Government's "second choice". It makes sense to us that the fundamental constitutional principles that arise from exiting the EU are set out in the EU (Withdrawal) Bill. Therefore, we urge all parties to continue to work together in order to reach a stage where the National Assembly can give its legislative consent to the EU (Withdrawal) Bill, while at the same time securing an orderly route for exiting the EU.

16. Should agreement not be reached, the LDEU Bill becomes one of the most important Bills ever scrutinised in the National Assembly. It is disappointing that it has arisen predominantly because of the failure of the UK and Welsh Governments to (as yet) reach agreement on the EU (Withdrawal) Bill.

¹³ Scottish Parliament Official Report, Meeting of the Parliament 28 February 2018

17. The LDEU Bill concerns complex matters, which could have a significant impact on how law is made in Wales post-Brexit. One of the consequences of dealing with the Bill as an Emergency Bill is that there is limited time in which to fully understand the implications of the LDEU Bill or to hear the views of stakeholders, including constitutional lawyers and experts in the field, as we did in our scrutiny of the EU (Withdrawal) Bill.

18. As a result, there is a concern, as our predecessor committee drew attention to in the Fourth Assembly¹⁴, that the LDEU Bill could be subject to less-informed scrutiny at Stages 2 and 3.

19. The same issues of principle apply to the regulation-making powers in the LDEU Bill as apply in relation the EU (Withdrawal) Bill, namely:

- regulation-making powers must not be used to shift the balance of power excessively towards governments and away from legislatures;
- 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;
- the important aspect of regulation-making powers is how they could be used. While we often hear reassurances from government ministers that they “do not intend to use a power in a certain way”, the real question is “how could the powers be used?”¹⁵

20. One Member of the Committee thought the LDEU Bill was not needed nor appropriate, believing it reduces the efficacy of the Legislative Consent Memorandum process.¹⁶ The Member in question does not therefore agree to this report.

Sections 3, 4 and 5

21. Sections 3, 4 and 5 form the heart of the LDEU Bill by giving the Welsh Ministers broad powers to make regulations that:

¹⁴ Constitutional and Legislative Affairs Committee, *Making Laws in Wales*, October 2015, paragraph 320

¹⁵ National Assembly for Wales Constitutional and Legislative Affairs Committee, *Report on the Welsh Government's Legislative Consent Memorandum on the European Union (Withdrawal) Bill*, December 2017, paragraph 23

¹⁶ Standing Order 29

- retain direct EU law (section 3);
- restate EU derived enactments (section 4);
- ensure that provisions made under EU related powers continue to have effect (section 5).

22. We raised a number of questions around the use of these powers.

23. In respect of the power to make “corresponding” provision in section 3(1), we appreciate the useful example provided by the Cabinet Secretary in respect of protecting eel stocks in Welsh waters. However, that is just one example of how the power could be used. There is still no hard edge to the “corresponding” power, something the Cabinet Secretary seemed to acknowledge when he said that the answer to the question of ‘what does corresponding mean’ is “difficult to answer in abstract”.

24. Nevertheless, we welcome the Cabinet Secretary’s statement that making corresponding provision requires the power to be used in a way that “retains the essential purpose” of the direct EU law. We believe this gives a particular focus to the regulation-making power in section 3.

25. With regard to section 4, we welcome that regulations must be “necessary” and, further, that the regulations must be “necessary to ensure the effective operation of the restated enactment”. Our understanding is that this excludes the Welsh Ministers from using the power in section 4 to ensure the effective operation of its policies – the power can only be used to ensure that the effective operation of the restated enactment.

Recommendation 1. We recommend that the Cabinet Secretary during the Stage 1 debate confirms that our understanding of the use of powers under section 4 of the LDEU Bill is correct.

26. We note that section 4 makes reference to “necessary” powers, and that the use of “necessary” is narrower than the use of “appropriate” in section 3. The Cabinet Secretary said that it was a deliberate choice to use “appropriate” in section 3 and “necessary” in section 4.

27. We understood the Cabinet Secretary to be saying that the “appropriate” power is needed where the LDEU Bill deals with areas that will be particularly uncertain in the future, and only in those cases (i.e. in section 3) has “appropriate” been used. The Cabinet Secretary said that, where there is greater uncertainty, the Welsh Ministers need the added flexibility to deal with the “unknowable nature of

the circumstances that we might be facing” and that this justifies the use of “appropriate” in section 3.

28. We have not had an opportunity to discuss in depth why section 3 deals with matters that are significantly more uncertain than the matters dealt with in section 4. However, we welcome the Cabinet Secretary’s confirmation that “necessary” is narrower than “appropriate”.

29. Also, we accept that the meaning of “appropriate” may not raise the exact same concerns as those raised in the context of the EU (Withdrawal) Bill. This is because the LDEU Bill and the EU (Withdrawal) Bill apply “appropriate” powers in different contexts. For example, “appropriate” powers under section 3 of the LDEU Bill must be used for the purpose of continuing the operation of direct EU law, while “appropriate” powers under clause 7 of the EU (Withdrawal) Bill must be used to prevent, remedy or mitigate failure of retained EU law to operate effectively or any other deficiency.

30. We remain concerned about the limitations that apply to the words “appropriate” and “necessary” in both the LDEU Bill and the EU (Withdrawal) Bill.

Recommendation 2. We recommend that the Cabinet Secretary clarifies during the Stage 1 debate whether the self-limiting ordinances (as the Cabinet Secretary described them) contained in the LDEU Bill are more restrictive than those contained in the EU (Withdrawal) Bill.

31. With regard to sections 3(5), 4(5) and 5(7) of the LDEU Bill, we note that the Bill allows some things to be done by regulations that could not be done under the *European Communities Act 1972*. For example, the 1972 Act sets restrictions on the kinds of criminal offences that can be created in regulations made under section 2(2) of the 1972 Act. The Cabinet Secretary’s legal adviser said that EU obligations have in the past been implemented not just via regulations made under section 2(2) but also via primary and subordinate legislation, and that this is why the LDEU Bill gives more flexibility around the kinds of criminal offences that can be created.

32. However, we do not think it is appropriate to lift the restrictions on the kinds of criminal offences that can be created in regulations just because primary legislation has created those offences in the past. Unfortunately, time constraints prevent us from looking deeper into this matter, but we stress the importance of keeping a clear distinction between what should be done in primary legislation and what should be done in subordinate legislation.

33. Ultimately, we must be careful not to hurry through primary legislation without thinking through how the powers in sections 3, 4 and 5 could be used. In this regard, the UK Parliament is in a much better position because the regulation-making powers in the EU (Withdrawal) Bill have been extensively scrutinised and reported upon.

Section 7 and the Charter of Fundamental Rights

34. We agree that, given the importance of the Charter of Fundamental Rights, the Charter should apply across all areas of UK law after exiting the EU. Given our feeling that the Charter should apply on such a broad basis, we agree with the Cabinet Secretary that the Charter should be incorporated into UK domestic law under the EU (Withdrawal) Bill.

35. However, we still welcome that the LDEU Bill refers to the Charter in section 7, so that the Charter influences the interpretation of all regulations made under section 3, 4 and 5.

Section 11

36. The Explanatory Notes accompanying Section 11 of the LDEU Bill state that:

“Section 11 creates a discretionary power for the Welsh Ministers to keep pace with EU law following the withdrawal of the UK from the EU. The EU (Withdrawal) Bill which is currently before the UK Parliament would, if passed, repeal the ECA 1972, including section 2(2). Any developments in EU law following the withdrawal of the UK could not be reflected domestically in the absence of any other existing relevant powers. Section 11 continues the power to implement EU law, although, as the UK will no longer be a member of the EU, there would not be an obligation to implement EU law.

As with section 2(2) of the ECA 1972, the power can modify primary legislation and is subject to restrictions relating to imposing or increasing taxation, retrospective provision and criminal offences. Subsection (3) reflects that EU law will require varying degrees of modification before it can apply effectively in a domestic context.

The restriction in paragraph 1(1)(c) of Schedule 2 to the ECA 1972 on conferring powers to legislate does not apply to the power in section 11.”¹⁷

37. The Explanatory Memorandum adds further context, saying that section 11:

“... will enable the Welsh Ministers to consider every development in EU law on a case by case basis and having consulted relevant persons they will be able to make the provision they consider appropriate.

This power is intended to enable the Welsh Ministers to maintain regulatory alignment with the EU where that is desirable. The EU is, and will continue to be, an important market for Welsh goods and services. Providing regulatory alignment will facilitate access to the EU internal market for Welsh businesses therefore mitigating any potential economic impact the withdrawal of the UK from the EU has on the Welsh economy.”¹⁸

38. Section 11 is a very wide power. Rather than correct deficiencies in the statute book in Wales as a consequence of the UK’s withdrawal from the EU, its purpose is to allow the Welsh Ministers to mirror EU law after exit day using subordinate legislation subject to the enhanced affirmative procedure set out in Schedule 2 (as introduced by section 17).

39. We note that section 11 permits the Welsh Ministers to mirror law from an institution (the European Union), of which the UK and Wales will no longer be a part, and will do so using subordinate rather than primary legislation. Such subordinate legislation will be able to amend primary legislation and is therefore a Henry VIII power. While we note that an enhanced affirmative procedure will be used to scrutinise such powers, subordinate legislation made under section 11 is not amendable by Assembly Members.

40. The power in Section 11 is broader than the power in section 2(2) of the *European Communities Act 1972*. Section 11 gives the Welsh Ministers powers, by regulations, to mirror EU law that is passed by both the European Parliament and the EU Council but which will no longer be subject to influence by the UK.

41. Section 11 is arguably a constitutionally novel approach and one that is not altogether satisfactory.

¹⁷ Explanatory Memorandum, page 71

¹⁸ Explanatory Memorandum, paragraphs 62-63

42. In the circumstances, we make the following recommendations seeking clarification on the mechanism for achieving regulatory alignment and, should it be retained, a method for strengthening that mechanism.

Recommendation 3. We recommend that the Cabinet Secretary justifies during the Stage 1 debate why primary legislation cannot be used to deliver regulatory alignment on a case by case basis instead of the subordinate legislation currently envisaged under section 11.

43. As the Cabinet Secretary indicated, the pace of developing EU law may allow it to be mirrored by primary legislation. Using primary legislation would have the benefit of enabling Assembly Members to scrutinise proposals in detail using the full legislative process of the National Assembly.¹⁹

44. We note section 11 is intended to enable the Welsh Ministers to maintain regulatory alignment with the EU where that is desirable. However, section 11 is drafted in a much broader way than this specific purpose. As we, and our predecessor committee have consistently highlighted, the important aspect of a regulation-making power is how it could be used by a particular Cabinet Secretary of any government at any time, rather than the intention of a Cabinet Secretary at the time of a Bill's introduction.

Recommendation 4. We recommend that the Cabinet Secretary should table an amendment to section 11 of the LDEU Bill, if retained, to narrow its scope solely to matters which maintain regulatory alignment with the European Union, as indicated in the Explanatory Memorandum.

45. In addition, we note that the Cabinet Secretary indicated that it would be appropriate to give consideration to time-limiting the section 11 powers were that to be a recommendation.

Recommendation 5. We recommend that the Cabinet Secretary should table amendments to the LDEU Bill to provide that:

- (i) section 11 is repealed with effect after 5 years from exit day unless regulations, subject to the affirmative procedure, provide otherwise;
- (ii) regulations made in respect of (i) must be informed by a review as to the continuing necessity for the powers provided by section 11;

¹⁹ Standing Order 26

- (iii) the review in (ii) should be conducted by a committee of the National Assembly and require public consultation.

Sections 13 and 14

46. We did not ask the Cabinet Secretary why it is appropriate for the Welsh Ministers to give consent to the UK Ministers making subordinate legislation in devolved areas, including the modification of primary legislation in devolved areas.

Recommendation 6. We recommend that the Cabinet Secretary:

- justifies why there is no consent role for the National Assembly under sections 13 and 14, particularly where the UK Ministers amend primary legislation, including Acts and Measure of the National Assembly;
- clarifies how the consent role for Welsh Ministers under sections 13 and 14 fits with the statutory instrument consent process set out in Standing Order 30A.

Section 17 and Schedule 2

47. All regulations made under the LDEU Bill are subject to the scrutiny framework set out in Schedule 2. Schedule 2 provides for three different scrutiny procedures:

- the standard procedure;
- the urgent procedure;
- the enhanced procedure.

48. The standard procedure is the affirmative procedure and it applies to regulations made under the LDEU Bill, which are not subject to the urgent or the enhanced procedure.

49. The urgent procedure can apply to any regulations made under the LDEU Bill except for those made under section 11. This procedure applies when Welsh Ministers consider it necessary to make regulations without a draft being laid and approved. Regulations made under the urgent procedure would lapse at the end of 30 days, unless the National Assembly approves a resolution before that deadline.

50. The LDEU Bill also makes provision for an enhanced affirmative scrutiny procedure. The decision as to whether the enhanced procedure should apply lies

with the National Assembly, or a committee of the Assembly, in relation to draft regulations making provision of a kind listed in paragraph 1(1) of Schedule 2 to the Bill. These include regulations under section 11 of the Bill, regulations establishing a new public authority, and regulations creating or amending a power to legislate. The enhanced procedure enables anyone to make representations about the draft regulations to the Welsh Government. The National Assembly can pass resolutions regarding the draft regulations, and a committee of the Assembly with responsibility for reporting on the draft regulations can make recommendations concerning them. The Welsh Ministers must have regard to any representations, resolution and recommendations made during the 60-day period following the laying of the draft regulations.

51. If the Welsh Ministers wish to proceed with their original draft of the regulations, they must inform the National Assembly of the details of any representations made. If the Welsh Ministers lay revised draft regulations, they must inform the Assembly of the changes made and, again, give details of any representations made on the original draft. A committee of the Assembly can recommend that the draft regulations should not be taken further; following this, no proceedings may be taken on the draft regulations unless the Assembly in Plenary overrides the committee recommendation. This applies both to where the Welsh Ministers keep to their original draft regulations, and where they lay revised draft regulations.

52. The Explanatory Notes accompanying the LDEU Bill state that the procedure with the potential for the greatest level of scrutiny is the enhanced procedure. It adds that, apart from the regulations made under section 11, the scrutiny procedure to be applied is informed by the contents of the regulations rather than the power under which the regulations are made.²⁰

53. The Cabinet Secretary told us that, when bringing forward regulations under the LDEU Bill, the Welsh Government's aim will be to provide the Committee with everything it needs to discharge its responsibilities.

54. In relation to the enhanced procedure, the Cabinet Secretary suggested that the significant use of this procedure in the LDEU Bill offered the National Assembly the safeguards it needs to have proper oversight over powers that Welsh Ministers will have through the Bill.

²⁰ Explanatory Memorandum, page 76

55. We asked the Cabinet Secretary why the LDEU Bill does not impose a duty on the Welsh Ministers to give reasons as to why the urgent procedure should apply. He told us that the explanatory memoranda accompanying each regulation put forward using the urgent procedure will set out the reasoning and justification for the use of that procedure. We also asked the Cabinet Secretary to provide an example of when it might be necessary to apply the urgent procedure. He suggested there is a possibility that necessary discussions at a UK/EU level may continue until very close to exit day and, as such, the Welsh Government would need to rapidly respond to last minute changes as a result of treaty negotiations.

56. On the matter of the urgent procedure, the Cabinet Secretary told us he would look very seriously at our considerations and conclusions.

57. We make the following recommendations regarding scrutiny procedures.

Recommendation 7. We recommend that the Cabinet Secretary should table an amendment to the LDEU Bill, requiring Explanatory Memoranda accompanying regulations made under the Bill, to be clear and transparent as to:

- why the affirmative procedure should apply;
- what changes are being made by the regulations, including what is being changed, why it is being changed and the impact that the change will have;
- whether there has been adequate consultation and what was the response to the consultation;
- the impact the regulations may have on equality and human rights;
- whether the regulations raise matters of public, political or legal importance.

Recommendation 8. We recommend that the Cabinet Secretary should table an amendment to the Bill, requiring Explanatory Memoranda accompanying regulations made under the Bill, to be clear and transparent as to:

- why the urgent procedure should apply;
- what changes are being made by the regulations, including what is being changed, why it is being changed and the impact that the change will have;

- whether there has been adequate consultation and what was the response to the consultation;
- the impact the regulations may have on equality and human rights;
- whether the regulations raise matters of public, political or legal importance.