

## **LEGISLATIVE CONSENT MEMORANDUM**

### **EUROPEAN UNION (WITHDRAWAL) BILL**

1. This Legislative Consent Memorandum is laid under Standing Order (“SO”) 29.2. SO29 prescribes that a Legislative Consent Memorandum must be laid, and a Legislative Consent Motion may be tabled, before the National Assembly for Wales if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies the legislative competence of the National Assembly.
2. The European Union (Withdrawal) Bill (the “Bill”) was introduced in the House of Commons on 13 July 2017. The Bill can be found at:  
[Bill documents — European Union \(Withdrawal\) Bill 2017-19 — UK Parliament](#)
3. This Memorandum relates to the Bill as introduced on 13 July 2017.

#### **Policy Objective(s)**

4. The UK Government’s stated policy objective for the Bill is to ensure that the UK withdraws from the EU with maximum certainty, continuity and control. It aims to end the supremacy of European Union (“EU”) law in UK law and to convert EU law as it stands at the moment of exit into domestic law. The Bill also creates temporary powers for Ministers to make secondary legislation to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has withdrawn, so that the domestic legal system continues to function correctly outside the EU. The Bill also enables domestic law to reflect the content of a withdrawal agreement under Article 50 of the Treaty on European Union once the UK leaves the EU.

#### **Summary of the Bill**

5. The Bill is sponsored by the Department for Exiting the European Union.
6. The Explanatory Notes set out the UK Government’s view that the Bill performs four main functions. It:
  - repeals the European Communities Act 1972
  - converts EU law as it stands at the moment of withdrawal into domestic law before the UK leaves the EU;
  - creates powers to make secondary legislation, including temporary powers to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left the EU and to implement a withdrawal agreement; and
  - maintains the current scope of devolved decision making powers in areas currently governed by EU law.

7. The clauses of particular relevance to devolved matters are:

- Clauses 2 – 6 (which preserve and retain EU law in domestic law, including in areas within devolved competence)
- Clauses 7 – 9 (which provide powers for UK Ministers to correct retained EU law and implement international obligations and the withdrawal agreement with the EU, including in devolved areas)
- Clause 10 and Schedule 2 (which provide powers for Welsh Ministers to correct retained EU law and implement international obligations and the withdrawal agreement with the EU);
- Clause 11 and Schedule 3 (which constrain the competence of the National Assembly for Wales and the Welsh Ministers); and
- Schedule 7 (which sets out legislative procedures to be followed for various secondary legislation provisions in the Bill, including powers of Welsh Ministers and UK Ministers acting in devolved areas).

### **Provisions in the Bill for which consent is required**

8. The full list of clauses which are within or modify the legislative competence of the National Assembly for Wales (“the Assembly”) are set out in the table at Annex A. The Government notes that the Scottish Government takes a similar view of the provisions requiring legislative consent from the Parliament.

#### Provisions which modify the legislative competence of the Assembly

9. These are:

- Clause 1 (repeal of the European Communities Act 1972). This provision modifies the Assembly’s competence by removing the requirement for the Assembly to legislate compatibly with EU law.
- Clause 11 amends section 108A of the Government of Wales Act 2006 to define the Assembly’s competence by reference to EU law retained in domestic law by the Bill’s provisions. The provision modifies the Assembly’s competence because it would prevent the Assembly from modifying retained EU law in a way which would not have been within competence immediately before exit day.
- Clause 17 and Schedule 8 and 9 confer broad powers on a Minister of the Crown to make consequential provision. Those powers could be exercised in such a way as to modify the legislative competence of the Assembly.

Provisions which are legislating for a purpose within the Assembly's legislative competence

*Clauses 2 – 6*

10. These provisions (subject to certain exceptions) convert the body of existing EU law into domestic law and preserve the laws made in the UK to implement EU obligations. The relevant provisions are summarised below:

- Clause 2 and Schedule 1 provides that EU-derived domestic legislation continues to have effect in domestic law after the UK leaves the EU. For example, secondary legislation made under section 2(2) of the European Communities Act 1972.
- Clause 3 makes separate provision for the incorporation of direct EU legislation (i.e. EU Regulations).
- Clause 4 ensures that any remaining direct EU rights and obligations continue to be recognised and available in domestic law after exit, such as directly effective Treaty rights.
- Clause 5 and Schedule 1 sets out exceptions to the saving and incorporation of EU law. These include the ending of the principle of supremacy of EU law and a provision which confirms that the Charter of Fundamental Rights will no longer have effect in domestic law from the date of EU exit.
- Clause 6 explains how retained EU law is to be interpreted from the date of EU exit. It confirms that the jurisdiction of the Court of Justice of the European Union (“CJEU”) will be brought to an end and makes provision for the treatment of CJEU decisions by the domestic courts when interpreting retained EU law after EU exit.

11. It is the Welsh Government’s view that consent is required for these provisions. The Assembly has competence to enact EU-derived rules into domestic law at the point of EU exit and to define how that law is to be interpreted, insofar that those rules relate to one or more subjects in Part 1 of Schedule 7 to the Government of Wales Act 2006. For example, the “environmental protection” subject under paragraph 6 of that Schedule in circumstances where the EU-derived rules to be enacted provide for the protection of the environment.

*Clauses 7- 10 and 16*

12. These provisions confer powers on Ministers of the Crown and the Welsh Ministers to amend retained EU law, and comprise as follows:

- Clause 7 allows a Minister of the Crown to make provision by regulations to prevent, remedy or mitigate any failure of retained EU

law to operate effectively or any other deficiency in retained EU law arising from EU withdrawal.

- Clause 8 confers a power on a Minister of the Crown to make regulations to enable continued compliance with the UK's international obligations.
- Clause 9 confers a power on a Minister of the Crown to implement a withdrawal agreement concluded between the UK and the EU.
- Clause 10 and Schedule 2 confer corresponding powers on the Welsh Ministers, but are restricted in a number of ways. For example, they only extend to correcting EU law that has been given effect via domestic legislation and cannot be used to modify direct EU legislation such as EU Regulations.
- Clause 16 and Schedule 7 make provision for the scrutiny of regulations made under the Bill.

13. It is the Welsh Government's view that consent is required for all of these provisions. Although certain powers are conferred on the Welsh Ministers to make regulations which can amend legislation within the Assembly's competence (clause 10 and Schedule 2), a Minister of the Crown can still exercise the powers in clauses 7-9 to modify legislation which is within the Assembly's competence.

14. It is within the Assembly's competence to confer regulation making powers upon the Welsh Ministers to address deficiencies arising from EU exit in circumstances where the law being modified relates to one or more subjects in Part 1 of Schedule 7 to the Government of Wales Act 2006.

#### *Clause 12 and Schedule 4 – Financial provision*

15. These provisions confer powers on a Minister of the Crown and devolved authorities to make secondary legislation to enable public authorities to charge fees or other charges.

16. It is the Welsh Government's view that consent is required for this provision. It is within the Assembly's competence to make provision for the charging of fees by public authorities, insofar that those authorities/their functions relate to one or more subjects in Part 1 of Schedule 7 to the Government of Wales Act 2006.

#### *Clause 13 and Schedule 5 – Publication and rules of evidence.*

17. This clause makes provision for the publication of retained direct EU legislation by the Queen's Printer within the National Archives. Schedule 5 contains further provision about the rules of evidence that are to apply to EU instruments.

18. It is the Welsh Government's view that consent is required for this provision. It is within the Assembly's competence to make provision for the publication of retained EU law and how that law is to be interpreted insofar that the content of that law relates to one or more subjects in Part 1 of Schedule 7 to the Government of Wales Act 2006.

#### Scrutiny of Welsh Ministers' subordinate legislation powers

19. By giving effect to Schedule 2, clause 10 provides Welsh Ministers with powers corresponding to those provided to Ministers of the Crown in clauses 7 -9 as set out above. The procedures for parliamentary scrutiny of these correcting powers are set out at Parts 1 and 2 of Schedule 7.
20. For each power, the Schedule lists a series of provisions, the inclusion of which within a statutory instrument ("SI") will make that SI subject to the affirmative resolution procedure in Parliament. The Schedule then provides that an SI of the Welsh Ministers which includes any of these provisions is subject to the affirmative resolution procedure in the Assembly. Where an SI containing these provisions is made by a Minister of the Crown and the Welsh Ministers acting jointly, the affirmative resolution procedures apply in respect of both Parliament and the Assembly. Any SI not containing any of the listed provisions is subject to the negative resolution procedure.
21. The provisions which will engage the requirement for affirmative resolution for each power are listed at Annex B.

#### **Reasons for making these provisions for Wales in the European Union (Withdrawal) Bill**

22. The Welsh Government agrees that legislation is necessary to provide clarity and certainty for citizens and businesses as we leave the EU. We accept in principle the need for provisions which convert EU law into domestic law, and provisions which create powers to make secondary legislation, including temporary powers to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left the EU. The Welsh Government also agrees that ideally such legislation should be made by Parliament, for the UK as a whole, as this would offer the greatest degree of consistency and certainty for citizens and businesses.

#### **Welsh Government position on the Bill as introduced**

23. The Welsh Government will not be able to recommend to the Assembly that it gives consent to the Bill as currently drafted.
24. The Welsh Government's position is set out in the [Written Statement](#) I published when the Bill was introduced in the House of Commons on 13

July, and in the [joint statement](#) I made with the First Minister of Scotland, on the same day.

25. The Welsh Government's principal objections relate to clauses 7-9 (which give Ministers of the Crown unacceptably wide regulation-making powers, including the ability to amend devolved law and the devolution settlement without consent), clause 10 (which gives effect to Schedule 2 and unreasonably restricts Welsh Ministers' correcting powers to domestic EU law) and clause 11 which introduces a new constraint on legislative competence.

*Powers for UK and Welsh Ministers to amend devolved law*

26. The Bill gives powers to Ministers of the Crown in clause 7 (to deal with deficiencies arising from withdrawal), in clause 8 (to enable continued compliance with the UK's international obligations, and clause 9 (to implement the withdrawal agreement). These powers would allow a Minister of the Crown to unilaterally amend legislation that is within the legislative competence of the Assembly, to include legislation where the Welsh Ministers exercise functions. The scrutiny obligation would then be discharged by Parliament rather than the Assembly. Those powers could also be used to amend the Government of Wales Act 2006, without any requirement for the Assembly's approval.
27. By giving effect to Schedule 2, clause 10 provides Welsh Ministers with powers corresponding to those provided to Ministers of the Crown in clauses 7-9. But the corresponding powers for devolved administrations' Ministers' extend only to correcting orders in respect of legislation which has been made by domestic institutions. Direct EU legislation (such as EU Regulations) can only be amended by a Minister of the Crown, and would fall to be scrutinised by Parliament even if the subject was one that was devolved to the Assembly.

*New constraints on the legislative competence of the Assembly*

28. Clause 11 introduces a new provision that will mean it will be outside the Assembly's competence to modify retained EU law in a way which would not have been compatible with EU law immediately before exit. This replaces the provision in section 108A of the Government of Wales Act 2006 which requires the Assembly to legislate compatibly with EU law.
29. It is common ground that, unless new legislative provision is made by Parliament, legislative competence for devolved matters which are currently subject to EU restrictions or obligations would remain with the devolved legislatures post-exit, with those legislatures able to exercise their competence without the limitations currently imposed in consequence of the UK's membership of the EU.
30. The Welsh Government's policy statement, [Brexit and Devolution](#), published in June, made clear our willingness to negotiate UK frameworks

in certain areas previously covered by EU law. This could be, for example, to support effective functioning of the UK market and prevent barriers emerging which would unreasonably constrain businesses, or to facilitate the management of common environmental resources.

31. The process of agreeing where frameworks are required, and what they should contain, must be one based on agreement, not imposition. But the Bill proposes instead a new set of legal constraints on the competences of the devolved institutions in respect of these matters, which we consider wholly unacceptable in principle. Moreover, in introducing a new constraint on competence defined in respect of ‘retained EU law’, the Bill would add complexity and uncertainty to the devolution settlement post EU exit.
32. The UK Government has suggested that the restriction imposed by clause 11 is transitional in nature, intended to allow time and space for discussion and consultation with devolved authorities on where frameworks are needed. However, in contrast to the various sunset provisions included in the Ministerial powers, there are no time limits on the operation of clause 11.
33. The Welsh Government’s position is that the clause should be deleted from the Bill. We propose the alternative approach which respects devolution, as outlined above, and stand ready to work closely with the UK Government and the other devolved administrations to achieve this, in the interests of the UK as a whole.
34. The imposition of this new restriction on competence on the Assembly represents an unnecessary and unacceptable centralisation of powers at the UK level, to which the Welsh Government cannot agree.
35. The Welsh Government is working with the Scottish Government to propose amendments to the Bill which will address our concerns. These will be made public to inform debate on the Bill in the Assembly, at Westminster and more widely. I hope in due course to be able to lay a supplementary memorandum, to reflect amendments agreed by Parliament which are essential if the Welsh Government is to be able to recommend legislative consent is given.

### **Financial implications**

36. While there are no direct financial implications for the Welsh Government or the Assembly arising from the powers under the Bill, there will be significant financial implications for Wales from withdrawing from the EU, both in its overall economic effect and in areas of funding currently deriving from the EU, as set out in *Securing Wales’ Future*.

### **Conclusion**

37. This memorandum sets out the Welsh Government's view of the requirement for the legislative consent of the Assembly in respect of the EU (Withdrawal) Bill, and confirms that we will not be in a position to recommend consent unless the Bill is amended to address our concerns.

**Rt Hon Carwyn Jones AM  
First Minister of Wales  
September 2017**

## Annex A Clauses requiring legislative consent of the Assembly

Clause/ Schedule	Effect
1	repeals the European Communities Act 1972 on exit day
2	provides that existing domestic legislation which implements EU law obligations remains on the domestic statute book after the UK leaves the EU
3	converts 'direct EU legislation' into domestic legislation at the point of exit from the EU, so that where appropriate, EU legislation continues to have effect post-exit
4	ensures that any remaining EU rights and obligations which do not fall within clauses 2 and 3 continue to be recognised and available in domestic law after exit
5	sets out certain exceptions to the saving and incorporation of EU law provided for by clauses 2-4, including that the Charter of Fundamental Rights will not form part of domestic law on or after exit day
6	sets out how retained EU law will be read and interpreted on and after exit day
7	gives Ministers of the Crown the power to make regulations which amend deficiencies in retained EU law so that it continues to operate effectively after exit
8	gives Ministers of the Crown the power to make provision in regulations for continued compliance with the UK's international obligations
9	gives Ministers of the Crown powers to make regulations to implement a withdrawal agreement
10 & Schedule 2	provides powers to the devolved administrations (including Welsh Ministers) corresponding to those given to Ministers of the Crown, as set out in Schedule 2
11 & Schedule 3	replaces the existing requirement that the Assembly may only legislate in a way which is compatible with EU law, with a new provision that will mean it will be outside the Assembly's competence to modify retained EU law in a way which would not have been compatible with EU law immediately before exit. Exceptions to this test may be prescribed by Order in Council, which must be approved by both Houses and by the Assembly
12 & Schedule 4	gives effect to Schedule 4 which provides powers in connection with fees and charges, and provides that devolved authorities may incur expenditure in preparation for the making of statutory instruments under the Bill
13 & Schedule 5	makes provision for the publication of retained EU legislation by the Queen's Printer
16 & Schedule 7	gives effect to Schedule 7 on how the powers to make regulations in the Bill are exercisable
17	Power to make consequential provision

## **Annex B Delegated powers: provisions requiring affirmative resolution procedures**

Schedule 7 lists a series of provisions, the inclusion of which within a statutory instrument will make that SI subject to the affirmative resolution procedure in the relevant legislature(s).

For regulations dealing with deficiencies arising from withdrawal, the provisions are those which:

- (a) establish a public authority in the United Kingdom,
- (b) provide for any function of an EU entity or public authority in a member State to be exercisable instead by a public authority in the United Kingdom established by regulations under section 7, 8 or 9 or Schedule 2,
- (c) provide for any function of an EU entity or public authority in a member State of making an instrument of a legislative character to be exercisable instead by a public authority in the United Kingdom,
- (d) impose, or otherwise relate to, a fee in respect of a function exercisable by a public authority in the United Kingdom,
- (e) create, or widen the scope of, a criminal offence, or
- (f) create or amend a power to legislate.

For regulations to enable continued compliance with the UK's international obligations, the provisions are those which:

- (a) establish a public authority in the United Kingdom,
- (b) provide for any function of an EU entity or public authority in a member State to be exercisable instead by a public authority in the United Kingdom established by regulations under section 7, 8 or 9 or Schedule 2,
- (c) provide for any function of an EU entity or public authority in a member State of making an instrument of a legislative character to be exercisable instead by a public authority in the United Kingdom,
- (d) impose, or otherwise relate to, a fee or charge in respect of a function exercisable by a public authority in the United Kingdom,
- (e) create, or widen the scope of, a criminal offence, or
- (f) create or amend a power to legislate.

For regulations to implement the withdrawal agreement, the provisions are those which:

- (a) establish a public authority in the United Kingdom,
- (b) provide for any function of an EU entity or public authority in a member State to be exercisable instead by a public authority in the United Kingdom established by regulations under section 7, 8 or 9 or Schedule 2,
- (c) provide for any function of an EU entity or public authority in a member State of making an instrument of a legislative character to be exercisable instead by a public authority in the United Kingdom,
- (d) impose, or otherwise relate to, a fee in respect of a function exercisable by a public authority in the United Kingdom,
- (e) create, or widen the scope of, a criminal offence,

- (f) create or amend a power to legislate, or
- (g) amend this Act.

Any SI not containing any of the listed provisions is subject to the negative resolution procedure.