Agenda – Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 1 – Senedd
Meeting date: 4 December 2017
Meeting time: 14.30

For further information contact:
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Committee Clerk
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1 Introduction, apologies, substitutions and declarations of interest

2 Instruments that raise no reporting issues under Standing Order 21.2 or 21.3

(Pages 1 – 2)

CLA(5)-29-17 – Paper 1 – Statutory instruments with clear reports

Affirmative Resolution Instruments

2.1 SL(5)154 – The Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017

3 Instruments that raise issues to be reported to the Assembly under Standing Order 21.2 or 21.3

Negative Resolution Instruments

3.1 SL(5)152 – The Seed (Miscellaneous Amendments) (Wales) Regulations 2017

(Pages 3 – 11)

CLA(5)-29-17 – Paper 2 – Regulations

CLA(5)-29-17 – Paper 3 – Explanatory Memorandum

CLA(5)-29-17 – Paper 4 – Report

CLA(5)-29-17 – Paper 5 – Welsh Government response

4 Instruments that raise no reporting issues under Standing Order 21.2 or 21.3 but have implications as a result of the UK exiting the EU

Negative Resolution Instruments

4.1 SL(5)153 - The Novel Foods (Wales) Regulations 2017

(Pages 12 - 37)

CLA(5)-29-17 - Paper 6 - Regulations

CLA(5)-29-17 - Paper 7 - Explanatory Memorandum

CLA(5)-29-17 - Paper 8 - Report

5 Papers to note

5.1 House of Commons Public Administration and Constitutional Affairs Committee report Devolution and Exiting the EU and Clause 11 of the European Union (Withdrawal) Bill: Issues for Consideration

(Pages 38 - 72)

CLA(5)-29-17 - PTN 1 - House of Commons Public Administration and Constitutional Affairs Committee report Devolution and Exiting the EU and Clause 11 of the European Union (Withdrawal) Bill: Issues for Consideration

6 Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business:

Items 7, 8 and 9.

7 Statutory Instrument Consent Memorandum: SICM(5)1 The Environmental Impact Assessment (Miscellaneous Amendments relating to Harbours, Highways and Transport) Regulations 2017: Consideration of draft report

(Pages 73 - 83)

CLA(5)-29-17 – Paper 9 – SICM(5)1 – Environmental Impact Assessment (Miscellaneous Amendments Relating to Harbours, Highways and Transport) Regulations 2017

CLA(5)-29-17 – Paper 10 – Letter from the Cabinet Secretary for Economy and Transport – 15 November 2017

CLA(5)-29-17 – Paper 11 – Draft Report

8 EU (Withdrawal) Bill: Legislative Consent Memorandum

(Pages 84 – 117)

CLA(5)-29-17 – Paper 12 – Legislative Consent Memorandum

CLA(5)-29-17 – Paper 13 – Research brief

CLA(5)-29-17 – Paper 14 – Legal briefing

9 Assembly Reform

(Pages 118 – 127)

Constitutional and Legislative Affairs Committee report (Fourth Assembly) – Disqualification of Members from the National Assembly for Wales – July 2014

CLA(5)-29-17 – Paper 15 – Committee paper

CLA(5)-29-17 – Paper 16 – Letter from the Llywydd to the Chair on Disqualification – 26 October 2017

CLA(5)-29-17 – Paper 17 – Letter from the Chair to the Llywydd– 4 October 2017

CLA(5)-29-17 – Paper 18 – Letter from the Llywydd to the Chair – 18 August 2017

10 A stronger voice for Wales: Consideration of draft recommendations and conclusions

(Pages 128 – 133)

CLA(5)-29-17 – Paper 19 – Committee paper

Date of the next meeting

11 December 2017

SL(5)154 – The Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017

Procedure: Affirmative

Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016 ("the Act") introduces a new system of regulation of care and support services in Wales, replacing that established under the Care Standards Act 2000 ("the Care Standards Act").

The Act introduces a new concept of "regulated services" which is defined in section 2 of the Act.

In accordance with powers in section 27 of the Act, these Regulations impose requirements on service providers in relation to a regulated service, including requirements as to the standard of care and support to be provided.

In accordance with powers in section 28 of the Act, these Regulations impose requirements on responsible individuals in relation to a place in respect of which the individual is designated.

These Regulations also provide for offences in the event of failure by a service provider or a responsible individual to comply with specified requirements.

Guidance has been published about how service providers and responsible individuals may comply with the requirements imposed by these Regulations (including how providers may meet any standards for the provision of a regulated service) and section 29 of the Act requires service providers and responsible individuals to have regard to this guidance.

Parent Act: Regulation and Inspection of Social Care (Wales) Act 2016

Date Made: Not stated

Date Laid: 27 November 2017

Coming into force date: 2 April 2018

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WELSH STATUTORY INSTRUMENTS

2017 No. 1095 (W. 276)

SEEDS, WALES

The Seed (Miscellaneous Amendments) (Wales) Regulations 2017

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Seed Marketing (Wales) Regulations 2012 and the Seed Potatoes (Wales) Regulations 2016.

Regulation 2 implements Commission Implementing Directive (EU) 2016/2109 which amends Directive 66/401/EEC to reflect the change of the botanical name of the species *Lolium x boucheanum* Kunth (OJ No L 327, 2.12.2016, p. 59). Regulation 2 amends the Seed Marketing (Wales) Regulations 2012 to reflect that change of botanical name.

Regulation 3 implements Commission Implementing Decision (EU) 2016/320 ("the Decision"). The Decision amends Decision 2004/842/EC regarding the rules by which Member States may authorise the placing on the market of seed belonging to varieties for which an application for entry in the national catalogue of varieties of agricultural plant or vegetable species has been submitted (OJ L 60, 5.3.2016, p. 88). The Decision includes the requirement for an officially assigned serial number to be stated on the official label of seed potatoes that are authorised to be marketed for the purposes of tests and trials. Regulation 3 amends the Seed Potatoes (Wales) Regulations 2016 to reflect that requirement.

The Welsh Ministers' Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to these Regulations. As a result, it was not considered necessary to carry out a regulatory impact assessment as to the likely costs and benefits of complying with these Regulations.

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WELSH STATUTORY INSTRUMENTS

2017 No. 1095 (W. 276)

SEEDS, WALES

The Seed (Miscellaneous Amendments) (Wales) Regulations 2017

Made	*14 November 2017*
Laid before the National Assembly for Wales	*16 November 2017*
Coming into force	*15 December 2017*

The Welsh Ministers, in exercise of the powers conferred by section 16(1), (2), and (3) of the Plant Varieties and Seeds Act 1964(**1**), and now vested in them(**2**), make the following Regulations.

In accordance with section 16(1) of that Act, the Welsh Ministers have consulted with representatives of such interests as appear to the Welsh Ministers to be concerned.

Title, commencement and application

1.—(1) The title of these Regulations is the Seed (Miscellaneous Amendments) (Wales) Regulations 2017 and they come into force on 15 December 2017.

(2) These Regulations apply in relation to Wales.

(**1**) 1964 c. 14. Section 16(1) was amended by section 4 of and paragraph 5 of Schedule 4 to the European Communities Act 1972 (c. 68). Section 16(3) was amended by S.I. 1977/1112.

(**2**) *See* section 38(1) for a definition of "the Minister". In accordance with article 2(1) of and Schedule 1 to the Transfer of Functions (Wales) (No. 1) Order 1978 (S.I. 1978/272) the functions of the Minister of Agriculture, Fisheries and Food under the Plant Varieties and Seeds Act 1964 were, so far as exercisable in relation to Wales, transferred to the Secretary of State. In accordance with article 2 of and Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672) the functions transferred to the Secretary of State by the 1978 Order were transferred to the National Assembly for Wales. By virtue of paragraph 30 of Schedule 11 to the Government of Wales Act 2006 (c. 32) those functions are now exercisable by the Welsh Ministers.

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Amendment of the Seed Marketing (Wales) Regulations 2012

2. In the table in Schedule 1 (seed to which these Regulations apply) to the Seed Marketing (Wales) Regulations 2012(**1**), in the first column (plants to which the Regulations apply), for "*Lolium x boucheanum* Kunth" substitute "*Lolium x hybridum* Hausskn".

Amendment of the Seed Potatoes (Wales) Regulations 2016

3. In Part 1 of Schedule 2 (official labels and official documents) to the Seed Potatoes (Wales) Regulations 2016(**2**), after paragraph 8(b)(i) insert—

"(ia) an officially assigned serial number;".

Hannah Blythyn
Minister for Environment under the authority of the Cabinet Secretary for Energy, Planning and Rural Affairs, one of the Welsh Ministers
14 November 2017

(**1**) S.I. 2012/245 (W. 39), amended by S.I. 2013/889 (W. 101), S.I. 2014/519 (W. 61) and S.I. 2016/1242 (W. 294).
(**2**) S.I. 2016/106 (W. 52), amended by S.I. 2017/596 (W. 139).

Explanatory Memorandum to the Seed (Miscellaneous Amendments) (Wales) Regulations 2017

This Explanatory Memorandum has been prepared by the Plant Health and Environment Protection Branch within the Economy, Skills and Natural Resources Department and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Seed (Miscellaneous Amendments) (Wales) Regulations 2017.

Hannah Blythyn,

Minister for Environment

16 November 2017

1. Description

These Regulations amend the Seed Marketing (Wales) Regulations 2012 and the Seed Potatoes (Wales) Regulations 2016.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

There are no matters of special interest to the Constitutional and Legislative Affairs Committee.

3. Legislative background

The powers to make these Regulations are in section 16 of the Plant Varieties and Seeds Act 1964. Section 16 confers broad powers to make regulations in relation to seeds which include, but are not limited to, the power to make regulations in relation to sales, marketing, importation or exportation, prevention of the spread of disease, licensing, ensuring seeds stay true to variety, packaging, information, tests, samples, exemptions and charges. The functions in section 16 that were vested in the Secretary of State were transferred to the National Assembly for Wales pursuant to article 2 of and Schedule 1, to the National Assembly for Wales (Transfer of Functions) Order 1999. The functions are now vested in Welsh Ministers pursuant to section 162 of and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006.

These Regulations are subject to the negative procedure.

4. Purpose & intended effect of the legislation

The Seed Marketing (Wales) Regulations 2012 control the marketing of seed of the main agricultural and vegetable species in Wales. The International Seed Testing Association has recently changed the botanical name of hybrid ryegrass from *Lolium x boucheanum Kunth* to *Lolium x hybridum Hausskn*. These Regulations amend the Seed Marketing (Wales) Regulations 2012 to reflect the change of botanical name.

The Seed Potatoes (Wales) Regulations 2016 control the production with a view to the certification and the marketing of seed potatoes in Wales other than those intended for export outside the EU.

Commission Implementing Decision (EU) 2016/320 includes the requirement for an officially assigned serial number to be stated on the official label of seed potatoes that are authorised to be marketed for the purposes of tests and trials. These Regulations amend the Seed Potatoes (Wales) Regulations 2016 to reflect the requirement.

5. Consultation

Two separate targeted, twelve week consultations were launched on 27 July 2017 and ended 19 October 2017.

No responses were received in respect of the consultation concerning the botanical change of name.

One response was received from the British Potato Trade Association in respect of the consultation concerning the official labels of test and trial seed potatoes. The British Potato Trade Association represent over 100 potato trade companies across the UK and fully support this proposal.

6. Regulatory Impact Assessment (RIA)

There has been no regulatory impact assessment undertaken. Seed potato producers in Wales already use labels with unique numbers so the amendments will simply bring into law this existing industry practice for test and trial potatoes.

No impact on charities or voluntary bodies is foreseen.

No impact on the public or private sector is foreseen.

SL(5)152 - The Seed (Miscellaneous Amendments) (Wales) Regulations 2017

Background and Purpose

These Regulations amend the Seed Marketing (Wales) Regulations 2012 and the Seed Potatoes (Wales) Regulations 2016.

Regulation 2 implements Commission Implementing Directive (EU) 2016/2109 which amends Directive 66/401/EEC to reflect the change of the botanical name of the species *Lolium x boucheanum* Kunth. Regulation 2 amends the Seed Marketing (Wales) Regulations 2012 to reflect that change of botanical name.

Regulation 3 implements Commission Implementing Decision (EU) 2016/320 ("the Decision"). The Decision amends Decision 2004/842/EC regarding the rules by which Member States may authorise the placing on the market of seed belonging to certain varieties. The Decision includes the requirement for an officially assigned serial number to be stated on the official label of seed potatoes that are authorised to be marketed for the purposes of tests and trials. Regulation 3 amends the Seed Potatoes (Wales) Regulations 2016 to reflect that requirement.

Procedure

Negative.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

Merits Scrutiny

The points are identified for reporting under Standing Order 21.3 in respect of this instrument.

Article 2 of Directive 2016/2109 (which gives rise to regulation 2) requires transposition by the 31st December 2017, with the provision to apply from the 1st January 2018. The Regulations come into force on the 15th December 2017, so the change will be in force from that date until the 31st December, a period when it should not apply. [Standing Order 21.3(iv) – inappropriately implements EU legislation]

Commission Decision 2016/320 (which gives rise to regulation 3) was made on the 3rd March 2016 and applied from 1st April 2017. These implementing Regulations will not apply until 15th December 2017. [Standing Order 21.3(iv) – inappropriately implements EU legislation]

Implications arising from exiting the European Union

The following points are identified for reporting under Standing Order 21.3 in respect of this instrument.

These Regulations can continue to operate after the UK leaves the EU, as they are made under domestic powers in the Plant Varieties and Seeds Act 1964, which pre-dates British membership of the EU. This is the case despite the fact that they are made to implement EU legislation.

Government Response

A Government response is required.

Legal Advisers
Constitutional and Legislative Affairs Committee
November 2017

The Seed (Miscellaneous Amendments) (Wales) Regulations 2017

The ‘Merits Scrutiny’ element of the report makes two time points both of which are accepted. Regarding the first, the amendment is limited to the change of the botanical name of a ryegrass and is not, in itself, anticipated to have a substantive impact. Regarding the second, the deadline was missed due to a number of delays during the process through which the Regulations were produced.

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WELSH STATUTORY INSTRUMENTS

2017 No. 1103 (W. 279)

FOOD, WALES

The Novel Foods (Wales) Regulations 2017

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations provide for the execution and enforcement in Wales of Regulation (EU) 2015/2283 of the European Parliament and of the Council of 25 November 2015 on novel foods, amending Regulation (EU) No 1169/2011 of the European Parliament and of the Council and repealing Regulation (EC) No 258/97 of the European Parliament and of the Council and Commission Regulation (EC) No 1852/2001 (OJ No L 327, 11.12.2015, p 1) ("the Novel Foods Regulation").

Regulation 3 makes food authorities responsible for the enforcement of the Regulations.

Regulation 4 provides that it is an offence for a person to fail to comply with Article 6(2) of the Novel Foods Regulation, punishable on summary conviction by a fine. Article 6(2) provides that only novel foods authorised by the European Commission and included in the European Union's list of novel foods may be placed on the market within the European Union, and the foods must be in accordance with conditions of use and the labelling requirements set out in the list.

Regulation 5 and Schedule 2 apply certain provisions of the Food Safety Act 1990 (1990 c. 16) with modifications. This includes the application (with modifications) of—

(a) section 9, enabling an authorised officer, if he or she considers that Article 6(2) of the Novel Foods Regulation is being or has been contravened, to give notice to the person in charge of the food that it is not to be used for human consumption or is not to be removed except to some place specified in the notice, or to seize the food in order to have it dealt with by a justice of the peace; and

(b) section 10(1), enabling an improvement notice to be served requiring the person in

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charge of the food to comply with the provisions of the Novel Foods Regulation specified in Schedule 1 to these Regulations. The provisions, as applied, make the failure to comply with an improvement notice an offence.

Regulation 6 revokes—

(a) The Novel Foods and Novel Food Ingredients Regulations 1997 (S.I. 1997/1335) in relation to Wales;

(b) The Novel Foods and Novel Food Ingredients (Fees) Regulations 1997 (S.I. 1997/1336) in relation to Wales;

(c) The Food Enzymes (Wales) Regulations 2009 (S.I. 2009/3377 (W. 299)).

The Welsh Ministers' Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to these Regulations. As a result, a regulatory impact assessment has been prepared as to the likely costs and benefits of complying with these Regulations. A copy can be obtained from the Food Standards Agency at Food Standards Agency Wales, 11th Floor, Southgate House, Wood Street, Cardiff, CF10 1EW or from the Agency's website at www.food.gov.uk/wales.

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WELSH STATUTORY INSTRUMENTS

2017 No. 1103 (W. 279)

FOOD, WALES

The Novel Foods (Wales) Regulations 2017

Made *14 November 2017*

Laid before the National Assembly for Wales *16 November 2017*

Coming into force *1 January 2018*

The Welsh Ministers make the following Regulations in exercise of the powers conferred by sections 6(4), 16(1)(a), (e) and (f), 17(2), 18(1)(a), 26(1)(a) and (3), and 48(1) of the Food Safety Act 1990(**1**) and, with the consent of the Treasury, in exercise of the powers conferred by section 56(1) of Finance Act 1973(**2**) and now vested in them(**3**).

In accordance with section 48(4A)(**4**) of the Food Safety Act 1990, the Welsh Ministers have had regard to relevant advice given by the Food Standards Agency before making these Regulations.

(**1**) 1990 c. 16. Section 6(4) was amended by paragraph 6 of Schedule 9 to the Deregulation and Contracting Out Act 1994 (c. 40), paragraph 10(1) and (3) of Schedule 5 and Schedule 6 to the Food Standards Act 1999 (c. 28) ("the 1999 Act"), and S.I. 2002/794. Section 16(1) was amended by paragraph 8 of Schedule 5 to the 1999 Act. Section 17(2) was amended by paragraphs 8 and 12(a) of Schedule 5 to the 1999 Act and S.I. 2011/1043. Section 26(3) was amended by Schedule 6 to the 1999 Act. Section 48 was amended by paragraph 8 of Schedule 5 to the 1999 Act. Functions formerly exercisable by the "the Ministers" so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales by S.I 1999/672 as read with section 40(3) of the 1999 Act, and subsequently transferred to the Welsh Ministers by paragraph 30 of Schedule 11 to the Government of Wales Act 2006 (c. 32).

(**2**) 1973 c. 51. Subsection (1) was amended by article 6(1)(e) of S.I. 2011/1043.

(**3**) By virtue of section 59(5) of the Government of Wales Act 2006.

(**4**) Section 48(4A) was inserted by paragraph 21 of Schedule 5 to the 1999 Act.

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There has been open and transparent public consultation during the preparation and evaluation of these Regulations as required by Article 9 of Regulation (EC) No 178/2002 of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety(**1**).

Title, application and commencement

1.—(1) The title of these Regulations is the Novel Foods (Wales) Regulations 2017.

(2) These Regulations apply in relation to Wales.

(3) These Regulations come into force on 1 January 2018.

Interpretation

2.—(1) In these Regulations—

"the Act" ("*y Ddeddf*") means the Food Safety Act 1990;

"Regulation (EU) 2015/2283" ("*Rheoliad (EU) 2015/2283*") means Regulation (EU) 2015/2283 of the European Parliament and of the Council of 25 November 2015 on novel foods, amending Regulation (EU) No 1169/2011 of the European Parliament and of the Council and repealing Regulation (EC) No 258/97 of the European Parliament and of the Council and Commission Regulation (EC) No 1852/2001(**2**);

"specified EU provision" ("*darpariaeth UE benodedig*") means a provision of Regulation (EU) 2015/2283 specified in column 1, and described in column 2, of the table in Schedule 1.

(2) Unless the contrary intention appears, any expression used both in these Regulations and Regulation (EU) 2015/2283 has the meaning that it bears in Regulation (EU) 2015/2283.

Enforcement

3. It is the duty of a food authority within its area to enforce Regulation (EU) 2015/2283 and these Regulations.

Offence and penalty

4. A person who fails to comply with Article 6(2) as read with Articles 24 and 35(2) of Regulation (EU)

(**1**) OJ No L 31, 1.2.2002, p 1, last amended by Regulation (EU) No 652/2014 of the European Parliament and of the Council (OJ No L 189, 27.6.2014, p 1).
(**2**) OJ No L 327, 11.12.2015, p 1.

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2015/2283 is guilty of an offence and liable on summary conviction to a fine.

Application and modification of provisions of the Act

5.—(1) Section 10(1) and (2) of the Act (improvement notices) applies for the purposes of these Regulations with the modification (in the case of section 10(1)) set out in Part 1 of Schedule 2 for the purposes of—

(a) enabling an improvement notice to be served on a person requiring that person to comply with a specified EU provision; and

(b) making the failure to comply with a notice referred to in sub-paragraph (a) an offence.

(2) Section 9 of the Act (inspection and seizure of suspected food) applies for the purposes of these Regulations with the modifications set out in Part 2 of Schedule 2 for the purposes of enabling an authorised officer of a food authority, if it appears to the authorised officer that Article 6(2) of Regulation (EU) 2015/2283 is being, or has been, contravened in relation to any food which has been placed on the market, to either—

(a) give notice to the person in charge of the food that it is not to be used for human consumption, and is not to be removed or is not to be removed except to some place specified in the notice, or

(b) seize the food and remove it in order to have it dealt with by a justice of the peace.

(3) The provisions of the Act specified in column 1 of the table in Part 3 of Schedule 2 apply, with the modifications (if any) specified in column 2 of that table, for the purposes of these Regulations.

(4) Paragraphs (1) to (3) are without prejudice to the application of the Act to these Regulations for purposes other than those specified in paragraphs (1) and (2).

Revocations

6. The following Regulations are revoked—

(a) The Novel Foods and Novel Food Ingredients Regulations 1997(**1**);

(b) The Novel Foods and Novel Food Ingredients (Fees) Regulations 1997(**2**);

(**1**) S.I. 1997/1335.
(**2**) S.I. 1997/1336.

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(c) The Food Enzymes (Wales) Regulations 2009(**1**).

Vaughan Gething
Cabinet Secretary for Health and Social Services, one of the Welsh Ministers
14 November2017

We consent

Guto Bebb
David Evennett
Two of the Lords Commissioners of Her Majesty's Treasury

10 October 2017

(**1**) S.I. 2009/3377 (W. 299).

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SCHEDULES

SCHEDULE 1 Regulation 2(1)

Specified EU Provisions

1. Specified EU Provision	2. Subject matter
1. Article 4(1).	Requirement that food business operators verify whether food they intend to place on the market is within the scope of Regulation (EU) 2015/2283.
2. Article 6(2) as read with Articles 24 and 35(2).	Requirement that only novel foods authorised and included in the Union list may be placed on the market as such, or used in or on food, in accordance with the conditions of use and the labelling requirements specified, and with any post-market monitoring requirements.
3. Article 25.	Requirement that a food business operator who has placed a novel food on the market must immediately inform the European Commission of any information of which it becomes aware concerning— (a) any new scientific or technical information which might influence the evaluation of the safety of use of the novel food; or (b) any prohibition or restriction imposed by a third country in which the novel food is placed on the market.

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SCHEDULE 2 Regulation 5

Application and modification of provisions of the Act

PART 1

Modification of section 10(1)

1. For section 10(1) of the Act (improvement notices) substitute—

"If an authorised officer has reasonable grounds for believing that a person is failing to comply with any provision specified in Schedule 1 to the Novel Foods (Wales) Regulations 2017, the authorised officer may, by a notice served on that person (in this Act referred to as an "improvement notice")—

(a) state the officer's grounds for believing that the person is failing to comply with the relevant provision;

(c) specify the matters which constitute the person's failure so to comply;

(d) specify the measures which, in the officer's opinion, the person must take in order to secure compliance; and

(e) require the person to take those measures, or measures that are at least equivalent to them, within such period (not being less than 14 days) as may be specified in the notice."

PART 2

Modification of section 9

2. For section 9 of the Act (inspection and seizure of suspected food) substitute—

"(1) This section applies where it appears to any authorised officer of a food authority that Article 6(2) of Regulation (EU) 2015/2283 is being, or has been, contravened in relation to any food which has been placed on the market.

(2) The authorised officer may either—

(a) give notice to the person in charge of the food that, until the notice is withdrawn, the food—

(i) is not to be used for human consumption; and

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(ii) either is not to be removed or is not to be removed except to some place specified in the notice; or

(b) seize the food and remove it in order to have it dealt with by a justice of the peace;

and any person who knowingly contravenes the requirements of a notice under paragraph (a) above is guilty of an offence and liable on summary conviction to a fine.

(3) Where the authorised officer exercises the powers conferred by subsection (2)(a) above, the authorised officer must, as soon as is reasonably practicable and in any event within 21 days, determine whether or not they are satisfied that the food complies with Article 6(2) of Regulation (EU) 2015/2283, and—

(a) if so satisfied, immediately withdraw the notice;

(b) if not so satisfied, seize the food and remove it in order to have it dealt with by a justice of the peace.

(4) Where an authorised officer exercises the powers conferred by subsection (2)(b) or (3)(b) above, the authorised officer must inform the person in charge of the food that it is to be dealt with by a justice of the peace and—

(a) any person who might be liable to a prosecution in respect of the food must, if attending before the justice of the peace by whom the food falls to be dealt with, be entitled to be heard and to call witnesses; and

(b) that justice of the peace may, but need not, be a member of the court before which any person is charged with an offence in relation to that food.

(5) If it appears to a justice of the peace, on the basis of such evidence as the justice of the peace considers appropriate in the circumstances, that any food falling to be dealt with under this section fails to comply with Article 6(2) of Regulation (EU) 2015/2283, the justice of the peace must condemn the food and order—

(a) the food to be destroyed or to be disposed of as to prevent it from being used for human consumption; and

(b) any expenses reasonably incurred in connection with the destruction or disposal to be defrayed by the owner of the food.

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(6) If a notice under subsection (2)(a) above is withdrawn, or the justice of the peace by whom any food falls to be dealt with under this section refuses to condemn it, the food authority must compensate the owner of the food for any depreciation in its value resulting from the action taken by the authorised officer.

(7) Any disputed question as to the right to or the amount of any compensation payable under subsection (6) above is to be determined by arbitration.

(8) For the purposes of this section, "Regulation (EU) 2015/2283" means Regulation (EU) 2015/2283 of the European Parliament and of the Council of 25 November 2015 on novel foods, amending Regulation (EU) No 1169/2011 of the European Parliament and of the Council and repealing Regulation (EC) No 258/97 of the European Parliament and of the Council and Commission Regulation (EC) No 1852/2001."

PART 3

Application and modification of other provisions of the Act

Column 1 *Provision of the Act*	*Column 2* *Modifications*
Section 2 (extended meaning of "sale" etc.)	For "this Act" (in each place it occurs) substitute "the Novel Foods (Wales) Regulations 2017".
Section 3 (presumptions that food intended for human consumption)	In subsection (1), for "this Act" substitute "the Novel Foods (Wales) Regulations 2017".
Section 20 (offences due to fault of another person)	For "any of the preceding provisions of this Part" substitute "section 10(2), as applied by regulation 5(1) of the Novel Foods (Wales) Regulations 2017 or under regulation 4 of those Regulations".
Section 21(1) and (5) (defence	In subsection (1),

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Column 1 *Provision of the Act*	*Column 2* *Modifications*
of due diligence)	for "any of the preceding provisions of this Part" substitute "section 10(2), as applied by regulation 5(1) of the Novel Foods (Wales) Regulations 2017 or under regulation 4 of those Regulations".
Section 30(6) and (8) (evidence of certificates given by a food analyst or examiner)	In subsection (8), for "this Act" substitute "the Novel Foods (Wales) Regulations 2017".
Section 32 (powers of entry)	In subsection (1), for paragraphs (a) to (c), substitute "(a) to enter any premises within the authority's area for the purpose of ascertaining whether Article 6(2) of Regulation (EU) 2015/2283 is being or has been contravened on the premises;".
Section 33 (obstruction etc. of officers)	In subsection (1), for "this Act" (in each place it occurs) substitute "the Novel Foods (Wales) Regulations 2017".

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Column 1 *Provision of the Act*	*Column 2* *Modifications*
Section 35(1)(**1**) and (2) (punishment of offences)	In subsection (1), after "section 33(1) above", insert ", as applied and modified by regulation 5 of, and Part 3 of Schedule 2 to, the Novel Foods (Wales) Regulations 2017". In subsection (2), in the opening words, for "any other offence under this Act" substitute "an offence under section 33(2), as applied by regulation 5 of, and Part 3 of Schedule 2 to, the Novel Foods (Wales) Regulations 2017,".
Section 36 (offences by bodies corporate)	In subsection (1), for "this Act" substitute "section 10(2), as applied by regulation 5(1) of the Novel Foods (Wales) Regulations 2017 or under regulation 4 of those Regulations".
Section 36A(**2**) (offences by Scottish partnerships)	For "this Act" substitute "section 10(2), as applied by regulation 5(1) of the Novel Foods (Wales) Regulations 2017 or under regulation 4 of those Regulations".
Section 37(1) and (6) (appeals to a magistrates' court)	For subsection (1) substitute— "(1) Any person

(**1**) Section 35(1) is amended by paragraph 42 of Schedule 26 to the Criminal Justice Act 2003 (c. 44) from a date to be appointed. There are other amendments to section 35(1) not relevant to these Regulations.

(**2**) Section 36A was inserted by section 40(1) of, and paragraphs 7 and 16 of Schedule 5 to, the Food Standards Act 1999 (c. 28).

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Column 1 *Provision of the Act*	*Column 2* *Modifications*
	who is aggrieved by a decision of an authorised officer of a food authority to serve an improvement notice under section 10(1), as applied and modified by regulation 5 of, and Part 1 of Schedule 2 to, the Novel Foods (Wales) Regulations 2017, may appeal to a magistrates' court." In subsection (6)— for "(3) or (4)" substitute "(1)", and in paragraph (a), omit "or to the sheriff".
Section 39 (appeals against improvement notices)	For subsection (1) substitute— "(1) On an appeal against an improvement notice served under section 10(1), as applied and modified by regulation 5 of, and Part 1 of Schedule 2 to, the Novel Foods (Wales) Regulations 2017, the magistrates' court may either cancel or affirm the notice and, if it affirms it, may do so either in its original form or with such modifications as the magistrates' court may in the circumstances think fit." In subsection (3), omit "for want of prosecution".

EXPLANATORY MEMORANDUM TO

The Novel Foods (Wales) Regulations 2017

This Explanatory Memorandum has been prepared by the Food Standards Agency (FSA) and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Member's Declaration

In my view the Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Novel Foods (Wales) Regulations 2017. I am satisfied that the benefits justify the likely costs.

Vaughan Gething AM

Cabinet Secretary for Health and Social Services

16 November 2017

EXPLANATORY MEMORANDUM TO

Novel Foods (Wales) Regulations 2017

1. Description

Novel foods are foods or food ingredients that do not have a significant history of consumption within the EU before 15 May 1997. They are currently regulated in the EU by the Novel Foods Regulation (EC) No 258/97. The main purpose of the Regulation is to prohibit the sale of unauthorised novel foods, which could pose a risk to public health.

The Novel Foods Regulation (EC) No 258/97 is to be repealed and replaced by Regulation (EU) 2015/2283 on novel foods as of 1 January 2018. The Novel Food (Wales) Regulations 2017 will revoke and replace in Wales the Novel Food and Novel Food Ingredients Regulations 1997 (1997/1335), which provide for the enforcement of the Novel Foods Regulations (EC) No 258/97. The proposed Regulations will also revoke the Novel Foods and Novel Food Ingredients (Fees) Regulations 1997 (1997/1336) in relation to Wales and the Food Enzymes (Wales) Regulations 2009 (2009/3377). HM Treasury consent has been obtained to revoke the Novel Foods and Novel Food Ingredients (Fees) Regulations 1997 in relation to Wales.

2. Matters of Special Interest to the Constitutional and Legislative Affairs Committee

None.

3. Legislative Background

The powers enabling the Regulations to be made are conferred by sections 6(4), 16(1)(a), (e) and (f), 17(2), 18(1)(a), 26(1)(a) and (3) and 48(1) of the Food Safety Act 1990, and section 56(1) of the Finance Act 1973.

The powers given by these sections, which were vested in UK Government Ministers prior to devolution, were transferred to the National Assembly for Wales in 1999 by the National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999/672) and were subsequently transferred to the Welsh Ministers by paragraph 30 of Schedule 11 to the Government of Wales Act 2006.

The Regulations will be made by statutory instrument subject to the negative resolution procedure.

4. Purpose and Intended Effect of the Legislation

The purpose of the Novel Foods (Wales) Regulations 2017 is to:

- Ensure that those placing novel foods on the market within Wales are fully compliant with the new EU legislative requirements. This supports consumers accessing safe food innovation and facilitates trade in new foods by UK businesses, whilst providing a high level of protection of human health and consumer interests;
- Provide for the effective and proportionate enforcement of the new EU Regulation on novel foods through the use of improved enforcement tools that may be employed to deal with suspected non-compliances with the EU Regulation and a range of civil penalties;
- Maintain access to a back stop criminal offence and provide for defences against prosecution and establish a right of appeal against the imposition of an improvement notice in particular circumstances;
- Specify penalties that the Courts may impose upon conviction and enable the award of compensation where enforcement authorities are found not to have taken appropriate action; and
- Revoke the Novel Foods and Novel Food Ingredients Regulations 1997 and the Novel Foods and Novel Food Ingredients (Fees) Regulations 1997 in relation to Wales.

5. Consultation

The FSA in Wales held a public consultation between 3rd April and 26th June 2017. There were no responses to the consultation.

6. Regulatory Impact Assessment

The figures used in the Impact Assessment to calculate the costs and benefits to businesses are on a UK wide basis. The FSA does not hold details of the number of businesses in Wales using novel foods and so these figures are not available on a disaggregated basis. Novel foods can be used by any business so they are unlikely to be registered as a 'novel foods business' and therefore identifiable as such. During the consultation for the Novel Foods (Wales) regulations 2017 the FSA asked local authorities to draw this to the attention of any business using novel foods in their areas. We received no responses to the consultation in Wales. On this basis UK figures have been used above to calculate the cost to industry.

What policy options have been considered?

Option 1 – Do Nothing – do not make domestic Regulations to provide for the enforcement and execution of the new EU Regulation in Wales.

This option will not prevent the new EU Regulation applying in Wales as it is already legally binding and applicable throughout the EU. However, enforcement authorities would not have the necessary powers to enable them to enforce it. This could also

lead to infraction proceedings being brought against the UK for failing to enforce the new EU Regulation as part of its legal obligations to the EU.

Option 2 – Make appropriate domestic Regulations for the execution and enforcement of the new EU Regulation on novel foods.

This option will provide enforcement authorities with the necessary powers to enforce the new EU Regulation, and remove the risk of the UK incurring infraction proceedings.

This is the preferred option.

Option Appraisal

Costs and Benefits

Option 1: Do Nothing – do not make national Regulations to provide for the enforcement and execution of the new EU Regulation in England; Wales; and Northern Ireland.

There are no additional costs or benefits associated with this option. This is the baseline against which the alternative policy option is appraised. As noted above, failing to introduce the Regulations carries a risk of infraction proceedings and a fine from the EU.

Option 2: Make appropriate domestic Regulations for the execution and enforcement of the new EU Regulation on novel foods.

There will be some cost to industry and enforcement in ensuring compliance with the new EU Regulation as identified below.

Option 2 - One-off Costs to Industry

One –off familiarisation cost

This figure is calculated by firstly taking the 2016 Provisional ONS ASHE (Annual Survey of Hours and Earnings)[1] figure 'Production managers and directors' £25.54 and uprating it by 20%, according to the Standard Cost model[2], to account for overheads, giving a mean[3] hourly wage rate of £30.65. It is estimated that the reading and understanding of the EU Regulation and the proposed Regulations will take one and half hours with a further one and a half hours more for dissemination to key staff within each firm (a total of three hours). Given the number of enquiries the FSA receives annually from companies concerning this area of legislation, it is estimated that approximately 1,000 companies[4] across the UK will need to invest in

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1 https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/occupation4digitsoc2010ashetable14

2 SCM methodology http://www.berr.gov.uk/files/file44503.pdf

3 The median figure would have been used but only the 'mean' figure was available at the time.

4 The FSA has made the reasonable assumption that approximately 1,000 food business operators are active in considering placing novel foods on the market based on the number of enquiries we receive; these enquiries generally concern whether a product is novel;

understanding the new legislation, thus yielding an approximate one-off familiarisation cost to firms across the UK of £92k.

Option 2 - Costs to Enforcement

One –off familiarisation cost

There are approximately 386 local authorities and 36 Port Health Authorities in England, Wales and Northern Ireland. It is estimated that one officer in each of these authorities (one / Health Officer from each local authority'; and one 'Inspector of Standards' from each Port Health Authority) is expected to read and familiarise themselves with the EU Regulation and the proposed Regulations and that it takes them one and a half hours to do so. In addition, we have estimated that a further hour and a half is required to disseminate to key staff within the organisation (three hours in total).

An estimate of the cost with respect to the time taken by enforcement officers at local authorities to familiarise themselves is £18.97. This figure taken from the 2016 Provisional ONS ASHE (Annual Survey of Hours and Earnings)[5], figures for an Environmental Health Officer £18.97 per hour (median value), which, in line with the Standard Cost Model, is then up-rated by 20% to account for overheads, which gives an hourly wage rate of £22.76. With 386 local authorities, this gives a total cost of £26k. An estimate of the cost with respect to the time taken by 'Inspectors of standards' at Port Health Authorities, to familiarise themselves is £17.83. This figure taken from the 2016 Provisional ONS ASHE (Annual Survey of Hours and Earnings), figures for an 'Inspector of standards' £15 per hour (median value), which, in line with the Standard Cost Model, is then up-rated by 20% to account for overheads. With 36 Port Health Authorities, this gives a total cost of £2k. This result in a total approximate one-off cost for enforcement bodies across England, Wales and Northern Ireland of £28k.

Within Wales there are 22 local authorities, including one Port Health Authority. Using the figures above for hourly rates and familiarisation time this would result in a cost for local authorities of £1500 and the Port Health Authority of £55. The total approximate one-off cost for enforcement bodies in Wales would be £1555.

Compared with the current system, there would be no additional or new burden on enforcement bodies, other than those identified in the costs and benefits above.

Option 2 – Benefits to Industry

Generic Novel Food Authorisations

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procedures for seeking authorisation of a novel food; and how to demonstrate that a product has a history of consumption in the EU.

5 https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/occupation4digitsoc2010ashetable14

Under current regulatory requirements operators wishing to place novel foods on the market may either submit:

a full novel food application (with accompanying scientific dossier) for authorisation; or

an application seeking to demonstrate the substantial equivalence (SE) of their novel food product to one that is already authorised.

Under the current system novel food authorisations are issued specifically to the company that submitted the application, consequently any other company wishing to market the same novel food product must submit a separate application. In most cases this can be done via a simplified procedure that is based on demonstrating to one of the national Competent Authorities that the two products are substantially equivalent. This has led to a large number of SE applications, creating unnecessary administrative burdens on applicants and national Competent Authorities.

By way of illustration, Company A wishes to place chia seeds on the market, and submits a full novel food application seeking authorisation. Company A's application is successful and is duly authorised to place their chia seeds on the market. Company B also wishes to place chia seeds on the market. Company B can submit a SE application, which should show how the novel food or novel food ingredient may be substantially equivalent to the existing authorised food as regards to its:

- composition (such as the source organism and preparation method);
- nutritional value;
- metabolism;
- intended use (such as a food ingredient or supplement); and the
- level of undesirable substances (such as contaminants, mycotoxins and allergens).

The new EU Regulation has introduced a move from applicant specific authorisations to generic authorisations. Once a novel food is authorised any operator could benefit from that authorisation subject to any proprietary data protection restrictions that may apply. This move to generic authorisations has removed the need for SE applications.

Informal enquiries amongst industry sources in the UK suggest the administrative cost of preparing an SE application and taking it through the existing process may be in the order of £5k-£25k; this is a saving for industry. It is expected that this will benefit small and medium sized businesses in particular as it means they too could place an authorised novel food on the market even if they did not submit the initial application for authorisation.

Streamlined procedures for the assessment and authorisation of novel foods

The current authorisation procedure is based on assessments carried out by the relevant authorities in one of the 28 EU MS, which are then scrutinised by the others.

In some cases, there are outstanding questions and concerns which, if they cannot be satisfied by further information from the applicant, are referred to EFSA. The new EU Regulation will replace this with a single centralised assessment by EFSA, in line with the approach used in other areas of EU food law, such as food additives. It is anticipated that whilst this will speed up the authorisation process, the financial cost of assembling data and preparing the initial dossiers would be substantially the same as at present. The centralised approach under the new EU Regulation is more supportive of a consortium of applicants than previously, providing opportunities for businesses to share the cost of preparing an application.

Reliance on a single, centralised safety assessment should not detract from the rigour of the safety assessment and it would be essential to ensure that assessments are carried out to a high standard and with the maximum degree of transparency.

The time taken for decisions to be made by the Commission on applications submitted under the current EU Regulation has varied between 6 months to more than 4 years. The Commission has calculated that authorisations have, on average, been issued 39 months after the application was submitted. This might be reduced to 18 months under the new EU Regulation if the authorisation process runs smoothly. Based on valid applications being forwarded for safety assessment within 1 month; 9 months for EFSA to carry-out the safety assessment and deliver its opinion; and 3 months thereafter to present a possible draft implementing decision for a vote by MS.

The cost to an applicant of making a novel application will vary from case to case; depending on the complexity of the case and the need to generate new data to demonstrate the acceptability of the product. Unilever estimated that the total cost of obtaining authorisation for their Phytosterol ingredient (used in spreads and other products under the brand name 'Flora Pro-activ' range) was €25 million[6] (£19.8m), although this figure does not differentiate between costs which would have been incurred in the absence of the current Regulation (e.g. work required to satisfy general obligations under EU food law, to meet the company's own level of corporate safety assurance or to obtain authorisation in other regions of the world).

There are no data on which an estimate of the financial benefits of enabling a new product to be brought to the market in a shorter time after the dossier is submitted.

On-going (annual) benefit of savings due to lower 'Administrative Costs'

Informal enquiries amongst industry sources in the UK suggest that the administrative cost of preparing a full novel food application dossier and taking it through the existing process may be in the order of £20k-£50k. If the applicant does not already have the data to undertake a formal risk assessment, the cost of the individual studies could range from £5k-£12k (for a detailed analysis of the

6 This figure was provided in 200. To convert it to sterling the Bank of England annual average Spot exchange rate, Euro into Sterling (code: XUAAERS) was used. This resulted in a figure of £19,860,184.

composition of the product) to a possible £250k (for a full Organisation for Economic Co-operation and Development 90-day feeding study in laboratory rats).

Having centralised safety assessment will, however, remove some of the burden placed on National Competent Authorities; with this being transferred to EFSA. However, the ongoing need for expert advice on novel foods to support the effective functioning of the new EU Regulation is not yet clear, in particular in relation to assessment of traditional foods from third countries. No allowance has therefore, been made for financial savings resulting from the transfer of the safety assessment from national level to EFSA.

The centralised authorisation procedure might reduce the administrative burden on the applicant as they would have to liaise with a single body rather than with individual MS. However, it is anticipated that applicants may still wish to seek advice from competent authorities in the transitional period until understanding of the new regulatory framework is fully embedded. For the purpose of this Impact Assessment, it has been assumed the current administrative costs of preparing a dossier and taking it through the authorisation process is £20k - £50k and that 50% of this might be saved on full applications and 100% on SE applications. Sensitivity analysis has been used by taking an upper bound of £50k, a lower bound of £20k and best estimate of £35k, which is the mid-point of the two bounds. Calculations have been made on the basis of 5.2 full applications and 2.4 applications seeking an opinion on substantial equivalence per year in the UK (the novel food applications that were made during 2011-2016 were 26 full applications and 12 applications seeking to demonstrate substantial equivalence). For full applications, the best estimate of annual savings in England, Wales and Northern Ireland is £91k, with a total cost savings over 10 years of £783k (present value); with an upper bound estimate of £1.1m and a lower bound estimate of £448k (also present value figures). For opinions on substantial equivalence, the best estimate of annual savings is £36k, with a total cost savings over 10 years of £310k (present value; with an upper bound estimate of £516k and a lower bound estimate of £103k (also present value figures).

No calculation could be made for UK businesses seeking authorisation through other MS as the number of business affected are unknown.

On-going (annual) benefit savings due to 'Removal of application fees'

In addition to the potential administrative costs that operators might save, the proposed Regulations provide for the removal of fees through revocation of the Novel Foods and Novel Food Ingredients (Fees) Regulations 1997; this Regulation empowers the FSA to charge:

£4,000 in respect of a full novel food applications; and

£1,725 in respect of an opinion on substantial equivalence.

Calculations have been made on the basis of 5.2 full applications and 2.4 applications seeking an opinion on substantial equivalence per year. For full applications, the administrative cost saving of £4k per application leads to a total

annual saving of £20.8k, leading to a total saving of £179k (present value) in England, Wales and Northern Ireland over ten years. For opinions on substantial equivalence, the administrative cost saving of £1.7k per application leads to a total annual cost saving of £4.1k, leading to a total annual saving of £36k (present value) over ten years.

Non-monetised benefit to industry of "the Establishment of a Union list of Authorised Novel Foods"

The establishment of a Union list of authorised novel foods and any applicable conditions of use will benefit industry by providing greater clarity as to the novel foods that may legally be placed on the market. This will assist operators in the delivery of the obligation placed on them by Chapter I, Article 4 of Regulation (EU) No 2015/2283 which requires operators to verify whether the food they intend to place on the market falls within the scope of the legislation**.**

Non-monetised benefit to industry of "A simplified safety assessment procedure for traditional food from third countries"

There is increasing interest in the introduction of exotic fruits and vegetables coming into the EU market from non-EU countries, which have not previously been exported to Europe. For example, a group of Andean countries (Columbia, Ecuador, and Peru) have estimated that there are about 60 plant species that are traditionally consumed in their regions that could in future be exported to the EU.

Whilst the existing Novel Foods Regulation does not prevent trade in traditional foods, such products need to go through the full authorisation procedure that applies to other novel food; but few applications have been received, possibly because the requirements for authorisation are seen by exporters as unduly onerous and burdensome.

The simplified traditional food from third countries notification procedure set out in the new EU Regulation requires the submission of a dossier demonstrating the safety of a traditional food. EFSA has developed a scientific and technical guidance document intended to support applicants in providing the type and quality of information needed by EU MS and EFSA to consider whether there are reasoned safety objections to the placing on the market within the Union of the traditional food with the proposed conditions of use.

Dossiers should contain specifications on the traditional food; reliable data on the composition of the food; information about the experience of continued use in a third country; and its proposed conditions of use. In addition to this, normal consumption of the traditional food should not be nutritionally disadvantageous for consumers. If the procedure were to operate smoothly (a valid dossier being forwarded to MS and EFSA for consideration within 1 month of receipt by the Commission and the specified 4 month period permitted for MS and EFSA to raise any reasoned safety objections) the notified traditional food could be added to the authorised Union list within 6 months.

This simplified procedure should help facilitate trade by enabling traditional foods to proceed swiftly to the market, unless a MS, or EFSA, lodges a reasoned objection to the claim that the product has a history of safe use in a non-EU country.

Option 2 – Benefits to Consumers

Non-monetised benefit to consumers of "the Establishment of a Union list of Authorised Novel Foods"

The establishment of a Union list of authorised novel foods is expected to benefit consumers by providing clarity on what novel foods have been risk assessed and are considered not to present a risk to human health. The Union list will also provide any applicable conditions of use that should be observed in relation use of the novel food.

Non-monetised benefit to consumers of "A simplified safety assessment procedure for traditional food from third countries" and streamlined procedures for the assessment and authorisation of novel foods

It is expected that the simplified process for traditional food from third countries and streamlined procedures for the assessment and authorisation of novel foods is likely to result in an increase in the choice of foods available to consumers. It is also expected that consumers will benefit from products proceeding to market more swiftly and potentially at a lower cost as the commensurate costs to industry of authorisation are reduced.

Competition Assessment

The competition filter test	
Question	**Answer yes or no**
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	No
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	No
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	No
Q4: Would the costs of the regulation affect some firms substantially more than others?	No
Q5: Is the regulation likely to affect the market	No

The competition filter test	
Question	**Answer** **yes or no**
structure, changing the number or size of firms?	
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q8: Is the sector characterised by rapid technological change?	No
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	No

The present system is regarded by many food businesses as a barrier to innovation and any improvements to the efficiency and clarity of the procedures (including allowing reasonable returns on investments by means of data protection) are expected to lead to increased innovation and potentially competition. This is especially the case, if the time-to-market of new novel food products/ingredients is reduced. These regulations will support businesses to be able to bring a wider range of products to market quicker.

SL(5)153 - Novel Foods (Wales) Regulations 2017

Background and Purpose

The Novel Food (Wales) Regulations 2017 will revoke and replace in Wales the Novel Food and Novel Food Ingredients Regulations 1997 (1997/1335), which provide for the enforcement of the Novel Foods Regulations (EC) No 258/97. Regulations will also revoke the Novel Foods and Novel Food Ingredients (Fees) Regulations 1997 (1997/1336) in relation to Wales and the Food Enzymes (Wales) Regulations 2009 (2009/3377).

The purpose of the Novel Foods (Wales) Regulations 2017 is to:

i. Ensure that those placing novel foods on the market within Wales are fully compliant with the new EU legislative requirements. This supports consumers accessing safe food innovation and facilitates trade in new foods by UK businesses, whilst providing protection of human health and consumer interests;

ii. Provide for the enforcement of the new EU Regulation on novel foods through the use of improved enforcement tools that may be employed to deal with suspected non-compliances with the EU Regulation and a range of civil penalties;

iii. Maintain access to a back stop criminal offence and provide for defences against prosecution and establish a right of appeal against the imposition of an improvement notice in particular circumstances;

iv. Specify penalties that the Courts may impose upon conviction and enable the award of compensation where enforcement authorities are found not to have taken appropriate action.

Procedure

Negative.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

Merits Scrutiny

No points are identified for reporting under Standing Order 21.3 in respect of this instrument.

Implications arising from exiting the European Union

The following analysis is based on the European Union (Withdrawal) Bill ("the Bill") as introduced.

These Regulations form part of "EU-derived domestic legislation" under clause 2 of the Bill, therefore these Regulations will be retained as domestic law and will continue to have effect in Wales on and after exit day. The Bill gives the Welsh Ministers power to modify these Regulations in order to deal with deficiencies arising from EU withdrawal, subject to certain limitations.

The Regulations also provide for the enforcement of the Novel Foods Regulations (EC) No. 258/97. EU Regulation 258/97 currently has direct effect in EU member states, including Wales. On exit, this Regulation will be frozen and will be retained as / converted into domestic law called "retained direct EU legislation".

The Bill will not give the Welsh Ministers (or the National Assembly for Wales) power to modify any retained direct EU legislation, including EU Regulation 258/97 which is concerned with the devolved area of food. Power to modify all retained direct EU legislation is given to UK Ministers; this includes the power to modify retained direct EU legislation in devolved areas without the need for the consent of the National Assembly for Wales or the Welsh Ministers.

Therefore, if UK Ministers use their powers to modify EU Regulation 258/97 as retained direct EU legislation, the power of the Welsh Ministers to modify these Regulations will be limited so that the Welsh Ministers cannot do anything that is inconsistent with the modification made by UK Ministers.

Government Response

No government response is required.

Legal Advisers
Constitutional and Legislative Affairs Committee
29 November 2017

House of Commons

Public Administration and Constitutional Affairs Committee

Devolution and Exiting the EU and Clause 11 of the European Union (Withdrawal) Bill: Issues for Consideration

First Report of Session 2017–19

Report, together with formal minutes relating to the report

Ordered by the House of Commons to be printed 28 November 2017

HC 484
Published on 29 November 2017
by authority of the House of Commons

Public Administration and Constitutional Affairs Committee

The Public Administration and Constitutional Affairs Committee is appointed by the House of Commons to examine the reports of the Parliamentary Commissioner for Administration and the Health Service Commissioner for England, which are laid before this House, and matters in connection therewith; to consider matters relating to the quality and standards of administration provided by civil service departments, and other matters relating to the civil service; and to consider constitutional affairs.

Current membership

Mr Bernard Jenkin MP (*Conservative, Harwich and North Essex*) (Chair)

Ronnie Cowan MP (*Scottish National Party, Inverclyde*)

Paul Flynn MP (*Labour, Newport West*)

Mr Marcus Fysh MP (*Conservative, Yeovil*)

Mrs Cheryl Gillan MP (*Conservative, Chesham and Amersham*)

Kelvin Hopkins MP (*Independent, Luton North*)

Dr Rupa Huq MP (*Labour, Ealing Central and Acton*)

Mr David Jones MP (*Conservative, Clwyd West*)

Sandy Martin MP (*Labour, Ipswich*)

David Morris MP (*Conservative, Morecambe and Lunesdale*)

Powers

The committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 146. These are available on the internet via www.parliament.uk.

Publication

Committee reports are published on the Committee's website at www.parliament.uk/pacac and in print by Order of the House.

Evidence relating to this report is published on the inquiry publications page of the Committee's website.

Committee staff

The current staff of the Committee are Dr Rebecca Davies (Clerk), Ian Bradshaw (Second Clerk), Dr Patrick Thomas (Committee Specialist), Mr Jonathan Bayliss (Committee Specialist), Ms Penny McLean (Committee Specialist), Dr Philip Larkin (Committee Specialist), Gabrielle Hill (Senior Committee Assistant), Iwona Hankin (Committee Assistant), and Mr Alex Paterson (Media Officer).

Contacts

All correspondence should be addressed to the Clerk of the Public Administration and Constitutional Affairs Committee, House of Commons, London SW1A 0AA. The telephone number for general enquiries is 020 7219 3268; the Committee's email address is pacac@parliament.uk.

Contents

Introduction

1. On 12 October 2017, the Public Administration and Constitutional Affairs Committee (PACAC) launched an inquiry into *Devolution and Exiting the EU*. This report constitutes an interim paper with supporting evidence. Its purpose is to develop the themes and issues raised in our predecessor Committee's report in the previous Parliament *The Future of the Union, part two: Inter-institutional relations in the UK*.[1] Our inquiry is particularly focused on the long-term arrangements for devolution within the UK (and the inter-institutional relations which underpin those arrangements), following the UK's departure from the EU.

2. Many of these issues have been bought into sharp focus by the provisions in the EU (Withdrawal) Bill. While our inquiry is continuing, much of the evidence we have heard to date is pertinent to the consideration of the EU (Withdrawal) Bill - not least for the consideration of Clause 11. At this stage, we draw no conclusions and make no recommendations in this report. This short report presents the evidence we have heard on key issues relating to Clause 11, with the intention of informing the debate expected to take place on the Floor of the House on 4 December 2017.[2] The Committee will make a further report early in 2018. It is important to emphasise that we have not finished taking evidence on these matters at the time of publishing this report.

1 Sixth Report from the Public Administration and Constitutional Affairs Committee of Session 2016–17, The Future of the Union, part two: Inter-institutional relations in the UK, HC 839, 8 December 2016

2 Other select committees who have reported and take evidence on these issues include reports of the Scottish Affairs Committee, European Union Withdrawal Bill: Implications for devolution and the Exiting the European Union Committee, European Union (withdrawal) Bill. The Committee would also highlight the Northern Ireland Affairs Committees inquiry The land border between Northern Ireland and Ireland, and the Welsh Affairs Committee inquiry Brexit: Agriculture, Trade and the repatriation of powers inquiry which have also taken evidence on these important devolution issues.

1 The Devolution Clause

3. The European Union (Withdrawal) Bill (EUW Bill) received its Second Reading on 7 and 11 September 2017, and is now being considered in Committee of the Whole House. Our report is particularly relevant to days 4 and 5 of the Committee stage. Day 4, on Monday 4 December, will include consideration of Clause 11 and Schedule 3. This includes the creation of UK wide frameworks, the Joint Ministerial Committee, and the powers of the devolved assemblies in relation to "retained EU law". Day 5, on Wednesday 6 December, will be in two parts: the first to consider Clause 10 and Schedule 2 which grant the Government the power to make changes through delegated legislation in connection with devolved powers; the second to consider Clause 12 and Schedule 4 concerning financial provision in connection with these powers.

4. The UK Government's stated intention in introducing the EUW Bill is to "provide a functioning statute book on the day the UK leaves the EU. As a rule, the same rules and laws will apply on the day after exit as on the day before".[3] In order to do this, the Government has stated that the EUW Bill should perform four main functions:

a) To repeal the European Communities Act 1972 (ECA 1972) (Clause 1)

b) To retain EU law in the UK statute book that might otherwise have been removed by the repeal of the ECA 1972. It does this through preserving domestic primary and secondary legislation that gives effect to EU law (Clause 2), through converting EU law that applies in the UK into domestic law and saving rights based on EU law (Clause 3 and 4). This converted and preserved EU law the forms a new body of UK law created by the Bill called "retained EU law".

c) The third function is performed by the Clauses that provide instructions for the courts (Clause 5 and 6) and creates powers for Ministers to deal with deficiencies in this new body of retained EU law that arise as a consequence of leaving the EU (Clauses 7, 8 and 9).

d) To maintain the "current scope of devolved decision-making powers in areas currently governed by EU law".[4] The EUW Bill aims to achieve this through converting EU law into a new retained EU law and creating a requirement for the devolved legislatures in Scotland, Wales and Northern Ireland to legislate in a way compatible with retained EU law.

5. The main provisions in the EUW Bill dealing with devolution are Clauses 10 and 11, and Schedules 2 and 3. Clause 10 has the sole function of giving effect to Schedule 2, which provides for corresponding and concurrent powers for devolved authorities to those given to UK Ministers in Clauses 7, 8 and 9, to correct deficiencies in domestic devolved legislation that arise from withdrawal from the EU.[5]

6. Clause 11 makes changes to the Scotland Act 1998 (section 29), Government of Wales Act 2006 (Section 108A) and Northern Ireland Act 1998 (Section 6). These changes remove the restriction preventing devolved institutions from legislating in a way incompatible with EU law. This currently ensures the devolution Acts are in line with the Court of Justice of

3 Explanatory Notes to the European Union (Withdrawal) Bill [Bill5 (2017–19)], para 10
4 Explanatory Notes to the European Union (Withdrawal) Bill [Bill5 (2017–19)], para 11
5 European Union (Withdrawal) Bill, Briefing Paper 8079, House of Commons Library, 1 September 2017, p 104

the European Union (CJEU) judgments that assert primacy of EU law over national law.[6] Clause 11 substitutes this restriction for a new restriction on devolved institutions that they cannot modify retained EU Law.

7. Schedule 3 makes corresponding changes to the Scotland Act 1998 (section 57), Government of Wales Act 2006 (Section 80) and Northern Ireland Act 1998 (Section 24), which replace the restriction on devolved authorities not to make subordinate legislation or act incompatibly with "EU Law" with a new restriction not to modify retained EU law.

8. The Acts of Parliament which established devolution in the UK were passed in the context of the UK's membership of the EU. Consequently, many of the areas of devolved competence are governed by EU Law, regulations and common frameworks. Professor Alan Page, Professor of Public Law at the University of Dundee, explained that the restrictions in the original Acts ensure devolved administrations do not place the UK in breach of its obligations as an EU Member State.[7] The Government's intention in Clause 11 is to "maintain the current parameters of devolved competence as regards retained EU law" in line with the Government's overall intention of ensuring legal continuity by having "the same rules and laws will apply on the day after exit as on the day before".[8] To ensure this legal continuity, the Bill prohibits devolved legislatures from modifying retained EU law within current devolved areas of competence, in a way which would not have been compatible with EU law immediately before exit day.[9]

9. In the explanatory notes to the Bill, the UK Government explains that devolution provisions in the Bill are intended as transitional arrangements, with decisions to be taken on long term common policy approaches later.[10] Clause 11 includes a provision to "release areas from the limit on modifying retained EU law" through an Order in Council. This enables powers to be returned to devolved institutions in areas where it is decided that the common approach existing under EU law does not need to be maintained.[11] For example, carbon capture and storage is currently regulated under a common framework, but could be released for devolved areas to develop their own policy. Orders in Council can also be used to release areas where new or modified common frameworks will be established, so, for example, could be used to set up or change a UK wide agriculture policy. Orders in Council, for this purpose, require approval in devolved legislatures and both Houses of Parliament.[12] If changes to common frameworks were to be made by statute, this would trigger the Sewel Convention and consent would be sought by UK Government from the devolved legislatures.[13]

6 Court of Justice of the European Union, Flamino Costa v E.N.E.L, 15 July 1964; Factortame Ltd, R (On the Application Of) v Secretary of State for Transport [1990] UKHL 13; European Union (Withdrawal) Bill, Briefing Paper 8079, House of Commons Library, 1 September 2017, p 53–5

7 Professor Alan Page (DEU0008) para 7; Q13

8 Explanatory Notes to the European Union (Withdrawal) Bill [Bill5 (2017–19)], paras 10, 34

9 Explanatory Notes to the European Union (Withdrawal) Bill [Bill5 (2017–19)], para 130

10 Explanatory Notes to the European Union (Withdrawal) Bill [Bill5 (2017–19)], para 34

11 European Union (Withdrawal) Bill [Bill5 (2017–19)],Clause 11(1)b,11(2)b, 11(3); Explanatory Notes to the European Union (Withdrawal) Bill [Bill5 (2017–19)], para 36

12 European Union (Withdrawal) Bill, Briefing Paper 8079, House of Commons Library, 1 September 2017, p 104

10. While there is a clear consensus amongst our witnesses that the effect of Clause 11 is to provide legal continuity, the means by which Clause 11 will achieve this has been the focus of some concern and controversy.[14] These issues are crucial, as Clause 11 not only provides the statutory framework within which devolution will operate in the UK following its departure from the EU, but the debate around Clause 11 raises fundamental principles about how the relationships between central and devolved government in the UK will be conducted.

13 The Sewel Convention applies when the UK Parliament legislates on a matter which is devolved. It holds that this will happen only if the devolved legislature has given its consent. While it was originally not included in the legislation, it is now included in the Scotland Act 2016 and the Wales Act 2017. It is also stated in the Memorandum of Understanding between the UK Government and devolved executives, first drawn up in 1999. The thinking behind the Convention is that the UK Parliament, as a sovereign body, retains full legal power to legislate on devolved matters, yet the spirit of devolution implies that political power rests with the Scottish Parliament. In order to avoid conflict, the Government undertook not to seek nor support relevant legislation in the UK Parliament without the prior consent of the Scottish Parliament. This consent is embodied in a "Sewel motion," or, formally, a "Legislative Consent Motion". The Sewel Convention, Standard Note SN/PC/2084, House of Commons Library

14 Professor Alan page (DEU0008); Q13; Dr Tobias Lock (0001) para 5; Rawlings, Richard, Brexit and the Territorial Constitution, 2017, p 5

2 Concerns relating to Clause 11

A power grab?

11. Without the inclusion of Clause 11 on the face of the EUW Bill, the powers currently held at EU level, to legislate in areas of devolved competency in Northern Ireland, Scotland and Wales, would return to the devolved legislatures and Governments.[15] Professor Alan Page states that concerns had been raised that the EUW Bill "was drafted without a proper understanding of devolution law", which raises questions about the mechanisms used in Clause 11.[16] He explains that the requirement for devolved administrations to act compatibly with EU law is rooted in the obligation not to put the UK in a position where it is breaching its obligations as an EU Member State. But if that requirement is rooted in the UK's membership of the EU, he adds, then when the UK has exited the EU, that requirement "ceases to have any justification".[17] Professor Page therefore poses the question: "Why would you expect Scotland, Wales and Northern Ireland to be bound after the UK has left? Surely you would expect the exact opposite, and I think that was the starting point for the devolved institutions' response to the Bill".[18]

12. Immediately after the publication of the EU Withdrawal Bill on 13 July 2017, the First Minister of Wales Carwyn Jones AM, and First Minister of Scotland, Nicola Sturgeon MSP, issued a joint statement calling the Bill a "naked power grab".[19] They stated that the Bill does not deliver on the promise to return powers from the EU to the devolved administrations, but rather returns them solely to the UK Government and Parliament, imposing new restrictions of devolved legislatures. This concern, Professor Richard Rawlings, Professor of Public Law at the University College London, explains, "goes to the heart of the controversy over the Bill from a devolved perspective".[20]

13. Professor Page and Professor Rawlings explain that this controversy comes down to the "difference of view between what is and what is not devolved".[21] The Secretary of State for Scotland David Mundell maintains that "there is no Power grab as the "Bill will maintain the scope of devolved decision making powers immediately after Exit–the Scottish Parliament and Scottish Government will not lose any of their current decision-making powers".[22]

14. From the perspective of the devolved administrations, however, powers coming back from the EU in areas of devolved competence should be devolved. Instead, Scottish Minister for UK Negotiations on Scotland's Place in Europe Michael Russell argues that the EUW Bill is:

15 Q4 (Page); Michael Keating, To Devolve or Not to Devolve,17 July 2017; Page, Alan, The implications of EU withdrawal for the devolution Settlement, 2016, p 3
16 Professor Page (DEU0008)
17 Q13
18 Q13
19 Scottish Government, EU (withdrawal) Bill, 13 July 2017; Welsh Government, Joint statement from First Ministers of Wales and Scotland in reaction to the EU (Withdrawal) Bill, 13 July 2017
20 Q4 (Rawlings)
21 Q4 (Page)
22 Scottish Parliament's Finance and Constitution Committee, Correspondence from the Secretary of State of Scotland to the Convenor, 13 July 2017

> a blatant power grab which would take existing competence over a wide range of devolved policy areas, including aspects of things like agriculture and fishing, away from Holyrood, giving them instead to Westminster and Whitehall.[23]

Professor Rawlings suggests that "the very fact… that you can give [at least] two answers… tells you a lot about the controversy surrounding this Bill, because it shows that it is possible here to have different constitutional perspectives".[24]

15. Professor Nicola McEwen, Professor of Territorial Politics at the University of Edinburgh, argues that while Clause 11 is clearly intended to ensure continuity and certainty, other clauses in the EUW Bill provide a functional statue book on exit day "Clause 11 is about what comes next".[25] Professor McEwen identifies that Clause 11:

> is fundamentally a problem of trust. The UK Government doesn't trust the devolved Governments to refrain from using repatriated powers to create policy and regulatory divergence that may harm the UK's internal market and create problems in trade negotiations. This rather overlooks the considerable constitutional authority that the UK Parliament already retains over market regulation, trade and the making and implementation of international treaties. For their part, the Scottish and Welsh Governments don't trust the commitment of the UK Government to devolve repatriated powers after Brexit and/or to agree and govern UK common frameworks on a genuinely cooperative basis.[26]

16. Professor Page suggests that the label 'power grab', is unhelpful as it distracts from "understanding what the key or most important points about the legislation and the process of leaving the European Union or the implications of that [are] for the devolved institutions".[27] Professor Page notes that at the heart of the debate surrounding Clause 11, is the question of "how are we going to appropriately allocate those powers [returning from the EU] around the UK constitution? [and] What is going to be the appropriate balance between the centre and the devolved administrations?"[28]

17. In written evidence, Nigel Smith, former Chair of Scotland Forward, the official "Yes" campaign in the 1997 Scottish devolution referendum, is no less critical of the Government for their handling of the devolution issues in the EUW Bill, but is less troubled by the substance of Clause 11:

> His [Mike Russell MSP] initial remarks, as is typical of him, were very firm. He was right to say that the manner in which the Bill and Clause 11 emerged from Whitehall showed it was still rooted in pre-devolution Britain. It should have been better done. But I do not subscribe to his view that the approach of the UK Government is an 'attack on the very foundations of

23 Brexit Bill talks: Scottish Government to recommend consent is rejected, Scottish Government press release, 9 August 2017.
24 Q4 (Rawlings)
25 Professor McEwen (0020) para 3
26 Professor McEwen (0020) para 15
27 Q4 (Professor Page);
28 Q16

> the devolution settlement' or that the 'reserved powers' model solves all. Nobody who voted for the Scottish Parliament exactly twenty years ago need worry - there is no 'power grab' underway.[29]

Nigel Smith sets out how it was the Scotland Act itself which effectively reserved the 111 EU framework powers in respect of Scotland, while the UK was an EU Member State, in Section 29 (which requires the Scottish Parliament to "observe EU law"), and explains why it is the "absence of a British devolution framework" which is what needs to be addressed.[30]

Constitutional balance

18. Professor Rawlings highlights that a central concern of the devolved administrations was that "Clause 11, when it comes to that negotiation… is essentially stacking the cards in favour of the centre".[31] Dr Tobias Lock, Senior Lecturer, Edinburgh Law School, said that:

> the European Union (Withdrawal) Bill will result in a shift in balance between the powers Westminster has in practice and the powers Holyrood has in practice with Westminster's powers being augmented and Holyrood's staying the same.[32]

19. Professor Rawlings and Professor Page raise three related concerns in relation to this unbalance. First, while there is a promise on the part of the UK Government that Clause 11 is described as a transition arrangement, there is no provision for this on the face of the Bill. As Professor Rawlings explains:

> Legally-speaking, suggested 'transitional' elements could so easily become permanent features. Nor need one be an expert in game theory to appreciate the way in which Clause 11 stacks the cards in favour of the centre when negotiating the different design choices with common frameworks: 'when', 'how', 'what', etc. Though the devolved authority has a veto power, in the absence of an agreed 'release' plan the default position is bar on competence.[33]

20. Second, Professor Page highlights the suspicion within the devolved administrations "that the real purpose of Clause 11 is not to secure legal continuity but to strip the devolved institutions of any bargaining power that they might have when it comes to the discussion of common frameworks and all the rest… [and that] Whitehall Departments will find it convenient to hang on to these powers rather than to pass them on".[34]

21. Third, Professor Rawlings highlights the concern over what he describes as the double hatted nature of the UK Government, meaning it is both simultaneously the UK wide Government and the government of England. This raises not only a concern of conflict of interest, but also that the subcultures, networks and assumptions of large departments like the Department for Environment, Food and Rural Affairs, which are focused on England. Professor Rawlings identifies that there is inevitably a concern in the constituent

29 Nigel Smith (DEU0007)
30 Nigel Smith (DEU0007)
31 Q16
32 Dr Lock (0001)
33 Rawlings, Richard, Brexit and the Territorial Constitution, 2017, p 26
34 Q13

parts of the UK that their interests will tend to get lost because of that, "not necessarily because of some sort of conspiracy thing; it is just subconsciously about how institutions operate in practice".[35]

Reserved matters and conferred powers

22. The devolution statutes operate on a reserved matters model, where certain matters are listed in the devolution statutes as matters that are reserved to the UK Parliament.[36] This means that matters not explicitly reserved to the UK Parliament are in the competence of the devolved legislatures. The advantage of the reserved powers model, Professor Page explains, "is that it allowed the devolution of discrete, meaningful, sensible policy areas".[37]

23. In its Legislative Consent Memorandum on the EUW Bill, the Scottish Government states that Clause 11 "creates further complexity in the devolution settlement by effectively grafting a "conferred powers" model, solely in retained EU law, onto, and across, the Scotland Act's reserved powers model".[38] There is a consensus in the evidence we received that Clause 11 has this effect. Professor Page suggests that trying to work out what the devolved legislatures can and cannot do is going to be "an extraordinarily difficult task".[39] He also suggests that it would have the "effect of hamstringing the devolved legislatures so that they will not be able to do that which is sensible", because instead of having discrete policy areas that belong to them, these areas will be legislated for by a mixture of the UK Parliament and the devolved legislatures.[40] Professor Rawlings agrees, and emphasises the importance of considering the "end user's perspective" as it will not just be governments, but business, consumer groups and individuals that will have to work with this system.[41]

24. Referring to the Welsh experience of previously having a conferred powers model, Professor Rawlings and Professor McEwen highlight the lack of clarity over where the National Assembly of Wales had power or even the extent to which it has competence produces litigation.[42] This uncertainty has resulted in Supreme Court litigation around the conferred powers model.[43] Professor Rawlings explains:

> The discussions about meanings in the Bill become very sharp when we get to the devolved Administrations because it is a question for them as to whether or not they actually have powers. The Government lawyers have to be able to advise, the Presiding Officers of the National Assembly and the Scottish Parliament will have to make rulings as to whether something is within competence, and again they will be open to challenge in areas where, frankly, challenge is very likely. Of course, we are talking about market

35 Q16
36 The Wales Act 2017 made provision for a reserved matters model for Wales. In Northern Ireland it is a reserved or excepted matters. In the Northern Ireland Act reserved matters cover areas which could be devolved at a later date, such as postal services, financial services, the national minimum wage. Excepted matters covers areas not to be considered for further devolution, such as the Crown, Parliament, international relations, defence.
37 Q20
38 Legislative Consent Memorandum European Union (Withdrawal) Bill, Scottish Government, LCM-S5–10, Session 5 (2017)
39 Q17
40 Q19; Q21
41 Q18
42 Q23; Professor McEwen (0020) para 8
43 Q23

> regulation, and where there is market regulation there is money involved, and where there is money involved there are lawyers involved. We have to be very aware of that.[44]

Professor Rawlings suggests that a clear end point in order "to avoid, or at least get past this problem" was to include in the reserved powers model, reservations covering common frameworks. Such a reservation could be worded: "the subject matter of such and such common framework".[45]

Legislative consent

25. The explanatory notes to the EUW Bill explain that several of the provisions of the Bill fall within the legislative competence of the devolved Legislatures.[46] Under the Sewel Convention there is a requirement for the Government to seek a Legislative Consent Motion (LCM) from each of the devolved Legislatures for the EUW Bill, and the Government has made clear its intention to seek LCMs.[47]

26. On 12 September 2017, the Scottish and Welsh Governments simultaneously published Legislative Consent Memoranda in relation to the EUW Bill. Both Governments made it clear that they would not present Legislative Consent Motions (LCMs) for the Bill in its current form.[48] The decision to state that Legislative consent will be withheld has raised speculation surrounding the Sewel Convention. As the Supreme Court's decision in *Miller v. Secretary of State for Exiting the European Convention* highlighted, the convention, even though placed in statute, is not legally enforceable. The Supreme Court, however, also emphasised that this decision does not diminish the "importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution".[49]

27. It is clear from the evidence we have heard that while the Convention is not justiciable, if "Parliament were to legislate notwithstanding the opposition of devolved legislatures, the argument would undoubtedly be made that that was a constitutional outrage; it was unconstitutional".[50] Professor Page says that placing the convention into statute even though it was not legally binding was a constitutionally binding commitment that is "the most solemn expression of intention that you can provide under our constitution".[51]

28. While there is a consensus that discussions around legislative consent and the Sewel Convention have served to reinforce Parliamentary Sovereignty within the UK constitution, questions have been raised about how Parliamentary Sovereignty is best deployed as a legislative and political tool in the context of Clause 11. Professor Rawlings suggests that, as currently drafted, Clause 11 treats Parliamentary Sovereignty as a "legislative blunderbuss" to be waved in the faces of the devolved administrations. He states that, regardless of what the Government has said about its intention, this is not a good way

44 Q23
45 Q23
46 Explanatory Notes to the European Union (Withdrawal) Bill [Bill5 (2017–19)], paras 68–70, Annex A
47 The Sewel Convention is now enshrined in statute in the Scotland Act 2016 and Wales Act 2017 and the mechanisms of consent set out in the Memorandum of Understanding and Supplementary Agreements.
48 Legislative Consent Memorandum European Union (Withdrawal) Bill, Scottish Government, LCM-S5–10, Session 5 (2017) para 25
49 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5, Para 151
50 Q7
51 Q6; Q7; Q8; Q9; Q10

to build trust.[52] Instead, Professors Rawlings and Page both suggest that Parliamentary Sovereignty be used as a "backstop or reserve power to require common frameworks and common decisions, as at the end of the day if they are not reached Parliament would have the power to pass legislation".[53] Such a model would be based on negotiation, cooperation and agreement, and could serve to build trust amongst the Governments and Legislatures of the UK.

Common frameworks

29. Following the UK's departure from the EU, the power to make the decisions previously made at the EU level will return to the UK. Through EU common frameworks, which created and maintain the EU wide policies to support the EU internal (single) market, all parts of the UK follow the same rules and laws in areas such as the EU Common Agriculture Policy, Common Fisheries Policy or mutual recognition of professional qualifications. The UK Government's overriding aim to have the same rules and laws apply after exit day is intended to ensure that common EU frameworks remain common UK frameworks. The concern is that, as some of these frameworks are in areas of devolved competence, differing policy focuses could lead to policy divergence, which could, unintentionally or not, threaten the UK's internal market, and potentially lead to difficulties with conducting trade agreements with other countries.

30. In evidence to the Committee, Professor Page makes clear that common frameworks will be required, but that "it is also important not to exaggerate the threat to the integrity of the UK single [internal] market posed by the repatriation of EU competences to devolved areas".[54] While there are a few areas where powers returning from the EU intersect with devolved settlements, the reserved matters dictate that most powers fall to the UK Parliament.[55] Even if the former EU powers, in areas such as agriculture, were devolved, this would be unlikely to result in devolved autonomy as there are areas under strong influence of international law and agreements, a competence that rests entirely with central Government.[56] Former Speakers Counsel, Michael Carpenter has in this regard described Clause 11 as an unnecessary "blanket provision" that amounts to a "proverbial steam hammer".[57]

31. The devolved statutes currently contain provisions which could have the effect of preserving the UK internal (single) market outside of the EU. There are already provisions for the relevant Secretary of State to require action by devolved legislatures and governments to comply with UK international obligations.[58] Evidence to the Committee highlights that it is in the clear mutual self-interests of Scotland, Wales, Northern Ireland and England not to take actions which may imperil a UK internal market. As Professor Page highlights, the EU is still trying to create a single (internal) market, but "we already have one. [The task in front of us is to] prevent damage to that market".[59]

52 Q26
53 Q47; Q33
54 Professor Page (DEU0008); Q22
55 Page, Alan, The implications of the EU withdrawal for the devolution settlement, paper prepared for the Scottish Parliament Culture Tourism, Europe and External Relations Committee, 4 October 2016
56 Dr Lock (0001) para 8–9
57 Michael Carpenter (DEU0009) para 5
58 Q30 (Rawlings); Scotland Act 1998, sections 35, 58; Government of Wales Act 2006, sections 82, 114; Northern Ireland Act 1998, sections 14, 26.
59 Q29

32. The UK Government's analysis of the existing EU competences that interact with the devolved statutes, identify 111 areas for Scotland, 64 for Wales and an estimated 149 for Northern Ireland.[60] (These are listed in Appendix 1). Of these areas Professor Page suggests that only a small number of areas are likely require common frameworks.[61] Michael Carpenter has suggested that what is required is a "compromise position whereby such modification would be lawful for so long as it did not affect, or seriously affect, other parts of the United Kingdom, or fragment the UK's internal market".[62] The first steps towards agreeing these common frameworks, were taken at the Joint Ministerial Council (European Negotiations) (JMC(EN)) on October 16 2017, where the principles that will underpin the how common frameworks will be considered, was agreed.[63] (As set out in Box 1 below).

Box 1: JMC Common Frameworks: Definition and Principles

Definition

As the UK leaves the European Union, the Government of the United Kingdom and the devolved administrations agree to work together to establish common approaches in some areas that are currently governed by EU law, but that are otherwise within areas of competence of the devolved administrations or legislatures. A framework will set out a common UK, or GB, approach and how it will be operated and governed. This may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition, depending on the policy area and the objectives being pursued. Frameworks may be implemented by legislation, by executive action, by memorandums of understanding, or by other means depending on the context in which the framework is intended to operate.

Context

The following principles apply to common frameworks in areas where EU law currently intersects with devolved competence. There will also be close working between the UK Government and the devolved administrations on reserved and excepted matters that impact significantly on devolved responsibilities. Discussions will be either multilateral or bilateral between the UK Government and the devolved administrations. It will be the aim of all parties to agree where there is a need for common frameworks and the content of them. The outcomes from these discussions on common frameworks will be without prejudice to the UK's negotiations and future relationship with the EU.

Principles

1. Common frameworks will be established where they are necessary in order to:
    - enable the functioning of the UK internal market, while acknowledging policy divergence;
    - ensure compliance with international obligations;

60 Q32 (Page)
61 Q43 (Page)
62 Michael Carpenter (0009) para 5
63 Joint Ministerial Committee (EU Negotiations) Communique, 16 October 2017

- ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
- enable the management of common resources;
- administer and provide access to justice in cases with a cross-border element;
- safeguard the security of the UK.

2. Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:
   - be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent;
   - maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules;
   - lead to a significant increase in decision-making powers for the devolved administrations.
3. Frameworks will ensure recognition of the economic and social linkages between Northern Ireland and Ireland and that Northern Ireland will be the only part of the UK that shares a land frontier with the EU. They will also adhere to the Belfast Agreement.

33. One suggestion made to the Committee by Professor Page was that a "standstill agreement" would maintain the EU common frameworks and would address the difficulties around the mechanism provided in Clause 11. He argues that:

> … the UK Government's 'guiding principle' can be more felicitously secured by a combination of the existing reservations and a 'standstill agreement' whereby the UK Government and the devolved administrations agree not to introduce, in the Prime Minister's words, 'new barriers to living and doing business within our own Union' while the business of common frameworks - and, no less importantly, the necessary revisions to retained EU law - are being worked out. As well as preserving the integrity of the UK single market, reliance on the combination of reserved matters and a standstill agreement would avoid the undeniably damaging consequences of Clause 11.[64]

64 Professor Alan Page (DEU0008);

34. Professor McEwen notes that a number suggestions have been put forward for how to resolve the impasse between the UK Government and the devolved Administrations, including "a sunset to Clause 11, narrowing its scope to focus on the internal market or international obligations, or replacing it with extensions to reserved powers".[65] She suggests that the standstill provision proposed by Professor Page is the most persuasive,

> especially if given statutory underpinning in the Withdrawal Bill. Provided the form of words could be agreed, it could help to provide both parties with the reassurance they need. Standstill provisions would allow powers to lie where the fall under the existing allocations of constitutional authority, while securing the time and trust needed to negotiate, agree and implement new frameworks.[66]

Inter-institutional relations in the UK

35. In the previous Parliament, our predecessor Committee published a report, *Future of the Union, part two: Inter-institutional relations in the UK*, which noted the potential of the UK's departure from the EU to complicate and further test the current inter-institutional arrangements within the UK. The Committee concluded that Brexit "offers both risk and a fresh opportunity, and, therefore, an incentive, to develop more effective inter-governmental relations in the UK".[67] The report highlighted the inadequacy of the current inter-governmental arrangements and made several key recommendations highlighting the starting points for establishing solid inter-governmental relations foundations. Our predecessor Committee highlighted the need to establish "formal inter-governmental machinery" and the importance of developing an atmosphere of trust and good-will among the four Administrations.[68] For this atmosphere to be established the Committee concluded, with a clear eye on the post exit constitutional settlement, that "the UK Government must show a genuine receptiveness to the concerns and suggestions put forward by the devolved administrations".[69]

36. Witnesses to our inquiry agreed unanimously that "one immediate problem, starkly revealed by the return of EU powers, is the lack of adequate inter-governmental arrangements capable of dealing with the developing situation".[70] Professor Page notes that there is need for a "fresh start". He continues:

> If anything comes out of this, it is the recognition that inter-governmental relations is every bit as important a part of the devolution settlements as the powers possessed by the individual devolved Administrations. That cannot simply be left to happenstance, chance or the inclination and instinct of individual Administrations. Therefore, … the basic machinery has to be

65 Professor McEwen (0020) para 15
66 Professor McEwen (0020) para 15
67 Sixth Report from the Public Administration and Constitutional Affairs Committee of Session 2016–17, The Future of the Union, part two: Inter-institutional relations in the UK, HC 839, 8 December 2016. Para 4
68 Sixth Report from the Public Administration and Constitutional Affairs Committee of Session 2016–17, The Future of the Union, part two: Inter-institutional relations in the UK, HC 839, 8 December 2016. Para 65
69 Sixth Report from the Public Administration and Constitutional Affairs Committee of Session 2016–17, The Future of the Union, part two: Inter-institutional relations in the UK, HC 839, 8 December 2016. Para 67
70 Nigel Smith (DEU0007); Unlock Democracy (DEU0004); Professor Alan Page (DEU0008)

> put on a statutory footing so that the Parliaments are making it clear, "This is our expectation as to the way these relations will be conducted," rather than leaving it to the discretion of individual Administrations.[71]

37. Nigel Smith, argued that the absence of a strong inter-governmental devolution framework is the major weakness of the otherwise "excellent" Scotland Act 1998.[72] He argues that after the UK has left the EU there will be a third important area of shared policy in addition to the reserved and devolved competencies. Such shared areas, he argues, will require an inter-governmental institutional framework. This "is integral to the success of the return of EU powers - not an optional addition".[73]

38. There appears to be a consensus in the evidence we received of the desirability to place the UK's inter-governmental machinery on a statutory footing. The current inter-governmental system relies on a series of ad hoc meetings between Ministers, and on central Government to adhere to the agreements set out in the Memorandum of Understanding, to convene JMC meetings when requested, which recently it has failed to do.[74] At the most basic level, placing inter-governmental machinery on a statutory footing would make clear the "expectation as to the way these relations will be conducted, rather than leaving it to the discretion of individual administrations".[75] This would have the effect of guaranteeing a basic level of communication and dialogue, by getting people in a room they will be "talking about common frameworks, and what can work for them or what may be their sticking points".[76] This would mark a very important step forward as it would help generate the trust that has been hitherto lacking in inter-governmental relations in the UK.

39. It has also been suggested to the Committee that the relations between the four Legislatures in the UK should be supported by more formal machinery. The Committee's previous report, *Future of the Union, part two: Inter-institutional relations in the UK,* suggested that steps should be taken to allow committees of the House of Commons to meet jointly with committees of the devolved legislatures; that written notice and summaries of the Speakers and Presiding Officers quadrilaterals are published; and that there be greater interworking and training of the staff of both the Houses of Parliament and the devolved legislatures.[77]

71 Q56 (Page)
72 Nigel Smith (DEU0007) para 19
73 Nigel Smith (DEU0007) para 9
74 Q56 (Rawlings)
75 Q56 (Page)
76 Q58
77 Sixth Report from the Public Administration and Constitutional Affairs Committee of Session 2016–17, The Future of the Union, part two: Inter-institutional relations in the UK, HC 839, 8 December 2016. Paras 95–98

3 Conclusion

40. The UK Government's stated intention and guiding principle in the EUW Bill is to ensure legal continuity through ensuring "the same rules and laws will apply on the day after exit as on the day before".[78] While this is clearly a sensible guiding principle, several concerns have been raised, from the devolved Administrations and others, about the mechanism the Government has chosen to implement this principle in Clause 11 of the EUW Bill.

41. The key technical concern raised about Clause 11 is the potential complexity it could create in the UK statute book, due to a conferred powers model being overlaid onto the reserved matters model of devolution. The overall concerns regarding the devolution aspects of the EUW Bill arise from the constitutionally insensitive nature of the UK Government's approach in Clause 11. While the intention of Clause 11 may be simply to maintain legal continuity, it has been interpreted by the devolved Administrations as an attempt to reverse some elements of the devolution settlements.

42. Our witnesses noted that there was a clear lack of understanding of the territorial aspects of the UK's constitution, both in the design of, and debate around Clause 11. However, the main source of disquiet and disagreement between central and devolved Government, derives from the lack of communication and established mechanisms for both proper consultation and shared decision making between governments.

43. The predecessor Committee's report *Future of the Union, part two: Inter-institutional relations in the UK*, highlighted the importance of investing in stronger inter-institutional relations. The Committee recommended several achievable first steps in resuscitating these relations, which would have aided these relations in the year following the publication of that report. An effective system of inter-governmental relations is the missing aspect of the current UK constitutional arrangements and the dispute around Clause 11 brings this issue into sharp focus. A set of effective relationships based on mutual trust and effective communication and consultation are essential for the internal governance of the UK, following its departure from the European Union.

78 Explanatory Notes to the European Union (Withdrawal) Bill [Bill5 (2017–19)], para 10

Appendix 1: Powers Returning from the EU that Intersect with the Devolution Settlements

Powers returning from the EU that intersect with the devolution settlement in Scotland

1. Agricultural Support
2. Agriculture - Fertiliser Regulations
3. Agriculture - GMO Marketing & Cultivation
4. Agriculture - Organic Farming
5. Agriculture - Zootech
6. Animal Health and Traceability
7. Animal Welfare
8. Aviation Noise Management at Airports
9. Blood Safety and Quality
10. Carbon Capture & Storage
11. Chemicals regulation (including pesticides)
12. Civil judicial co-operation - jurisdiction and recognition & enforcement of judgments in civil & commercial matters (including B1 rules and related EU conventions)
13. Civil judicial co-operation - jurisdiction and recognition & enforcement of judgments instruments in family law (including BIIa, Maintenance and civil protection orders)
14. Civil judicial cooperation on service of documents and taking of evidence
15. Criminal offences minimum standards measures - Combating Child Sexual Exploitation Directive
16. Control of major accident hazards
17. Cross border mediation
18. Data sharing - (EU fingerprint database (EuroDac)
19. Data sharing - European Criminal Records Information System (ECRIS)
20. Data sharing - False and Authentic Documents Online (FADO)
21. Data sharing - passenger name records
22. Data sharing - Prüm framework

23. Data sharing - Schengen Information System (SIS II)
24. Efficiency in energy use
25. Elements of Reciprocal Healthcare
26. Elements of the Network and Information Security (NIS) Directive
27. Elements of Tobacco Regulation
28. Energy Performance of Buildings Directive
29. Environmental Impact Assessment (EIA) Directive
30. Environmental law concerning energy planning consents
31. Environmental law concerning offshore oil & gas installations within territorial waters
32. Environmental quality - Air Quality
33. Environmental quality - Chemicals
34. Environmental quality - Flood Risk Management
35. Environmental quality - International timber trade (EUTR and FLEGT)
36. Environmental quality - Marine environment
37. Environmental quality - Natural Environment and Biodiversity
38. Environmental quality - Ozone depleting substances and F-gases
39. Environmental quality - Pesticides
40. Environmental quality - Spatial Data Infrastructure Standards
41. Environmental quality - Waste Packaging & Product Regulations
42. Environmental quality - Waste Producer Responsibility Regulations
43. Environmental quality - Water Quality
44. Environmental quality - Water Resources
45. Environmental quality - Biodiversity - access and benefit sharing of genetic resources
46. Equal Treatment Legislation
47. EU agencies - EU-LISA
48. EU agencies - Eurojust
49. EU agencies - Europol
50. EU Social Security Coordination

51. Fisheries Management & Support
52. Food and Feed Law
53. Food Compositional Standards
54. Food Geographical Indications (Protected Food Names)
55. Food Labelling
56. Forestry (domestic)
57. Free movement of healthcare (the right for EEA citizens to have their elective procedure in another member state)
58. Genetically modified micro-organisms contained use
59. Good laboratory practice
60. Harbours
61. Hazardous Substances Planning
62. Heat metering and billing information
63. High Efficiency Cogeneration
64. Implementation of EU Emissions Trading System
65. Ionising radiation
66. Land use
67. Late payment (commercial transactions)
68. Legal aid in cross-border cases
69. Migrant Access to benefits
70. Minimum standards -housing & care: regulation of the use of animals
71. Minimum standards legislation - child sexual exploitation
72. Minimum standards legislation - cybercrime
73. Minimum standards legislation - football disorder
74. Minimum standards legislation - human trafficking
75. Mutual recognition of professional qualifications
76. Mutual recognition of criminal court judgments measures & cross border cooperation - European Protection Order, Prisoner Transfer Framework Directive, European Supervision Directive, Compensation to Crime Victims Directive
77. Nutrition health claims, composition and labelling

78. Onshore hydrocarbons licensing

79. Organs

80. Plant Health, Seeds and Propagating Material

81. Practical cooperation in law enforcement - Asset Recovery Offices

82. Practical cooperation in law enforcement - European Investigation Order

83. Practical cooperation in law enforcement - Joint Action on Organised Crime

84. Practical cooperation in law enforcement - Joint investigation teams

85. Practical cooperation in law enforcement - mutual legal assistance

86. Practical cooperation in law enforcement - mutual recognition of asset freezing orders

87. Practical cooperation in law enforcement - mutual recognition of confiscation orders

88. Practical cooperation in law enforcement - Schengen Article 40

89. Practical cooperation in law enforcement - Swedish initiative

90. Practical cooperation in law enforcement - European judicial network

91. Practical cooperation in law enforcement - implementation of European Arrest Warrant

92. Procedural rights (criminal cases) - minimum standards measures

93. Provision of legal services

94. Provision in the 1995 Data Protection Directive (soon to be replaced by the General Data Protection Regulation) that allows for more than one supervisory authority in each member state

95. Public sector procurement

96. Public health (serious cross-border threats to health)

97. Radioactive Source Notifications–Trans-frontier shipments

98. Radioactive waste treatment and disposal

99. Rail franchising rules

100. Rail markets and operator licensing

101. Recognition of insolvency proceedings in EU Member States

102. Renewable Energy Directive

103. Rules on applicable law in civil & commercial cross border claims

104. Sentencing - taking convictions into account

105. State Aid

106. Statistics

107. Strategic Environmental Assessment (SEA) Directive

108. Tissues and cells

109. Uniform fast-track procedures for certain civil and commercial claims (uncontested debts, small claims)

110. Victims rights measures (criminal cases)

111. Voting rights and candidacy rules for EU citizens in local government elections

Powers returning from the EU that intersects with the devolution settlement in Wales

Department for Business, Energy and Industrial Strategy

1. Carbon Capture & Storage

2. Efficiency in energy use

3. Environmental law concerning energy planning consents

4. Environmental law concerning offshore oil & gas installations within territorial waters

5. Implementation of EU Emissions Trading System

6. Mutual recognition of professional qualifications

7. Onshore hydrocarbons licensing

8. Radioactive Source Notifications - Transfrontier shipments

9. Radioactive waste treatment and disposal

10. State Aid

Cabinet Office

1. Public sector procurement

2. Statistics

3. Voting rights and candidacy rules for EU citizens in local government elections

Department for Communities and Local Government

1. Environmental Impact Assessment (EIA) Directive

2. Energy Performance of Buildings Directive
3. Hazardous Substances Planning
4. Strategic Environmental Assessment (SEA) Directive

Department for Digital, Culture, Media and Sport

1. Elements of the Network and Information Security (NIS) Directive
2. Provision in the 1995 Data Protection Directive (soon to be replaced by the General Data Protection Regulation) that allows for more than one supervisory authority in each member state

Department for the Environment, Food and Rural Affairs

1. Agricultural Support
2. Agriculture - Fertiliser Regulations
3. Agriculture - GMO Marketing & Cultivation (not food/feed law, see FSA return)
4. Agriculture - Organic Farming
5. Agriculture - Zootech
6. Animal Health and Traceability
7. Animal Welfare
8. Environmental quality - Air Quality
9. Environmental quality - Biodiversity - access and benefit sharing of genetic
10. resources (ABS)
11. Environmental quality - Chemicals
12. Environmental quality - Flood Risk Management
13. Environmental quality - International timber trade (EUTR and FLEGT)
14. Environmental quality - Marine environment
15. Environmental quality - Natural Environment and Biodiversity
16. Environmental quality - Ozone depleting substances and F-gases
17. Environmental quality - Pesticides
18. Environmental quality - Spatial Data Infrastructure Standards
19. Environmental quality - Waste Packaging & Product Regulations
20. Environmental quality - Waste Producer Responsibility Regulations

21. Environmental quality - Water Quality
22. Environmental quality - Water Resources
23. Fisheries Management & Support
24. Food Compositional Standards (not hygiene / safety - see FSA return)
25. Food Geographical Indications (Protected Food Names)
26. Food Labelling
27. Forestry (domestic)
28. Land use
29. Plant Health, Seeds and Propagating Material

Department for Health

1. Blood Safety and Quality
2. Elements of Reciprocal Healthcare
3. Free movement of healthcare (the right for EEA citizens to have their elective procedure in another MS)
4. Good laboratory practice
5. Nutrition health claims, composition and labeling
6. Organs
7. Public health (serious cross-border threats to health) (notification system for pandemic flu, Zika etc)
8. Tissues and cells (apart from embryos and gametes)
9. Elements of Tobacco Regulation

Department for Transport

1. Harbours
2. Rail franchising rules

Food Standards Agency

1. Food and Feed Law (Food and feed safety and hygiene; food and feed law enforcement (official controls); food labelling (Defra, DH and FSA all have responsibilities for different parts); Commission consents.

Government Equalities Office

1. Equal Treatment Legislation

Health and Safety Executive

1. Chemicals regulation (including pesticides)
2. Control of major accident hazards
3. Genetically modified micro-organisms contained use (i.e. rules on protection of human health and the environment during the development)
4. Ionising radiation

Policy Areas/Powers returning from the EU which intersect with the devolution settlement in Northern Ireland (141)

1. Agricultural Support
2. Agriculture - Fertiliser Regulations
3. Agriculture - GMO Marketing & Cultivation
4. Agriculture - Organic Farming
5. Agriculture - Zootech
6. Animal Health and Traceability
7. Animal Welfare
8. Aviation Noise Management at Airports
9. Blood Safety and Quality
10. Carbon Capture & Storage
11. Chemicals regulation (including pesticides)
12. Civil judicial co-operation - jurisdiction and recognition & enforcement of judgments instruments in family law (including BIIa, Maintenance and civil protection orders)
13. Civil judicial co-operation - jurisdiction and recognition & enforcement of judgments in civil & commercial matters (including B1 rules and related EU conventions)
14. Civil judicial cooperation on service of documents and taking of evidence
15. Civil use of explosives
16. Clinical trials of medicinal products for human use
17. Company Law
18. Consumer law including protection and enforcement

19. Control of major accident hazards
20. Criminal offences minimum standards measures - Combatting Child Sexual Exploitation Directive
21. Cross border mediation
22. Data sharing - Eurodac
23. Data sharing - European Criminal Records Information System (ECRIS)
24. Data sharing - False and Authentic Documents Online (FADO)
25. Data sharing - passenger name records
26. Data sharing - Prüm framework
27. Data sharing - Schengen Information System (SIS II)
28. Driver Licensing Directive (roads). Also Driver Certificates of Professional Competence
29. Efficiency in energy use
30. Elements of Employment Law, including health and safety at work
31. Elements of reciprocal healthcare
32. Elements of the Network and Information Security (NIS) Directive
33. Elements of tobacco regulation
34. Energy Performance of Buildings Directive
35. Environmental Impact Assessment (EIA) Directive
36. Environmental law concerning energy planning consents
37. Environmental law concerning offshore oil & gas installations within territorial waters
38. Environmental quality - Air Quality
39. Environmental quality - Biodiversity - access and benefit sharing of genetic resources (ABS)
40. Environmental quality - Chemicals
41. Environmental quality - Flood Risk Management
42. Environmental quality - International timber trade (EUTR and FLEGT)
43. Environmental quality - Marine environment
44. Environmental quality - Natural Environment and Biodiversity

45. Environmental quality - Ozone depleting substances and F-gases
46. Environmental quality - Pesticides
47. Environmental quality - Spatial Data Infrastructure Standards
48. Environmental quality - Waste Packaging & Product Regulations
49. Environmental quality - Waste Producer Responsibility Regulations
50. Environmental quality - Water Quality
51. Environmental quality - Water Resources
52. Equal Treatment Legislation
53. EU agencies - EU-LISA
54. EU agencies - Eurojust
55. EU agencies - Europol
56. EU social security coordination
57. Fisheries Management & Support
58. Food and Feed Law (Food and feed safety and hygiene; food and feed law enforcement (official controls); food labelling; Commission consents.
59. Food Compositional Standards
60. Food Geographical Indications (Protected Food Names)
61. Food Labelling
62. Forestry (domestic)
63. Free movement of healthcare (the right for EEA citizens to have their elective procedure in another MS)
64. Genetically modified micro-organisms contained use (i.e. rules on protection of human health and the environment during the development)
65. Good laboratory practice
66. Harbours
67. Hazardous Substances Planning (Seveso III Directive)
68. Health and safety at work
69. Heat metering and billing information
70. High Efficiency Cogeneration
71. Implementation of EU Emissions Trading System

72. Inland transport of dangerous goods and transportable pressure equipment
73. Ionising radiation
74. Land use
75. Late payment (commercial transactions)
76. Legal aid in cross border cases
77. Maritime Employment and Social Rights
78. Medical devices
79. Medicinal products for human use
80. Medicine prices
81. Migrant access to benefits
82. Minimum standards -housing & care, regulates the use of animals
83. Minimum standards legislation - child sexual exploitation
84. Minimum standards legislation - cybercrime
85. Minimum standards legislation - football disorder
86. Minimum standards legislation - human trafficking
87. Mutual recognition of criminal court judgments measures & cross border cooperation - European Protection Order, Prisoner Transfer Framework Directive, European Supervision Directive, Compensation to Crime Victims Directive
88. Mutual recognition of professional qualifications
89. Non-food product design and labelling
90. Nutrition health claims, composition and labelling
91. Onshore hydrocarbons licensing
92. Operator licensing (roads)
93. Organs
94. Passenger Rights (rail)
95. Plant Health, Seeds and Propagating Material
96. Practical cooperation - Asset Recovery Offices
97. Practical cooperation - European Investigation Order
98. Practical cooperation - implementation of European Arrest Warrant (dealing with requests etc.)

99. Practical cooperation - Joint Action on Organised Crime

100. Practical cooperation - Joint investigation teams

101. Practical cooperation - mutual legal assistance

102. Practical cooperation - mutual recognition of asset freezing orders

103. Practical cooperation - mutual recognition of confiscation orders

104. Practical cooperation - Schengen Article 40

105. Practical cooperation - Swedish initiative

106. Practical cooperation- European judicial network

107. Private cross border pensions

108. Procedural rights (criminal cases) - minimum standards measures

109. Product safety and standards

110. Provision in the 1995 Data Protection Directive (soon to be replaced by the General Data Protection Regulation) that allows for more than one supervisory authority in each member state

111. Provision of legal services (temporary and permanent basis)

112. Public health (serious cross-border threats to health) (notification system for pandemic flu, Zika etc)

113. Public Sector Procurement

114. Radioactive Source Notifications - Transfrontier shipments

115. Radioactive waste treatment and disposal

116. Rail franchising rules

117. Rail markets and operator licensing (governance, structure, track access & charging)

118. Rail Markets: safety rules and régimes

119. Rail Markets: technical standards

120. Rail Markets: Train driving licenses and other certificates directive

121. Rail Workers Rights Directive

122. Recognition of insolvency proceedings in EU Member States

123. Renewable Energy Directive

124. Roads - Motor Insurance (minimum required levels of insurance and various compensation schemes, not insurance, financial and prudential regulation, which is reserved)

125. Roadworthiness Directive

126. Rules on applicable law in civil & commercial cross border claims (includes RI and II Regs)

127. Security of supply (emergency stocks of oil)

128. Security of supply (gas)

129. Sentencing - taking convictions into account

130. Single energy market/ Third Energy Package

131. State Aid

132. Statistics (where production is devolved)

133. Strategic Environmental Assessment (SEA) Directive

134. The Rental and Lending Directive (concerning library lending)

135. Tissues and cells (apart from embryos and gametes)

136. Transporting dangerous goods by rail, road and inland waterway Directive

137. Uniform fast track procedures for certain civil and commercial claims (uncontested debts, small claims)

138. Vehicle registration (roads)

139. Vehicle standards - various type approval Directives (roads)

140. Victims rights measures (criminal cases) - minimum standards

141. Working Time Rules and Harmonisation of Hours Directive and regulations on tachographs

Formal Minutes

Tuesday 28 November 2017

Members present:

Mr Bernard Jenkin, in the Chair

Ronnie Cowan	Dr Rupa Huq
Paul Flynn	Mr David Jones
Kelvin Hopkins	Sandy Martin

Draft Report (*Devolution and Exiting the EU and Clause 11 of the European Union (Withdrawal) Bill: Issues for Consideration*), proposed by the Chair, brought up, and read.

Motion made, and Question proposed, That the draft Report be read a second time, paragraph by paragraph.—(*The Chair.*)

The Committee Divided

Ayes, 6	**Noes, 1**
Ronnie Cowan	Paul Flynn
Paul Flynn	
Kelvin Hopkins	
Dr Rupa Huq	
Mr David Jones	
Sandy Martin	

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 43 read and agreed to.

Resolved, That the Report be the First Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned until 9.30am on Tuesday 5 December 2017

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the inquiry publications page of the Committee's website.

Tuesday 31 October 2017	*Question number*
Professor Richard Rawlings, Professor of Public Law, University College London, and **Professor Alan Page**, Professor of Public Law, University of Dundee	Q1–68

Tuesday 28 November 2017	
Sir Michael Carpenter, Former Speakers Counsel, and **Professor Nicola McEwen**, Professor of Territorial Politics, University of Edinburgh	Q69-

Published written evidence

The following written evidence was received and can be viewed on the inquiry publications page of the Committee's website.

DEU numbers are generated by the evidence processing system and so may not be complete.

1 Professor Alan Page (DEU0008)

2 Dr Joanie Willett (DEU0003)

3 Dr Tobias Lock (DEU0001)

4 Martin Howe (DEU0022)

5 Michael Carpenter (DEU0009)

6 Nat O'Connor (DEU0006)

7 Nigel Smith (DEU0007)

8 Professor Nicola McEwen (DEU0020)

9 Unlock Democracy (DEU0004)

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website.

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2017–19

First Special Report	Will the NHS never learn? Follow-up to PHSO report 'Learning from Mistakes' on the NHS in England: Government Response to the Committee's Seventh Report of Session 2016–17	HC 441
Second Special Report	The Future of the Union, part two: Inter-institutional relations in the UK: Government Response to the Sixth Report from the Committee, Session 2016–17	HC 442

STATUTORY INSTRUMENT CONSENT MEMORANDUM

THE ENVIRONMENTAL IMPACT ASSESSMENT (MISCELLANEOUS AMENDMENTS RELATING TO HARBOURS, HIGHWAYS AND TRANSPORT) REGULATIONS 2017

1. This Statutory Instrument Consent Memorandum is laid under Standing Order ("SO") 30A.2. SO 30A prescribes that a Statutory Instrument Consent Memorandum must be laid and a Statutory Instrument Consent Motion may be tabled before the National Assembly for Wales ("Assembly") if a UK Statutory Instrument makes provision in relation to Wales amending primary legislation within the legislative competence of the Assembly.

2. The Environmental Impact Assessment (Miscellaneous Amendments relating to Harbours, Highways and Transport) Regulations 2017 were laid before Parliament on 13 November 2017 and before the Assembly on 15 November 2017. The regulations can be found at:

   http://www.legislation.gov.uk/uksi/2017/1070/contents/made

Summary of the Regulations and their objective

3. The objective of the regulations is to transpose Directive 2014/52/EU, which amends Directive 2011/92/EU[1] on the assessment of the effects of certain public and private projects on the environment. This assessment is known as the Environmental Impact Assessment ('EIA').

4. The Directive:
   - Confirms the inter-relationships between the EIA Directive and other environmental directives (e.g. Habitat Directive).
   - Requires additional information to be included in the environmental statement (also referred to as the environmental impact assessment report), such as information about the impact on climate change, and population and human health.
   - Increases the requirement for transparency within the EIA process, particularly in terms of the role of the Overseeing Organisation.
   - Strengthens the requirements of the determination and screening processes.

5. These provisions are technical in nature, covering the procedural requirements of an EIA and clarifying elements of the existing regime. In many cases the existing legislation is likely to be sufficient to meet the requirements of the 2014 Directive, but a copy out approach has been

[1] Throughout this document, 'the EIA Directive' refers to Directive 2011/92/EU as amended by Directive 2014/52/EU. 'The 2014 Directive' refers to Directive 2014/52/EU only, and 'the 2011 Directive' refers to Directive 2011/92/EU only. These terms will be used as necessary to illustrate the changes under 2014/52/EU that are required to be transposed, compared to the existing regulatory scheme required by Directive 2011/92/EU.

taken in all appropriate places in order to minimise the risk of failure to properly transpose. The practical impacts of the changes are minor, as EIAs in Wales are already being carried out with a regard to the 2014 Directive.

6. The Regulations cover England and Wales. Elements of the Regulations also apply in Scotland.

Relevant provision to be made by the Regulations

7. Transposition of this Directive will not affect schemes which have already been determined (i.e. confirmation has been received that an EIA is required) and a scope of works has been requested. Article 3(1) of the 2014 Directive allows for such schemes to carry on under the un-amended provisions of the 2011 Directive. The following provisions will apply to new schemes which have not reached this point only.

8. The regulations cover areas within devolved competence and outside of devolved competence. It covers a range of transport related matters. The Highways Act 1980 is the only element which is entirely within the devolved competence of the National Assembly. The National Assembly has legislative competence over harbours which are used for fishing, for recreation, and/or for communication between places in Wales, though not all harbours in Wales. However, the Welsh Ministers are only designated to transpose the provisions of this Directive in relation to major transport schemes, which excludes fisheries harbours even though fisheries harbours are within the legislative competence of the National Assembly.

9. It is the view of the Welsh Government that the provisions described in paragraph (8) above fall within the legislative competence of the National Assembly for Wales in so far as they relate to harbours, highways and transport which are used or required wholly or mainly for the fishing industry, for recreation, or for communication between places in Wales (or for two or more of those purposes, listed under paragraph 10 of Part 1, Schedule 7 to the Government of Wales Act 2006.

<u>Harbours Act 1964</u>

10. Schedule 2 of the regulations copy out the definition of the EIA process into Schedule 3 of the Harbours Act, including the changes to terminology and that the assessment should be of likely significant effects of the project on the environment.

11. The regulations transpose the exemption for projects which have the response to civil emergencies or defence as their sole purpose, and the additional flexibility conferred in exceptional circumstances. The regulations set out when certain steps of the EIA process may be deferred.

12. The regulations transpose the requirement that when a project requires an EIA and an assessment under the Habitats Directive (Directive 92/43) or

the Birds Directive (Directive 2009/147) the authority that must ensure, where appropriate, that the relevant assessments are coordinated. The regulations transpose the projects for which an EIA is required and the type of information required or might be provided in an application by reference to the Directive.

13. The regulations amend the process for the scoping report, requiring that the Secretary of State must inform the applicant of their decision in writing within 90 days, unless exceptional circumstances apply. The regulations now add that where insufficient information has been provided the Secretary of State may write within 90 days requesting further information with subsequent impacts on the timescales for decisions.

14. The regulations transpose the type of information to be provided by a developer in order for a competent authority to screen a proposal, transpose the selection criteria by reference to the Directive, and include a copy out reference to 'authorities with local and regional competencies' alongside the existing consultation provisions.

15. The regulations make amendments to the requirements for documentation to be submitted for an application for a Harbour Revision Order. The regulations set out the minimum information that a developer must provide in their environmental statement as part of the assessment process in paragraph 8 of the Harbours Act. The regulations copy out that the competent authority must issue an opinion on the scope and level of detail of the information required in the statement, taking into account the information provided by the developer on the specific characteristics of the project and its likely impact on the environment.

16. The regulations update publication arrangements for notices, to make them available electronically within specified times.

17. The regulations set out the information which the Secretary of State must consider when making a decision on the environmental impact of a project, including provisions to ensure any necessary monitoring conditions are included in a project when appropriate.

18. The regulations insert a requirement in paragraph 19 that the Secretary of State must make a determination under that paragraph within a reasonable period of time, taking into account the nature and complexity of the application and proposed works, as well as any additional procedures required, from the date on which the Secretary of State has been provided with the environmental information provided. The regulations also update the provisions for the publication of that decision.

<u>Amendments to the Highways Act 1980</u>

19. The regulations amend Section 105A (1) of the Highways Act to refer to the amended Directives of 2011and 2014, including the new definition of

"environmental impact assessment" included in the 2014 Directive. The amended section 105A sets out the procedures for determining whether an EIA is required for a highway project and the factors that must be taken into account in making that determination. The amendments to 105A clarify that the environmental factors that should be considered as part of the assessment should be the likely significant effects of the project on the environment. It also amends some of the terminology used.

20. Amendments to 105A also specify that where a project is subject to an assessment under the EIA Directive and under the Habitats or Birds Directives, where appropriate these assessments should be coordinated. Section 105A has been amended to set out the content of an environmental statement. Amendments to 105A also include the requirement for the developer to ensure that the environmental statement is prepared by competent experts, while the competent authority must ensure that it has, or has access to, sufficient expertise to examine the EIA report.

21. Amendments to Section 105B sets out procedures for making a determination on whether or not an EIA is required. Section 105B (1C) in the Highways Act 1980 will require the determination to be made as soon as possible and within 90 days. Amendments to 105B incorporate the requirement that the public should be informed about an application and the matters set out in Article 6(2) electronically. Amendments to this section set a 30 day minimum for public consultation on the environmental impact assessment report and a new minimum time frame for public consultations on the environment statement.

22. New Sections have been added to 105B to reflects the requirement that the competent authority's reasoned conclusion must be integrated into any decision; that competent authorities must also ensure that any mitigation measures and, where appropriate, monitoring measures are identified in the consent; requires that the decision to grant development consent should also now include, where appropriate, monitoring measures; and that the competent authority takes any of the decisions referred to within a reasonable period of time.

23. Section 105B (6) of the Highways Act has been amended to implement the changes to article 9(1) of the 2011 Directive, regarding procedures and content for making known a decision whether or not to proceed with a project that is subject to an EIA.

24. Section 105C has been amended to include consultations on transboundary effects may be conducted through an appropriate joint body.

25. The regulations transpose the exemption for defence and civil emergencies projects and confer some additional flexibility in exceptional circumstances into new section 105E and 105F.

Why is it appropriate for the regulations to make this provision

26. EIAs are required under EU law to be carried out for a range of developments. The EIA Directive has updated the EIA requirements, and must be transposed into UK law. The Directive affects a range of policy areas, including planning, agriculture, forestry and transport. This Statutory Instrument Consent Memorandum concerns the transport elements of transposition, the regulation for which is proposed to be made by the Secretary of State.

27. It is the view of the Welsh Government that it is appropriate to deal with these provisions in these regulations as it represents the most practicable and proportionate legislative vehicle to enable these provisions to apply in Wales. These regulations amend primary legislation which applies in Wales and England, and it was not practical or proportionate to make separate Welsh regulations to make identical changes to the same pieces of primary legislation.

28. Additionally, the Welsh Ministers are not designated to transpose the provisions relating to harbours and therefore only part of these regulations could be transposed in Wales. The Wales Act 2017 will extend devolved competence over ports and harbours, though at this point the enabling legislation (the Harbours Act 1964 and the Highways Act 1980) will still apply on an England and Wales basis. This approach ensures a common approach to transposing the Directive across the UK, and will support a smooth transition to further devolution.

29. This Statutory Instrument Consent Memorandum relates to regulations laid in the UK Parliament under the negative procedure which automatically become law unless there is an objection from a member of either House of Parliament. If there is no such objection, the regulations would come into force on 5 December 2017.

Financial implications

30. There are costs associated with carrying out EIAs, which are included within the budgets for individual projects. The new Directive has additional requirements for monitoring, which could lead to additional costs to confirm the validity of the measures put in place to reduce, minimise and offset the environmental effects. Approaches to implementation may also affect costs of individual projects, and these would need to be considered on a case by case basis. The transitional provision means that these regulations will not affect projects which are already underway.

Ken Skates AM
Cabinet Secretary for Economy and Transport
15 November 2017

Ken Skates AC/AM
Ysgrifennydd y Cabinet dros yr Economi a Thrafnidiaeth
Cabinet Secretary for Economy and Transport

Llywodraeth Cymru
Welsh Government

Chair
Mick Antoniw AM
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff
CF99 1NA

15 November 2017

Dear Mick

I have laid a Statutory Instrument Consent Memorandum ('the memorandum') in relation to the Environmental Impact Assessment (Miscellaneous Amendments Relating to Harbours, Highways and Transport) Regulations 2017, which were laid in Parliament on 13 November 2017, by the Secretary of State for Transport. These Regulations cover England and Wales, and parts also cover Scotland. They come into force on 5 December 2017. These Regulations make amendments to the Harbours Act 1964 and the Highways Act 1980 in order to transpose Directive 2014/52/EU (The Environmental Impact Assessment Directive, or EIA Directive) as it applies to transport legislation.

The Directive:

- Confirms the inter-relationships between the EIA Directive and other environmental directives (e.g. Habitat Directive).
- Requires additional information to be included in the environmental statement (also referred to as the environmental impact assessment report), such as information about the impact on climate change, and population and human health.
- Increases the requirement for transparency within the EIA process, particularly in terms of the role of the Overseeing Organisation.
- Strengthens the requirements of the determination and screening processes.

These provisions are technical in nature, covering the procedural requirements of an EIA and clarifying elements of the existing regime. They do not amend the underlying policy behind the EIA, only the requirements for how EIAs are carried out. The amendments to primary legislation are set out in the memorandum.

I have laid the memorandum in accordance with the requirement under Standing Order 30A for 'a member of the Welsh Government...[to]…lay a memorandum (a statutory instrument consent memorandum) in relation to any relevant statutory instrument laid before the UK Parliament by UK Ministers'. I consider the Regulations to be a relevant statutory instrument as they make provision in relation to Wales amending primary legislation within the National Assembly's legislative competence, and are not matters which are incidental or

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

consequential to matters which are outside of the National Assembly's legislative competence. However, I do not intend to table a Statutory Instrument Consent Motion for debate.

The Regulations have been made by negative procedure. They were made before they were laid, and providing no Member of Parliament 'prays' against them they will come into force 21 days after being laid. It is for you to decide as a Committee whether to consider and report on the memorandum, as the responsible Committee referred to under Standing Order 30A. I have considered carefully whether to table a Statutory Instrument Consent Motion under SO 30A, to be debated after the 35 days allowed for scrutiny by the responsible Committee has elapsed. There is no requirement for the Welsh Government to do so, but normally we would table a motion to debate so that the Assembly can give its consent, or not, to the relevant provisions before the statutory instrument is made.

As the outcome of such a debate would not have practical effect, I have decided not to table a Statutory Instrument Consent Motion for a debate. Each case must be decided on its merits, and these amendments, though numerous, are all technical and operational in nature. They do not make amendments to policy in Wales, only how the EIAs are to be carried out. I do not think there is merit in holding a debate where the changes are technical in nature and where the outcome of the debate is unlikely to have a practical effect. It is of course still open to any Assembly Member to table their own memorandum and motion for a debate if they feel strongly that this should be debated.

Yours sincerely

Ken Skates AC/AM
Ysgrifennydd y Cabinet dros yr Economi a Thrafnidiaeth
Cabinet Secretary for Economy and Transport

By virtue of paragraph(s) vi of Standing Order 17.42

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Agenda Item 8

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.

<u>Provisions which modify the legislative competence of the Assembly</u>

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.

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Elin Jones AC, Llywydd
Cynulliad Cenedlaethol Cymru
Elin Jones AM, Presiding Officer
National Assembly for Wales

Huw Irranca-Davies AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
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Your ref:
Our ref: EJ/HG

26 October 2017

Dear Huw

Assembly reform: disqualification

In my letter of 18 August, I outlined the work that the Assembly Commission is leading on behalf of the Assembly to consider how the powers in the Wales Act 2017 relating to the Assembly's electoral and institutional arrangements might be exercised. I look forward to receiving your views on any legislative reforms required relating to defamation, contempt of court and Assembly privilege in due course.

As part of this work, careful consideration has been given to the Fourth Assembly's Constitutional and Legislative Affairs Committee's inquiry into disqualification from being an Assembly Member in 2014. The Committee's recommendations include a number calling for legislative change (see Annex to this letter). At the time, these issues were not within the Assembly's competence. However, the devolution of powers over the Assembly's electoral arrangements with effect from April 2018, and the development of Assembly Reform legislation, could provide an opportunity to give effect to the Committee's recommendations.

I would welcome your Committee's views on how your predecessors' recommendations should be taken forward, and whether there are any other issues relating to disqualification which should be considered as part of the development of an Assembly Reform Bill.

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Elin Jones AM, Presiding Officer
National Assembly for Wales

I am acutely aware of your Committee's substantial workload and the need for you to balance competing priorities. For that reason, I thought it best to write to you as early as possible so that you have sufficient lead-in time and provide you with an opportunity to inform the development of the legislation. It would be helpful to receive your views on any issues which might require legislative change as part of the reform programme by the end of 2017.

Yours sincerely

Elin Jones AM
Llywydd

Annex: Relevant recommendations on disqualification made by the Fourth Assembly's Constitutional and Legislative Affairs Committee

Recommendation 2 - we recommend that the UK Government brings forward appropriate legislation to amend the Government of Wales Act 2006 to provide that disqualification from a particular public office should take effect on taking the oath or affirmation of allegiance as an Assembly Member. This change should not apply to a very limited number of posts - as specified in section 16 of the 2006 Act or by order - where being a candidate would, for example, give rise to a conflict of interest or appear to undermine impartiality.
Recommendation 3 - we recommend that the UK Government brings forward appropriate legislation to remove the relevant provisions in The National Assembly for Wales (Representation of the People) Order 2007 requiring candidates, when accepting nomination, to declare that to the best of their knowledge and belief, they do not hold a disqualifying office.
Recommendation 5 - we recommend that the UK Government amends section 16 of the Government of Wales Act 2006 to ensure that any disqualifications it contains are set out fully rather than by reference to other legislation and that all disqualifications it specifies take effect on nomination.
Recommendation 6 - we recommend that the UK Government amends section 16(1) of the Government of Wales Act 2006 to remove the Auditor General and Public Services Ombudsman for Wales, so that they may be included in an appropriate disqualification order with other offices.
Recommendation 7 - we recommend that the UK Government amends section 16(4) of the Government of Wales Act 2006 so that a person who holds office as lord-lieutenant, lieutenant or high sheriff should be disqualified from being an Assembly Member.
Recommendation 21 - we recommend that the UK Government prohibits the practice of standing as an Assembly Member and a Member of the House of Lords, but that such a prohibition should not be applied to anyone who is currently serving as a member of both institutions.

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

National Assembly for Wales
Constitutional and Legislative Affairs Committee

Elin Jones AM
Y Llywydd

4 October 2017

Annwyl Llywydd

ASSEMBLY REFORM: DISQUALIFICATION, DEFAMATION, CONTEMPT OF COURT AND ASSEMBLY PRIVILEGE

Thank you for your letter of 18 August 2017, which we considered at our meeting on 25 September 2017.

We have a busy programme of work scheduled for the autumn term, focusing on the scrutiny of legislation, the completion of our Stronger Voice inquiry and scrutiny of the UK Government's EU (Withdrawal) Bill. Nevertheless, as a first step, we have asked for some advice on the issues you have raised with a view to considering them later in the term.

We will write again once we have considered that advice and once our programme of work on the scrutiny of the Withdrawal Bill becomes clearer in light of the Bill's passage through the UK Parliament.

Yours sincerely

Huw Irranca-Davies

Huw Irranca-Davies
Chair

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

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Your ref:
Our ref: EJ/HG

18 August 2017

Dear Huw

Assembly reform: disqualification, defamation, contempt of court and Assembly privilege

As you will be aware, the Wales Act 2017 provides the Assembly with powers to determine its own internal, operational and electoral arrangements. The Commission is leading work to explore how these powers might be used to ensure that this institution is a stronger, more accessible, inclusive and forward-looking legislature that delivers effectively for the people of Wales.

Earlier this year I announced that the Commission intends to introduce legislation in 2018 to change the Assembly's name. I have also established an Expert Panel to consider matters relating to the size and electoral arrangements of the Assembly. Once the Panel has reported, the Commission will consider the full scope of the reform programme and the legislative proposals we intend to bring forward.

As part of this scoping work, the Commission is also considering whether any reform is required to the sections of the Government of Wales Act 2006 relating to the Assembly's internal arrangements which the Wales Act 2017 will bring within the Assembly's legislative competence. This includes provisions which fall within the remit of your Committee, and on which I would welcome your views.

Elin Jones AC, Llywydd
Cynulliad Cenedlaethol Cymru
Elin Jones AM, Presiding Officer
National Assembly for Wales

Disqualification

Sections 16 to 19 of GOWA make provision in relation to disqualification from membership of the Assembly. As part of the scoping work, my officials are giving careful consideration to the recommendations made in the Fourth Assembly's Constitutional and Legislative Affairs Committee's 2014 report on disqualification. I will write further in the autumn to seek your Committee's views on these issues.

Defamation, contempt of court and Assembly privilege

Sections 42 and 43 of GOWA provide protections for Assembly Members from proceedings against them on the basis of defamation and, in some circumstances, contempt of court. The protection offered to Members is narrower than that offered by the principle of parliamentary privilege which operates in Westminster, although wider than the statutory protection in Scotland and Northern Ireland.

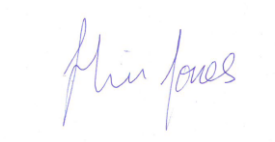
You will be aware that Assembly privilege is not a reserved matter under the Wales Act 2017. In principle, therefore, the Assembly could confer new privileges on itself, subject to the other reservations and competence tests which might apply.

I would welcome the views of your Committee on:

- the provisions in sections 42 and 43, in particular whether any legislative changes would be desirable as part of the Commission's reform work;
- whether any other reforms to the privileges of the Assembly would be desirable, and if so whether the Assembly reform legislation could be an appropriate legislative vehicle.

To ensure that your Committee's views can inform the development of the legislation, it would be helpful to receive your views on any issues which might require legislative change as part of the reform programme by the end of 2017.

Yours sincerely



Elin Jones AM
Llywydd

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