

Cynulliad Cenedlaethol Cymru / National Assembly for Wales
Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol a'r Pwyllgor Materion Allanol a
Deddfwriaeth Ychwanegol / The Constitutional and Legislative Affairs Committee and the
External Affairs and Additional Legislation Committee
Ymgynghoriad ar Fil yr Undeb Ewropeaidd (Ymadael) a'i oblygiadau i Gymru / The
European Union (Withdrawal) Bill and its implications for Wales
EUWB 08
Ymateb gan Gyswilt Amgylchedd Cymru / Evidence from Wales Environment Link

Overview

1. WEL would assume that, as outlined by the UK Government, any powers repatriated from the EU relating to currently devolved areas will remain the competence of the devolved governments. However, we recognise that there will need to be certain UK wide frameworks on cross-border areas like nature conservation, animal health, air quality and water. Any UK-wide policies that replace common EU frameworks – such as agriculture, fisheries, land management and marine management – would need to be jointly agreed on by all four countries.
2. We are concerned that the EU Withdrawal Bill excludes general principles of EU law. For example, the need to contribute to sustainable development in the UK and overseas; the precautionary principle; the principle that preventative action should be taken; the principle that environmental damage should, as a priority, be rectified at source; the need to guarantee participatory rights including public participation in decision making and access to justice in relation to environmental matters; and the integration principle. These principles must provide a foundation for future legislation in all parts of the UK, including any jointly agreed frameworks between the UK Government and the devolved nations.
3. In terms of opportunities for Wales in replacing EU legislation on land use after Brexit, WEL launched a Sustainable Land Management Vision¹ in summer 2017 which we'd like to draw the EAAL and CCERA Committees' attention to. For Wales to be able to make its own environment legislation in this vein, the EU Withdrawal Bill needs to respect the devolution settlements.

Treatment of Devolution

4. We recognise that many environmental issues are cross border and the EU framework has provided a commonality across the UK nations, up until this point. A coordinated trans-boundary approach will continue to be necessary post-Brexit in order to avoid significant regulatory divergence and 'competitive deregulation' between the four countries of the UK, and we hope all four will work together to maintain high environmental standards. We are advocating for the inclusion of EU environmental principles in the Bill to provide a shared foundation for any future legislation.

¹ Wales Environment Link, July 2017. Sustainable Land Management Vision for Wales.
http://www.waleslink.org/sites/default/files/wel_sustainable_land_management_vision_-_english_online_0.pdf

5. WEL would echo concerns highlighted of the Constitutional & Legislative Affairs (CLA) Committee – in the letter² to Brexit Secretary, David Davis – where concerns are outlined on Clause 11 and the ‘freezing’ of the Assembly’s competence in relation to EU law.
6. There needs to be some detail on how ‘retained EU law’ is managed when UK Ministers’ temporary powers are transferred back to Wales, Scotland and Northern Ireland. There should be a clear process on how this will be taken forward and a definitive end point where devolved nations can begin to legislate again in these areas.
7. It is a concern that there has yet to be any discussion of UK-wide plans to develop the new domestic governance arrangements that will be required to replace the functions currently carried out by the EU institutions. This is vital to ensure a robust approach to standard setting, monitoring, dispute resolution and oversight. The UK Government is currently suggesting that the availability of judicial review, and the role of Parliament in holding them to account, is an adequate substitute for the enforcement mechanisms currently delivered by the EU. Such an approach fails to recognise the function that EU institutions perform. Whilst the Welsh Government has recognised this ‘governance gap’, no proposals have so far been forthcoming as to how to address it.
8. On a different note, WEL is also concerned that the Brexit process is exposing a number of gaps in existing Welsh legislation – such as the Well-being of Future Generations and Environment Acts – which are underpinned by principles enshrined in European Directives (see paragraph 2 above). During the development of this legislation, WEL members suggested that these principles should be included on the face of the Bills. However, we were informed by the Welsh Government that it was not required given the presence of the Directives which directly underpinned them. This highlights that the Acts were not drafted in a way which is easily able to reconcile the loss of EU legislation and governance structures.
9. Given the uncertainty surrounding the extent to which these principles will be transposed, the effectiveness of these Acts post-Brexit remains in question. As such, WEL believes that Assembly committees should give consideration to how these principles can be transposed into Welsh legislation should the EU Withdrawal Bill not do so sufficiently.

Delegation of powers and their control

10. The EU Withdrawal Bill gives the UK and devolved governments delegated powers i.e. powers to change EU derived laws via statutory instruments. Criticism of the ‘Henry VIII powers’ has been widespread. We maintain that the EU Withdrawal Bill should confine any delegated powers to the purpose of faithful transposition and implementation of existing EU legislation into domestic law, with technical changes only to ensure that it is functional on ‘Exit Day’. Any policy changes must be made through primary legislation and given the due scrutiny that they require
11. As pointed out by the CLA Committee³, a significant amount of subordinate legislation will likely be laid before the Assembly in areas like agriculture, fisheries and food. The timescale needs to allow

² National Assembly for Wales, July 2017. Letter from the Chair of the Constitutional & Legislative Affairs Committee to Secretary of State for Existing the EU.

<http://www.senedd.assembly.wales/documents/s65432/Letter%20from%20the%20Chair%20of%20the%20Constitutional%20and%20Legislative%20Affairs%20Committee%20to%20the%20UK%20Government.pdf>

³ National Assembly for Wales, April 2017. Letter from the Chair of the Constitutional & Legislative Affairs Committee to the House of Commons Procedure Committee.

for Welsh Ministers and AMs to have thorough scrutiny of this legislation and not be dictated to by a narrow timetable which may not allow proper debate.

The scrutiny processes and the role of the devolved legislatures

12. Whilst the Assembly must dedicate as much time as possible to these scrutiny processes, this will have significant implications for both Welsh Government and the third sector in terms of both resource and capacity. This should not be underestimated; the focus on post-Brexit legislation will also have a sizeable impact on what other issues the Welsh Government and National Assembly for Wales are able to focus on.
13. Whilst we recognise that a vast amount of legislation is being converted through the Bill in a relatively short time frame, it is important that independent oversight is put in place on the use of delegated powers. A Parliamentary or Assembly committee is required to determine the form and duration of scrutiny needed for statutory instruments as a result of this Bill. This committee should have the power to make recommendations to the relevant Minister before a statutory instrument is laid before the relevant legislature.
14. Another element that will need to be resolved is the 'right to challenge' and judicial scrutiny and oversight after the UK has left the EU. Dialogue has just begun on this through the UK Government's Brexit position papers on '*Providing a cross-border civil judicial cooperation framework*⁴ and '*Enforcement and dispute resolution*⁵.
15. The Assembly's Research Service⁶ pointed out that it is "*unclear*" how courts will interpret legislation: "*While the UK is a member of the EU, domestic implementing legislation must be interpreted so as to give effect to the purpose of the underlying EU Directive (and indeed the Treaties). Once the UK was no longer a Member State, that interpretive rule would no longer apply automatically. The UK Parliament could nevertheless legislate to require the courts to continue to operate the interpretive rule for the time being. It is unclear whether the Assembly could do likewise in relation to devolved subjects.*" A year after this briefing was written, it remains unclear how UK courts will operate alongside EU legislation and international commitments.

<http://www.senedd.assembly.wales/documents/s62098/Letter%20from%20the%20Chair%20of%20the%20Constitutional%20and%20Legislative%20Affairs%20Committee%20to%20the%20Chair%20of%20the%20Pr.pdf>

⁴ UK Government, August 2017. Brexit Position Paper from DExEU: Providing a cross-border civil judicial cooperation framework. <https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper>

⁵ UK Government, August 2017. Brexit Position Paper from DExEU: Enforcement and dispute resolution.

<https://www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper>

⁶ National Assembly for Wales, Research Service Briefing Paper, 'Wales and the EU: what does the vote to leave the EU mean for Wales?' June 2016. <http://www.assembly.wales/Research%20Documents/16-037-Wales%20and%20the%20EU%20What%20does%20the%20vote%20to%20leave%20the%20EU%20mean%20for%20Wales/16-037-Leave-English.pdf>

Wales Environment Link (WEL) is a network of environmental, countryside and heritage Non-Governmental Organisations in Wales, most of whom have an all-Wales remit. WEL is a respected intermediary body between the government and the environmental NGO sector in Wales. Our vision is a healthy, sustainably managed environment and countryside with safeguarded heritage in which the people of Wales and future generations can prosper.

This paper represents the consensus view of a group of WEL members working in this specialist area. Members may also produce information individually in order to raise more detailed issues that are important to their particular organisation.