

Mark Drakeford AM/AC  
Ysgrifennydd y Cabinet dros Gyllid  
Cabinet Secretary for Finance



Llywodraeth Cymru  
Welsh Government

Assembly Members

19 June 2018

Dear colleagues

As we reach the concluding stages of the EU Withdrawal Bill in the Houses of Parliament and ahead of the government debate on the second anniversary of the Brexit referendum in the National Assembly this week, I wanted to write to all Members to confirm the details of the Intergovernmental Agreement (IGA) the Welsh Government reached with the UK Government.

I also wanted to take this opportunity to address some continuing misunderstandings and correct some misleading statements made about the IGA.

The agreement confirms the inversion of Clause 11. The Bill as originally drafted would have retained all 'returning' EU powers over devolved policy areas at Westminster, with Ministers of the Crown able to release them to the devolved institutions to an extent and to a timescale which they alone determined.

Now, all powers over devolved policy areas are confirmed as remaining with the National Assembly. Moreover where the Assembly agrees that frameworks are required, a process has been established for these to be identified. When the EU law restriction ends, the devolved institutions will be able to exercise them without the current requirement to operate within EU frameworks. In these areas, our ability to exercise our devolved competence will increase.

No powers whatsoever have been withheld from the Assembly and none will be until the Assembly has had the opportunity to consider any draft regulations brought forward under the legislation.

The agreement sets out a collaborative process between the governments to identify where frameworks are needed and to develop these draft regulations which specify which EU powers will be 'frozen'. Moreover, it applies the Sewel convention to these secondary legislative powers – the National Assembly and the Scottish Parliament will be asked for their consent. The UK Government makes the same commitment not normally to proceed

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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.

without this consent as currently applies to primary legislation, which touches on devolved policies.

The agreement contains further safeguards compared to Sewel – if the UK Government wishes to press on with making these regulations in the absence of consent, it has to present not just its own views but those of devolved Ministers about why their legislature has refused consent. And for the UK Government's view to prevail, both Houses of Parliament will need to agree.

The agreement puts onto the face of the Bill sunset clauses for the power to create regulations – two years from exit day – and any regulations made (a maximum of five years). After this date, all powers in devolved areas currently held by the EU will be exercised in Holyrood and Cardiff Bay. Any pooling of competence in areas where frameworks are to be agreed will therefore be temporary.

It gives an unequivocal guarantee that UK Ministers will not bring before Parliament any legislation relating to England to make changes to retained EU law in areas subject to regulations. This effectively establishes a level playing field across the UK – the effect of regulations will be to retain the current EU frameworks in operation across the whole UK until new frameworks are negotiated and agreed. This commitment will also provide a strong incentive to the UK Government to agree frameworks long before the five-year maximum term provided by the regulations.

Finally, there is an unequivocal statement in the agreement that the Sewel convention will apply to any UK Parliament primary legislation, which is used to put in place agreed UK-wide frameworks. This ensures there is no risk that the regulations will be used as the basis of arguing that as matters are temporarily beyond competence, Sewel does not apply.

I next want to set out clearly some of the things the agreement does not do:

- No powers have been given away– all powers currently exercised by the EU will come to Wales until such time as regulations are brought forward to put specific EU powers 'in the freezer' while frameworks are being developed. These regulations have not been drafted yet and they will come to the National Assembly to consider before they are laid in Parliament. The annex to the agreement lists areas within which regulations can be brought forward – in most cases, frameworks are likely to be needed in relatively narrow areas of current EU legislation within these areas;
- It does not allow the UK Government to do whatever it likes or to rewrite Welsh laws while things are 'in the freezer'. The only changes to retained EU law which can be made in these areas are narrow, technical ones needed to make the law operable after Brexit. The agreement means the UK cannot make changes to the current EU frameworks – even in respect of England – while things are in 'the freezer'. Frameworks will need to be negotiated and agreed between governments, and if they are not, at the end of the sunset period, the powers will come back to the National Assembly and it will be able to legislate as it sees fit;
- The sunset clauses do not mean the National Assembly will not be able to legislate in any of these devolved areas for seven or eight years. No such restrictions will exist until such time as they are agreed by the National Assembly. Where temporary restrictions are placed on competence, the agreement means no government – including the UK Government acting for England – can make any changes to the status quo. Nor can the sunset clause be extended by the Bill –it gives no such powers to Ministers, and to do so would need a new piece of primary legislation, to which Sewel would apply;

- Any restrictions placed on competence will only prevent us from legislating incompatibly with EU-retained law, exactly as we are prevented from legislating incompatibly with EU law now. Suggestions that these restrictions would have prevented us from passing such Acts as the Wellbeing of Future Generations Act are simply wrong. Such Acts were enacted within the constraints which have prevented us from legislating incompatibly with EU law since the National Assembly came into being;
- The agreement is not just a piece of paper which has no binding effect on the UK Government. It was painstakingly negotiated at a level of specific detail. It is a clear and unequivocal commitment from the UK Government and we have no reason to believe the UK Government will not adhere in full to the terms of the agreement. Our inter-governmental machinery is based on a Memorandum of Understanding, which has the same status, as does the fiscal framework.
- The agreement does not define consent as meaning the National Assembly has given a view, whether it is to give consent or refuse it. The reference to the 'consent decision' in the amendments is simply to allow action to be taken more quickly than the 40-day period envisaged, where all devolved legislatures have already expressed a view. The UK Government's commitment is not normally to lay regulations before Parliament without the consent of the National Assembly, not without a consent decision.

Finally, it has been suggested that it is a constitutional outrage that Parliament can just override the will of the National Assembly on devolved matters. However, this is the basis of the current constitutional settlement. The agreement gives additional safeguards to the way in which the Sewel convention operates.

I look forward to Tuesday's debate.

A handwritten signature in black ink that reads "Mark". The letters are cursive and slightly slanted to the right.

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