

NATIONAL ASSEMBLY FOR WALES

LAW DERIVED FROM THE EUROPEAN UNION (WALES) BILL

SUMMARY OF LEGISLATIVE COMPETENCE ISSUES

1. The Law Derived from the European Union (Wales) Bill has been submitted to the Llywydd by the Member in charge of the Bill, Mark Drakeford AM, Cabinet Secretary for Finance, to enable the Llywydd to state her view on whether the Bill is within the legislative competence of the Assembly. In accordance with section 110(3) of the Government of Wales Act 2006 (“GoWA”) and Standing Order 26.4, this statement must be made on or before the Bill is introduced.

2. The Llywydd has decided that, in her view, the provisions of the Bill are within legislative competence, and the statement under Standing Order 26.4 was laid before the Assembly today.

3. However, the Llywydd’s decision was not straightforward, as it was recognised that there are significant arguments both for and against legislative competence existing for this Bill. A summary of the issues that the Llywydd considered in relation to competence are therefore outlined in this note for Members’ information ahead of the debate on the Bill’s general principles.

Overview of the Bill

4. The Welsh Government states that the main policy objective of the Bill is “to ensure that the legislation covering subjects devolved to Wales works effectively after the UK leaves the European Union (“EU”) and the European Communities Act 1972 is repealed by the EU (Withdrawal) Bill”.

5. The Bill (sections 3–5) would give Welsh Ministers regulation-making powers designed to ensure that all EU law covering subjects within the current¹ legislative competence of the Assembly becomes part of the law of

¹ That is, the conferred-powers competence that will remain in force until 1 April 2018.

Wales, and remains in effect, at the point at which the UK leaves the European Union (“Brexit”). This body of ‘imported’ EU law is called, in the Bill, “EU derived Welsh law”.

6. The Bill would enable the Welsh Ministers to modify EU derived Welsh law provisions; but, broadly speaking, only so far as is necessary to make it operate effectively in the light of Brexit (for example, replacing references to EU institutions with references to existing or new Welsh bodies).

7. The Bill would, effectively, prevent EU derived Welsh law from falling under the provisions of the European Union (Withdrawal) Bill (“EU(W) Bill”). This would have a knock-on effect on the Assembly’s competence. If clause 11 of the EU(W) Bill is passed by the UK Parliament as currently drafted, the Assembly will not be able to modify any EU law that has been transferred into UK law by the EU(W) Bill. (That body of law is called “retained EU law” in the EU(W) Bill). The exceptions to that rule are, first, that the Assembly will still be able to modify “retained EU law” in ways that that would have been compatible with EU law before Brexit. Secondly, the Assembly will also be able to modify “retained EU law” if, and to the extent that, competence is ‘released back’ to the Assembly by Order in Council under the EU(W) Bill.

8. The EU(W) Bill also gives UK and Welsh Ministers very wide powers to modify “retained EU law”, including in all areas within the Assembly’s competence. Thus, Ministers – including UK Ministers – will be able to change the law in Welsh devolved areas in ways which the Assembly itself is prohibited from doing; and the Assembly will also be prohibited from undoing those changes made by Ministers (subject to the exceptions mentioned above). The Bill presently under consideration would, again, prevent that result from occurring.

9. Section 11 of the Bill would create a new power for Welsh Ministers to make subordinate legislation reflecting **post-Brexit** EU law; in other words, maintaining regulatory alignment with the EU where the Welsh Ministers

consider this appropriate. This power includes the power to modify EU law when translating it into Welsh law, so that it can apply on a practical level.

10. Sections 13 and 14 of the Bill would oblige the UK Government to obtain the consent of Welsh Ministers before making subordinate legislation that would change the law of Wales, in devolved policy areas covered by EU law. For competence reasons, this requirement would apply only where the UK Government's power to make that subordinate legislation is granted by or under a **future** UK Parliamentary Act. In principle, this would include the EU(W) Bill and other Brexit-related primary legislation of the UK Parliament.

11. The Bill would give the Welsh Ministers two other significant powers to make regulations in Welsh devolved policy areas. The first is to ensure compliance with the UK's international obligations in the light of the UK's withdrawal from the EU (see section 9). The second, in section 10, is to implement the withdrawal agreement to be reached between the UK and the EU27 under Article 50 of the Treaty on European Union ("TEU"). Both of these powers are broadly in line with powers proposed to be given to Welsh Ministers by the EU(W) Bill, but are less restricted than under that Bill.

Competence issues considered by the Llywydd

Relevant settlement

12. Legislative competence for this Bill falls to be assessed under the current (conferred-powers) devolution settlement. The reserved-powers settlement to be introduced under the Wales Act 2017 affects only Bills where the vote on the general principles took place on or after 1 April 2018. Had the reserved-powers settlement applied, in a similar way to the devolution settlement in Scotland, certain of the competence considerations arising would have been different, and additional considerations would have arisen.

The issue concerning compatibility with European Union law.

13. The main issue in relation to competence concerns the prohibition, in section 108(6)(c) GoWA, on an Assembly Act making provision that is

incompatible with EU law. This issue runs through most of the provisions of the Bill. For example, sections 3–5 and 9–11 of the Bill give the Welsh Ministers powers to modify EU–derived law in ways that would not be compatible with that law (see, for example, s. 3(4)).

14. When the UK leaves the EU, the requirement that Assembly Acts must be compatible with EU law will become void (as the Supreme Court confirmed in the case of *R (Miller) v Secretary of State for Exiting the European Union*)² (“Miller”)³. However, both the date on which the Bill is passed, and the date of Royal Assent, are envisaged to fall before EU law ceases to apply to the UK. Therefore, at the point at which the Assembly passes the Bill, the Bill will – if it remains as drafted – confer powers on Welsh Ministers to do things that are incompatible with the letter of EU law – despite the fact that the whole purpose of the Bill is to ensure as much compatibility with EU law as practicable in the light of Brexit.

15. However, the Bill would not allow any changes to Welsh devolved law (whether made by the Welsh Ministers, or anyone else), that deviate from EU law, to take effect **before** Brexit. The Bill has been carefully drafted to ensure compatibility with EU law for as long as that law actually applies to the UK, and to allow divergence from it only after that ceases to be the case. This is the essential reason for the Llywydd’s decision that the Assembly would not, in passing the Bill as drafted, be passing provision that is incompatible with EU law.

16. The context of the Brexit process itself is also an essential factor in the Llywydd’s decision. At the time of making her decision, it is certain that Brexit will occur, either on 29 March 2019 or on another date. It is also a fact that that, at that point, the test for competence in section 108(6)(c)

² [2017] UKSC 5.

³ The Supreme Court, said, “The removal of the EU constraints on withdrawal from the EU Treaties will alter the competence of the devolved institutions unless new legislative constraints are introduced. In the absence of such new restraints, withdrawal from the EU will enhance the devolved competence” (para. 130). The present Bill does not – and cannot – prevent the UK Parliament from introducing “new ... constraints” on the Assembly’s competence; this would, however, require the consent of the Assembly under the constitutional convention known as the Legislative Consent Convention, or Sewel Convention.

GoWA will no longer apply. The Supreme Court has confirmed this in the *Miller* case, as referred to above.

The issue of effect on Minister of the Crown functions.

17. The Bill also raised a separate competence issue (effect on powers of UK Ministers). It affects sections 13 and 14 only. Those sections would require UK Ministers to obtain Welsh Ministers' consent before making, approving or confirming subordinate legislation affecting Welsh devolved policy areas in ways that would be within the scope of current EU law.

18. The obligation for UK Ministers to obtain Welsh Ministers' consent would apply only where the UK Minister is exercising a function that is either **conferred** on her/him **after sections 13 and 14 come into force**, or which is **modified at that future time**.

19. Under the current settlement, the Assembly cannot **impose** a function on a Minister of the Crown without the consent of the Secretary of State. However, it can **modify** a function of a Minister of the Crown without UK Government consent, provided that that function is not a "pre-commencement function". "Pre-commencement functions" are functions acquired by a UK Minister before 5 May 2011, the day on which the Assembly acquired full primary legislative powers⁴.

20. Sections 13 and 14 have been drafted in a way designed to comply with these restrictions on the Assembly's competence. In the Llywydd's view, this has been successfully achieved, i.e. the sections would not impose functions on UK Ministers. Instead, if UK Ministers acquire a future function within both Welsh devolved competence and the pre-Brexit scope of EU law, the Bill would modify that function by making it subject to the consent of the

⁴ See paragraph 1 of Part 2 of Schedule 7 to GoWA, together with the exceptions in paragraph 6 of Part 3 of that Schedule.

Welsh Ministers. The same applies if UK Ministers have an existing function, and that function is changed in future so as to allow the Minister to legislate within Welsh devolved competence and within the scope of former EU law. Even if the UK Ministerial function was originally created before 5 May 2011, it cannot, in the Llywydd's view be regarded as a "pre-commencement function" if it is changed, in future, as radically as section 13 envisages.

21. Moreover, under current competence, the Assembly could completely remove non-pre-commencement functions of UK Ministers in so far as they apply to Welsh devolved policy areas. Therefore, logically, the Assembly must be able to make the exercise of those functions subject to the consent of the Welsh Ministers.

Other competence issues

22. The Llywydd also considered all the other tests for competence set out in GoWA: whether the Bill's provisions "relate to" a subject listed in Schedule 7 to GoWA and do not fall within any of the exceptions listed there; territorial effect; compatibility with the Convention rights; protection of certain other enactments; protection of the functions of HM Revenue and Customs and of the position of the Comptroller and Auditor General; and the test that the Bill must not have a prohibited effect on the Welsh Consolidated Fund. She was satisfied that the Bill clearly met all these tests.