



Our Ref: MFC/1294

David Rees AM
National Assembly for Wales
Cardiff Bay
Cardiff
CF99 1NA

10 May 2018

Dear David,

Meeting with the External Affairs and Additional Legislation Committee

Thank you for your letter further to our meeting on 30 April, and for the additional questions from your Committee that we did not have sufficient time to cover during that session.

I am grateful to you and your Committee for giving myself and Robin Walker, Parliamentary Under-Secretary of State at the Department for Exiting the European Union, the opportunity to give evidence to you on the European Union (Withdrawal) Bill and on EU exit and devolution matters more widely.

I have included with this letter an Annex that sets out the answers to your detailed questions. I have endeavoured to provide this to you as swiftly as possible as I recognise the time pressures that your Committee is under to report on the Bill to the National Assembly for Wales in advance of its consideration of the legislative consent motion.

As we agreed during our meeting, and as you mention in your letter, my colleague Robin Walker will write to you separately regarding nominations to the Committee of the Regions.

CHLOE SMITH MP

ANNEX A – RESPONSES TO QUESTIONS FROM THE COMMITTEE

Questions from Dai Lloyd AM on consent decisions

We can be absolutely clear that a ‘consent decision’, as defined in the Bill, does not automatically equate to a decision to grant consent. Rather, it is a decision over whether consent should be granted.

It is correct that the UK Parliament could approve regulations put before it under clause 11 by a UK minister without the consent of the relevant devolved legislature as, in the case of a dispute between administrations and legislatures, it is ultimately the UK Parliament, acting for and in the interests of the UK as a whole, which will be able to take the final decision.

However, that does not mean that a decision to withhold consent has no substantive effect. As identified in the Committee’s further questions, where a devolved legislature does not give its consent, the UK minister, if proceeding to lay the regulations, must explain why it is appropriate to proceed without consent, and must provide the explanation of the refusal provided to them by the relevant devolved administration.

Further, as you note, we have agreed with the Welsh Government that we will follow the same commitment in relation to these regulations, that we follow in relation to primary legislation under the Sewel Convention. That means, in accordance with the IGA, the UK Government will not normally ask the UK Parliament to approve clause 11 regulations where the consent of the devolved legislature has not been given. The IGA has been drafted as such so that the Scottish Government will be able to join the agreement, if they wish to do so in the future, as well as allow incoming Northern Ireland Ministers to join as well should they wish.

We do not believe that setting out the types of decision in the Bill creates the impression that refusal of consent is tantamount to granting consent precisely because of the additional duties that apply to UK ministers where consent is withheld. The inclusion of decisions to refuse consent within the definition of a ‘consent decision’ is necessary because they are triggers for those additional duties on UK Ministers to apply.

Further questions from the Committee

- 1) Given that the length of the proposed sunset clauses will allow restrictions to extend beyond the life of the current Welsh and UK Governments, what legal effect will the intergovernmental agreement have on future governments?**

The Intergovernmental Agreement and the Memorandum on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks reflect political agreement between administrations about how we will work together on these matters.

It is standard practice to abide by these agreements even as governments change. Successive administrations in London, Cardiff, Edinburgh and Belfast have continued to commit to the Memorandum of Understanding on Devolution and the many supplementary agreements and concordats that fall under it.

2) Can you set out why restrictions introduced need to last five years given that the UK will need to have new frameworks in place by the end of a transition period in 2020?

We decided on the five year period for the expiry of regulations made under clause 11 as a result of the joint analysis that the UK Government and the devolved administrations have been undertaking into frameworks. On the basis of our analysis we believe, and the Welsh Government have agreed, that five years is the right period to ensure that we have sufficient time to establish our future UK frameworks, in those areas where they are needed.

It is not necessarily the case that all future framework arrangements will be designed and implemented before exit day or before the end of an implementation period. This is why the clause 11 arrangements are needed to temporarily maintain the existing EU frameworks and bridge the gap between EU law based common approaches ending when EU law ceases to have effect, and our new UK frameworks being established.

The power to apply these restrictions will only be available for up to two years after exit day, in line with other powers in the Bill, to demonstrate that this is not an ongoing mechanism to affect devolved competence. The regulations made under the power can then last for up to five years from when they come into force to provide certainty and continuity of law to our communities and businesses in all parts of the UK, until the lasting arrangements can be put in place.

We have also made clear that the sunset period is only the upper limit. Temporary arrangements given effect by clause 11 can be removed sooner. Where we have implemented our future frameworks before the clause 11 regulations have expired they can of course be revoked at that earlier date. UK ministers will be under a duty to consider every three months whether clause 11 regulations should be repealed, and to report on the progress made during that period towards repealing the regulations.

3) Can you provide an assurance that you will consult stakeholders in England and Wales on proposed restrictions prior to introducing regulations to the Houses of Parliament?

We have already begun comprehensive engagement with stakeholders in Wales on the question of frameworks. Robin Walker made mention during our meeting of the Secretary of State for Wales' Expert Implementation Panel. This is an important forum that meets regularly to provide businesses and other stakeholders a means to inform this ongoing work. As part of the consideration of frameworks more widely this group will be consulted on the use of the clause 11 regulations.

The Secretary of State for Wales, and his Cabinet colleagues, will also continue to engage regularly with stakeholders across Wales including, for example, roundtables with stakeholders from the agriculture and rural affairs sector.

- 4) Can you explain why the clause 11 amendments do not require Welsh Ministers to lay a copy of any draft clause 11 restrictions before the Assembly on the day they receive them from UK Ministers even though the 40 day clock on making a consent decision will have begun ticking?]**

This approach was agreed with the Welsh Government. It is a matter for Welsh Ministers to decide how and when they put these regulations before the Assembly.

In line with paragraph 7(c) of the memorandum attached to the intergovernmental agreement, Welsh Ministers have committed to lay regulations before the Assembly where they have been developed in line with that agreement. It also stated that Welsh Government will not unreasonably withhold an accompanying recommendation of consent to the Assembly.

- 5) Can you set out why the clause 11 amendments do not require UK Ministers to notify the Welsh Ministers or the Assembly when clause 11 restrictions are repealed?**

The Bill sets out a procedure which allows the clause 11 restrictions to be repealed as quickly as possible. We have therefore limited the formal procedural steps which need to be taken to repeal regulations made under clause 11. In practice, the UK Government will work closely with the Welsh Government when deciding whether to revoke these regulations, which are likely to be revoked as the new arrangements are established.

- 6) Can you explain why the clause 11 amendments do not require Welsh Ministers to provide Ministers of the Crown with a statement setting out the opinion of Welsh Ministers as to why the Assembly has not made that decision?**

We agreed with the Welsh Government that this would be best covered in the memorandum attached to the intergovernmental agreement. Under paragraph 7(e) of the memorandum, Welsh Ministers committed to provide a written statement, indicating why, in the Minister's view, the devolved legislatures did not provide consent.

The clause 11 amendments place a duty on UK Ministers to include any statement from Welsh Ministers when the UK Minister makes a statement to Parliament on why he or she is proceeding without the consent of the Assembly.

- 7) Can you explain why the clause 11 amendments do not require UK Ministers or Welsh Ministers to lay a copy of the report on progress made towards removing clause 11 restrictions before the Assembly?**

This approach was agreed with the Welsh Government. We consider that it is a matter for Welsh Ministers to decide how they report to the Assembly.

8) Can you set out what would happen if you are unable to reach agreement with the Scottish Government, is there a risk that different restrictions could apply in Wales that do not apply in Scotland?

The Government's sincere hope is that the Scottish Government will be able to sign up to the agreement that we have reached with the Welsh Government. The Intergovernmental Agreement is drafted inclusively to allow for this to happen and the door remains open to the Scottish Government.

The amendments to clause 11, approved by the House of Lords, make the same provision in relation to Scotland that they make in relation to Wales and to Northern Ireland. This means that, even though the Scottish Government have not been able to agree to these proposals, the Scottish Parliament's consent for clause 11 regulations will be sought in the same way as the National Assembly for Wales' consent is to be sought.

Should one devolved legislature refuse consent for the making of regulations where another has granted it, it will be for the UK Parliament to make the final decision on whether the regulations proceed. It is not our intention to apply restrictions differently across separate jurisdictions where the boundaries of devolved competence are the same. It would be counter to the purpose of maintaining common approaches if those common approaches were themselves applied differentially.