



# THE LEARNED SOCIETY OF WALES CYMDEITHAS DDYSGEDIG CYMRU

THE NATIONAL ACADEMY – CELEBRATING SCHOLARSHIP AND SERVING THE NATION  
YR ACADEMI GENEOLAETHOL – YN DATHLU YSGOLHEICTOD A GWASANAETHU'R GENEDL

## BREXIT: AGRICULTURE, TRADE AND THE REPATRIATION OF POWERS

### Response from the Learned Society of Wales

The Learned Society of Wales / Cymdeithas Ddysgedig Cymru (LSW) celebrates and encourages excellence in all of the scholarly disciplines. A Royal Charter charity established in 2010, the LSW is an independent source of expert scholarly advice and commentary on matters affecting the wellbeing of Wales and its people. The Society draws upon the expertise of over 450 distinguished Fellows based in Wales, the UK and beyond. For more information, please visit [our website](#).

1. The Learned Society of Wales thanks the House of Commons Welsh Affairs Committee for the opportunity to contribute to its consideration of this important topic.
2. The Learned Society has already contributed to the consultation on the EU (Withdrawal) Bill conducted jointly by the Constitutional and Legislative Affairs Committee and the External Affairs and Additional Legislation Committee of the National Assembly for Wales. Its contribution to that consultation can be found at <http://senedd.assembly.wales/documents/s65617/EUWB%2010%20The%20Learned%20Society%20of%20Wales.pdf>. Issues raised in that response are equally relevant to aspects of the current inquiry as well.
3. This response relates to the first and second points in the inquiry's stated terms of reference, namely:
  - the implications for the Welsh devolution settlement of the EU (Withdrawal) Bill as drafted; and,
  - UK-wide policy making: which EU competencies should be transferred to the National Assembly for Wales after Brexit? How should UK-wide common policy frameworks be structured, and what inter-parliamentary mechanisms would be needed to scrutinise such frameworks?

### The implications for the Welsh devolution settlement of the EU (Withdrawal) Bill as drafted

4. Currently, under the conferred-powers model of Welsh devolution, the National Assembly cannot enact provisions which are incompatible with EU law.<sup>1</sup> The same restriction will apply to its legislative competence when it moves to the reserved-powers model of devolution enacted by the Wales Act 2017.<sup>2</sup> It is important to stress that the requirement for the Assembly's legislation to be compatible with

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<sup>1</sup> GoWA 2006, s.108(6)(c).

<sup>2</sup> GoWA 2006, s.108A(2)(e), inserted by Wales 2017, s.3(1).

EU law in order to be within competence is a limit upon the use of its devolved competence. It is not the case that the subjects in relation to which it may currently legislate exclude matters regarding which the UK is bound by EU law. Nor is it the case that those matters, in future, would be reserved. Where otherwise devolved, they are within the subject-matter competence of the Assembly, but the Assembly is limited when legislating in relation to them to doing so in a manner which is compatible with EU law. When EU law, therefore, ceases to be law within the UK on exit day, that limit will be removed and the devolved legislatures, in the absence of any further provision, would be competent to legislate in relation to those subjects free of that restriction.

5. From this, it follows that, without further restriction, the devolved legislatures would be free on and after exit day to make such changes to retained EU law in relation to devolved issues as was otherwise within their competence as previously approved by the UK Parliament in successive devolution statutes. This is not what the EU (Withdrawal) Bill envisages. Instead, it replaces the restriction concerning compatibility with EU law with a new restriction requiring that provisions enacted by the devolved legislatures should not be incompatible with retained EU law.<sup>3</sup> In that retained EU law on exit day will be a static set of rules as opposed to the developing body of EU law, this changes a limitation to the legislative competence of the devolved legislatures. The change is significant for a number of reasons. Not least is the fact that it asserts the supremacy of laws made by the UK Parliament in all of the areas, many of which are devolved, where before exit day supremacy had been accorded EU law, a supremacy untrammelled by any convention requiring the consent of the devolved legislatures for intrusions into their legislative space.
6. Retained EU law will therefore constitute a distinct body of law within the UK, a body of law defined by its history, being a legacy of the UK's membership of the EU, approved by Westminster and not amendable by the devolved legislatures.
7. The Explanatory Notes to the Bill note that not all changes to existing devolution legislation have been included in the Bill on introduction, citing as an example changes to the lists of reserved matters in the relevant Acts, including those in the recently enacted Schedule 7A inserted into the Government of Wales Act 2006 by the Wales Act 2017.<sup>4</sup> It is stated that this is because the UK Government intends to discuss these changes with the devolved administrations before finalising the amendments. While consultation with the devolved administrations is highly desirable, it is nevertheless undesirable to introduce incomplete Bills that will be amended by the Government, possibly at a late stage in the Parliamentary process and therefore without proper scrutiny.

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<sup>3</sup> Clause 11. Subsection (2) deals with the Assembly, amending GoWA 2006, s.108A.

<sup>4</sup> Explanatory Notes, ¶195.

8. There is also a disturbing lack of clarity with regard to the proposed mechanism by which the devolved legislatures may in time be released in part from the ban on their modifying retained EU law. Clause 11 of the Bill envisages such release being achieved by an Order in Council procedure, but it is not clear how the amendments to legislative competence wrought by such Orders will fit into the existing devolution settlements. One possibility is that they might list matters within retained EU law in relation to which some or all of the devolved legislatures might in future legislate, thus in effect incorporating elements of a conferred-powers model of devolution within the reserved-powers models currently enacted. This is admittedly only one possibility, but it is unsatisfactory that such an important factor for the future competence of the devolved legislatures should be lacking in clarity and certainty when scrutiny of the Bill begins.<sup>5</sup>

**UK-wide policy making: which EU competencies should be transferred to the National Assembly for Wales after Brexit? How should UK-wide common policy frameworks be structured, and what inter-parliamentary mechanisms would be needed to scrutinise such frameworks?**

9. The withdrawal of the UK from the EU poses a number of questions for the UK as a whole and for each of the devolved nations. Some answers to some of these questions are to be found in the bill. With regard to others, the bill is silent. The ‘other provision’ it proposes to make ‘in connection with the withdrawal of the United Kingdom from the EU’ does not provide for the future governance arrangements between the United Kingdom, as the former EU member state, and the devolved governments of its component nations.
10. The supremacy which the UK has been prepared to accord EU law during its membership reflects the acceptance that the appropriate level for laws to be made in relation to certain matters is at EU rather than state level. In many instances, for example aspects of environmental protection, this recognizes that action at the international level is necessarily more effective than action by a state acting alone. In others, such as internal trade, the underlying logic rests on what is required to allow a single market in goods and services to work effectively without tariffs or non tariff barriers. In yet others, dealing with for instance the rights of individuals, the basis is a shared commitment to respect fundamental values.
11. Regardless of the various rationales underlying the supremacy of EU law, if one upholds the view that such decisions are more appropriately made at a higher rather than a lower level of government, it is logical to accept that following withdrawal some decisions will be more appropriately made at the UK level or taken separately on a coordinated basis previously agreed by the governments involved.

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<sup>5</sup> The relevant Explanatory Notes, ¶¶36–38, do not assist.

12. Given the devolution of powers, the devolved nations should have a say in such decision making. While a member of the EU, the UK has not been able to make changes to EU law of its own motion. Such changes require for their enactment the support, in most cases, of a weighted majority of the member states or, in some cases, their unanimity. While withdrawal certainly envisages that in future retained EU law can be changed freely within the UK, there is no necessity that such changes should be the exclusive preserve of the UK state. Indeed it is undesirable that such power should be unilateral if it covers a devolved matter. Given that the legislative powers being resumed by the UK as a consequence of withdrawal are being resumed by a state which has embraced legislative devolution, it is arguable that the mechanisms put in place for the future development of retained EU law should reflect that constitutional context.
13. This is perhaps particularly important given that, over matters which are devolved, the UK government is also acting as the government of England and therefore suffers from a possible conflict of interest. At times the interests of England and the rest of the UK will not necessarily coincide. There is no recognition of this in the Bill, and it marks therefore another missed opportunity to show a strategic approach to, and some respect for, the rights of the democratically-elected legislatures of the devolved nations and their respective governments. It threatens to be a further example of the sort of *ad hoc* constitutional intervention that has marred the progress of devolution and harmed relations between the nations of the UK.
14. Retained EU law will extend to and apply in all of the constituent nations of the UK. Certain of its subject matter is and will remain within the competence of devolved authorities albeit that they cannot and will not be able to legislate incompatibly with it. It is the devolved authorities therefore which have legitimate interest in any modification to that body of law however necessary or appropriate the modification.
15. It is crucial that the scrutiny of proposed modifications allows the voices of those with legitimate interest to be heard. The Bill accepts this, but limits formal involvement in the scrutiny process concerning modifications to retained EU law to members of the respective legislatures involved, and only involves them when the Minister or Ministers making the regulations is accountable to them. This is arguably insufficient.
16. It is submitted that a strong case can be made for sharing the scrutiny of these regulations or at least having enhanced scrutiny of them. Shared scrutiny could involve joint meetings of committees from Westminster and the devolved legislatures – meetings of a kind which have proved useful and effective on past occasions. Enhanced scrutiny could be employed, for example by use respectively of super-

affirmative and enhanced-negative procedures requiring relevant regulations to be laid in draft with a suitable opportunity for interested parties – even if limited to the devolved authorities – to comment and suggest amendments. Regardless of the Ministerial response to the suggestions, the report of the views of the devolved authorities would be available to the Parliamentary committees charged with the final scrutiny to inform their work and increase the chances of due regard being had to the views from the devolved nations. Given the current composition of the House of Commons, failure to show such due regard might well lead to the withholding of approval for, or the annulment of, the statutory instruments containing the proposed modifications.

17. The development of UK-wide policy frameworks in post-Brexit Britain and Northern Ireland affords an opportunity to undertake an arguably overdue constitutional appraisal with a view to creating a model of governance regarding those matters where an identified need for UK-wide policies overlaps with devolved competences, for example environmental issues and animal health. The UK state should recognize that devolution requires power sharing in such areas. Such power could be shared through ministerial co-operation in the development of policies, but would require that UK government ministers acknowledge that on devolved issues they speak for England only and that parliamentary sovereignty should not be used to override the wishes of the governments of the other nations.
18. While a constitutional convention in this regard might be deemed sufficient, it might equally be thought to offer an opportunity to enshrine a special legislative procedure in statute, similar to that in the Parliament Acts, whereby UK-wide legislation regarding such policies could not receive Royal Assent without sufficient prior consent from the devolved legislatures.
19. It should also be recognized that, if it is undesirable and impractical to have national divergence within the UK on matters such as animal health, the same is true within the island of Ireland. As the Republic will remain bound by EU law on such matters, it is therefore questionable how far a distinct UK-wide approach can be taken as opposed to a distinct approach in Great Britain.

#### **Legal Aspects of Future Trading Matters: International Obligations**

20. There is currently a process of consultation between the UK Government and the devolved administrations before UK positions are determined or particular negotiations entered into with the EU. The Bill, however, makes no provision with regard to the position of the devolved nations as the UK proceeds to create new trading links with the EU and other entities. While a member of the EU, the forging of such trading relationships was a matter for the EU, and the relevant terms of agreements reached became binding in the member states as part of EU law. Laws made by the devolved nations

have to be compatible with that law in order to be valid. Questions regarding the compatibility of such devolved legislation are questions of law to be determined by the courts.

21. It is not clear therefore from the bill how the requirements of future trading deals will be incorporated into UK domestic law and how such incorporation will affect the legislation of the devolved nations. Will the UK Parliament legislate to amend retained EU law where that is required by a future trading arrangement? Will the devolved nations be allowed to implement such laws within their territories as they currently can with EU law? Will Wales be treated any differently to Scotland and Northern Ireland because it is not a distinct jurisdiction?
  
22. With regard to trade deals outside of the EU, and possibly with the EU itself, the deals made by the UK are likely to be a source of international obligations. As such, while incompatibility with such obligations does not currently affect the legislative competence of the devolved legislatures, it is open to the Secretary of State to intervene. The Secretary of State can intervene to prevent an Assembly Bill being submitted for Royal Assent if he has reasonable grounds to believe that it contains provisions which 'would be incompatible with any international obligation'.<sup>6</sup> Unlike the current question regarding compatibility with EU law, this question is not one of law for the courts but one of political judgment. The Secretary of State's view prevails unless his order prohibiting submission for Royal Assent is annulled in one or other House of Parliament. It is unclear from the Bill as introduced what approach will be taken in future regarding incompatibility with the terms of international trading obligations. The position of the devolved legislatures *vis-à-vis* the UK government is however weakened if what is currently a question of law to be determined by the courts as a devolution issue following a full hearing becomes instead an exercise of political discretion by a Minister of the Crown. Moreover, the issues involved underline the crucial importance of a real coordination and consultation between the governments involved before international agreements are concluded.

## **Conclusion**

23. The above analysis makes a series of pertinent points on issues arising from the detailed provisions of this Bill. The Learned Society understands and shares the logic that there should be legal certainty with regard to retained EU law after British withdrawal from the EU. The Acts providing for devolution within the UK assumed British membership of the EU and the devolved legislatures have been required to comply with EU law in exercising the powers devolved to them. It is those Acts which have determined the distribution of powers within the UK. In creating a body of retained law, to be legislated by Westminster for the UK as a whole, the Bill amends the powers already devolved to the three nations.

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<sup>6</sup> GoWA 2006, s.114.

Moreover it is not clear whether this is a temporary measure or one which would permanently change the distribution of powers. It is therefore a matter of considerable constitutional import.

24. Currently EU law creates an internal market among 28 states, and by definition an internal market within the UK. After withdrawal there will need to be an internal market in the UK. Achieving this and delivering the necessary policy coherence between the four nations must take account of the constitutional and political considerations. This underlines the vital need for real consultation between governments to achieve agreed and implementable outcomes acceptable to all. It is not apparent that this has been the case in the drafting of this Bill.
25. The Learned Society of Wales hopes that the Welsh Affairs Committee will find these comments of use in its deliberations on the European Union (Withdrawal) Bill and its effects on devolved government in Wales.

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