AGREEMENT BETWEEN WELSH AND UK GOVERNMENTS ON THE EUROPEAN UNION (WITHDRAWAL) BILL: EFFECT ON CLAUSE 11

Summary

1. The proposed amendments to the Bill, agreed between the Welsh and UK Governments, considered together with the non-legislative agreement reached by them, represents an improvement on clause 11 as originally introduced in the UK Parliament, from a devolution point of view.

2. However, the Bill as amended will still allow the Assembly's competence to be restricted without its consent, and the inter-governmental agreement does not provide watertight assurance that this will not happen.

Detail

Scope of the restrictions

3. The amended clause 11 would allow restrictions to be imposed on the Assembly's competence by UK Ministerial regulations. The restrictions would take the form of preventing the Assembly from departing from retained EU law in policy areas specified in the regulations: putting those areas of legislative competence "in the freezer" to that extent. Retained EU law, of course, can include law derived from the EU but **modified by UK Ministers** after the UK leaves the EU.

4. The Assembly would be able to legislate for other changes in the policy areas concerned; but, in areas like agricultural support (a very likely candidate for restrictions), the scope for this would be extremely limited due to the reach of retained EU law. The Assembly would also remain able to change the law in restricted policy areas in ways that would not have breached pre-Brexit EU law: this would enable it, for instance, to impose higher standards of animal welfare or food safety in circumstances where present EU rules represent a mandatory minimum.

5. There is a lack of clarity and certainty about the areas in which restrictions can be imposed, as these will not be listed on the face of the Bill. The intergovernmental agreement (para. 5) states that

restrictions are "likely" to be in 24 areas, but that it is "possible" that some additional areas will be restricted. The agreement attaches a Memorandum of Understanding between the two Governments on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks. Annex A to that Memorandum sets out the "likely" 24 areas (these are the same as the 24 listed as "subject to more detailed discussion" in the "Frameworks analysis" agreed between the two Governments, and the Scottish Government and provided previously to the Assembly[1]). Annex A to the Memorandum also refers to two possible "additional" areas – ones which the UK Government believes to be reserved to the UK Parliament (the "Frameworks analysis" listed 12 such potential additional areas).

6. If the **maximum** scope of the restrictions has been identified and agreed, as the Memorandum suggests, this could have been set out in the Bill and acted as a back-stop on restrictions.

Temporary nature of the restrictions

7. The power to impose restrictions on the Assembly's competence is time-limited (to a maximum of 2 years from "exit day"). The restrictions made under the power are also time-limited (to a maximum of 5 years from their coming into force). So, restrictions may be in place until 7 years from exit day[2], but no restriction will be "live" for longer than 5 years in all[3].

8. The amendments to the Bill would introduce incentives for the UK Government to get rid of restrictions earlier than the time-limit. UK Ministers would be obliged to report to the UK Parliament every 3 months (starting 3 months after Royal Assent) on a number of matters, including the steps they have taken to implement arrangements to replace restrictions, and indeed to replace the very need for restrictions. In practice, these "arrangements", of course, mean the establishment of

[1] The 24 include agricultural support, animal welfare and food safety.

[2] Technically, a regulation containing a restriction could be in place later than 7 years after exit day: each restriction will last until an Assembly Act on the relevant matter receives Royal Assent, once that restriction has been in force for 5 years. But after the 5-year period has expired, the regulation will not actually prevent the Assembly from making laws.

[3] See footnote 2: technically, a restriction could be in existence for longer than 5 years but will not have any effect beyond that time.

common UK frameworks in the restricted policy areas (or an agreement between the UK governments that there is no need for frameworks in certain areas, after all). Frameworks will normally be put in place by UK primary legislation. The intergovernmental agreement (para. 8) states that the Sewel convention will apply to such legislation, despite any restrictions on Assembly competence being in place; this is welcome, although, of course, the convention requires Assembly consent only "normally".

9. In the 3-monthly reports, UK Ministers will also have to inform Parliament specifically about what progress they consider is needed to enable remaining restrictions, and the powers to make them, to be ended.

10. UK Ministers will have to provide a copy of each report to the Welsh Ministers, but the Bill does not require them, or the Welsh Ministers, to lay such reports before the Assembly.

11. The requirement to report every 3 months is fairly onerous (although the report must be in writing, so a personal appearance is not essential). It would provide a practical incentive to UK Ministers and civil servants to progress work on common frameworks swiftly.

Role of Assembly consent to restrictions on its competence

12. As set out above, restrictions on the Assembly's competence under clause 11 will be contained in regulations made by UK Ministers. These regulations need the approval of both Houses of the UK Parliament (affirmative procedure). **However, Parliament will be able to approve the regulations even if the Assembly has refused, or withheld, its consent to them being made.**

13. This is made clear in the proposed amendments inserting a new section 109A into the Government of Wales Act 2006. New subsection 109A(4) would read as follows:

(4) A Minister of the Crown must not lay a draft [of regulations restricting the Assembly's competence to modify retained EU law] unless–

(a) The Assembly has made a consent decision in relation to the laying of the draft, or

(b) The 40 day period has ended without the Assembly having made such a decision.

14. The words "consent decision" suggest that the Minister can only lay the draft regulations before the UK Parliament if either the Assembly has consented to their making, or the Assembly has done nothing about them for 40 days**. But this is misleading.** New subsection 109A(5) defines a "consent decision" as a decision to agree a motion consenting to the laying of the draft regulations; or a decision not to agree such a motion; or a decision to agree a motion refusing to consent to the laying of the draft regulations.

15. The amendment has been described by some as defining the concept of consent as including refusal of consent. In our view, this is not technically accurate. However, we do consider that the definition is confusing and counter-intuitive. It would have been preferable if an expression like "decision concerning consent", rather than "consent decision" was used.

16. The key point remains that **the Assembly's competence can be restricted without its consent**. The intergovernmental agreement (para. 6) states that the UK Government will "not normally" ask the UK Parliament to approve regulations imposing restrictions on the Assembly's competence without the Assembly's consent. For its part, the Welsh Government commits to not withholding recommendations of consent "unreasonably". **However, the Bill will allow the UK Minister to lay the draft regulations in the UK Parliament whether the Assembly consents to them, makes clear that it does not consent to them, or does nothing about them for 40 days.**

17. The UK Parliament can of course then reject the draft regulations. It is extremely unusual for either House to do so (particularly the Lords), but, given the current composition of each House, and the controversy

over the Bill, that may be a real possibility, at least until the next UK General Election.

18. The chances of it happening are increased by procedural safeguards in the proposed amendments to the Bill. Proposed amendments to Schedule 3 to the Bill include amendments to the Government of Wales Act 2006 (GOWA). One of these adds a new section 157ZA into GOWA. This would require the UK Government to lay (and publish) a written statement before the UK Parliament, explaining why it is seeking Parliament's approval for any regulations restricting the Assembly's competence, **where the Assembly has not expressly consented to those regulations being made**. The Minister must do this before laying the regulations.

19. More importantly, the UK Minister must also lay any statement which the Welsh Government has provided, giving its opinion as to why the Assembly has not consented. This is an unprecedented provision.

20. Given that the regulations are subject to affirmative procedure, these requirements could have some real practical effect on the outcome: the House of Lords, in particular, is likely to take serious account of an Assembly decision to refuse or withhold consent, and the reasons given for that. It is true that the Lords very rarely vote down a statutory instrument, but it is not unheard of where they have serious concerns.

21. However, there are weaknesses in the procedural safeguards. The Assembly's time to consider draft regulations restricting its competence may be short: UK Ministers can lay them in Parliament 40 days after providing the Welsh Ministers with a draft and, although the UK Government must inform the Llywydd that a draft has been provided, they do not have to provide her with a copy of the draft itself. Nor are the Welsh Ministers placed under a duty to lay the draft before the Assembly.

22. Moreover, it seems unfortunate that the Assembly's reasons for withholding consent are to be explained by the Welsh Ministers, with no duty to reflect reasons approved in the form of an Assembly resolution

or Committee report. And, finally, Parliament will only see a description of the Assembly's reasons if the Welsh Government provides one; the Bill does not impose a statutory duty on them to do so.

23. There may be scope for Standing Order changes to address some of these weaknesses (and other weaknesses in procedural safeguards, mentioned in earlier sections of this Briefing). Alternatively, Protocols between the Assembly and the Welsh Government might be agreed to fill the gaps (although a request for such a protocol might strengthen the Government's hand in relation to other areas in which it wishes to see such agreed arrangements).

Improvements over clause 11 as introduced (other than mentioned above)

24. The restriction on the Assembly's competence is no longer a blanket one applying to all areas affected by EU law, with a power for the UK Government to provide for exceptions. Instead, the default position is that the Assembly's competence is untouched, but the UK Government has a power to impose restrictions in particular areas of competence (although, as mentioned above, these areas are not to be set out on the face of the Bill and are therefore open-ended).

25. The intergovernmental agreement addresses the issue of lack of parity between England and Wales in terms of freedom to deviate from pre-Brexit EU law. In the agreement, the UK Government agrees not to introduce legislation of this nature for England while the Assembly is unable to do so for Wales. There is, however, still a lack of parity in that the Assembly will be restricted by statute, while the UK Government will be bound only by a non-legislative agreement.

Legal Services
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