Rebecca Evans AS/MS
Y Gweinidog Cyllid a Llywodraeth Leol
Minister for Finance and Local Government

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA/RE/1163/22

Huw Irranca-Davies MS
Chair
Legislation, Justice and Constitution Committee
Senedd Cymru
Cardiff Bay
CF99 1SN

11 May 2022

WELSH TAX ACTS etc. (POWER TO MODIFY) BILL

Dear Huw

Thank you once again for your consideration of the Welsh Tax Acts etc. (Power to Modify) Bill during Stage 1. I am pleased that the general principles of the Bill have been agreed, and I thank your Committee for their recommendations in this regard.

During the General Principles debate on the Bill on 26 April, I confirmed that I would provide a detailed response to your Committee's Stage 1 report and its 18 recommendations. I have set out below my response to the recommendations, including details of where I agree there is need to put forward amendments to the Bill. I have already tabled one Government amendment and will table further amendments before the closure of the tabling period.

I am copying this letter to the Chair of the Finance Committee.

Rebecca Evans.

Rebecca Evans AS/MS
Y Gweinidog Cyllid a Llywodraeth Leol
Minister for Finance and Local Government

CC: Chair of the Finance Committee

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1NA

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400
Correspondence.Rebecca.Evans@gov.wales
Gohebiaeth.Rebecca.Evans@llyw.cymru

Annex A
Welsh Tax Acts etc. (Power to Modify) Bill – Stage 1

LJC Committee Recommendations

Recommendation 1. The Minister should table an amendment to the Bill to require a statutory review of the regulation-making power in the Bill within two years of Royal Assent. The review should include an assessment of the extent to which the power provided to the Welsh Ministers to make regulations has been used

I am pleased to accept in principle the recommendation of both Committees to require the Welsh Ministers to carry out a review on the operation and effect of the Act.

However, I consider the most appropriate timing for such a review to report to be in the first year of the next Senedd term in 2026. This will help to inform the decisions of the next Senedd as to the most appropriate next steps. The aim of the review is to consider the effectiveness of this Bill. If Committees wish to undertake their own review of the Bill at any point before that, it is, of course, open to them.

Recommendation 2. The Minister should table an amendment to the Bill to include an appropriate sunset provision such that no new regulations may be made under the power in section 1 after July 2027. This will provide the Welsh Government with sufficient time to develop more appropriate approaches to legislating in respect of devolved taxation involving the use of primary legislation.

I accept in principle the recommendation of the Committee to include a sunset provision. I intend to bring forward a Government amendment that no new regulations may be made using this regulation making power after five years from the date that the Bill receives Royal Assent.

However, I do consider it important to provide the next Senedd with the opportunity to extend the life of the Act by up to a maximum of 5 years if that Senedd considers that the power should remain in force for that extended period. This will be achieved by members voting to approve an Order made by the Welsh Ministers.

These actions are intended to ensure that we are ready to take the agreed next steps in our devolution journey at a specified point in the future. This could include the continued operation of the Act for a limited period, the removal of the power to make further regulations, or agreement on any new arrangements.

Recommendation 3. The Minister should provide in advance of the Stage 1 debate, examples of circumstances in which the Minister would be prevented from using the power proposed in section 1 of the Bill as a result of the “appropriate” test.

I have provided information on this in my response to you in advance of the General Principles debate.

Recommendation 4. The Minister should table an amendment to remove the “necessary or appropriate” test from section 1 of the Bill.

The aim of including the “necessary or appropriate” thresholds in section 1(1) of the Bill is to indicate the kind of provision that can be made using the power. The “appropriate” threshold

is intended to provide a degree of flexibility for the Welsh Ministers to ensure the response is right for our citizens and taxpayers.

I recognise that the “necessary or appropriate” test is a subjective one and that this presents challenges for Members in deciding whether to support the power, because it is not easy to envisage what Welsh Ministers might consider necessary or appropriate in the future. I hope that my letter dated 22 April in response to your Recommendation 3 has helped Committee Members.

There are valid and important reasons to keep the test. Removing the test means that we will be left with a power that is at least as wide as the power that is already in the Bill, but we will lose the indications given by the test about what the power can be used for. The Welsh Ministers will be able to make regulations “for or in connection with” any of the four purposes - full stop. There will be no statutory requirement for Ministers to believe that the regulations are either necessary or appropriate. They will of course have to reach a rational conclusion and follow public law rules in deciding on how to use the power and so they will likely end up in the same place - that is, making regulations that they consider suitable for one or more of the four purposes.

Moreover, removing the test will mean that the only grounds available to challenge its use in the courts will be the generic public law grounds - there will be no chance to challenge its use on stand-alone grounds that the provision made was not “necessary” or that it was not “appropriate”

Ultimately all decisions to use the power, and all judgments about whether the use is necessary or appropriate, would require approval by the Senedd. And, of course, all those decisions would be open to challenge in the courts.

Taking this into consideration, I believe that retaining the “necessary or appropriate” test is the more useful and transparent approach and so removing that test is not something I can support.

Recommendation 5. The Minister should table an amendment to the Bill to limit the meaning of “tax avoidance” in section 1(1)(b) by reference to the general anti-avoidance provisions set out in Part 3A of the Tax Collection and Management (Wales) Act 2016.

As I have set out previously to the Committees, whilst I recognise a precise definition of what constitutes avoidance activity may be attractive, it is not possible to provide that degree of certainty. If defined in this way, there is a risk that Welsh Ministers might find the purpose is too narrow. Those seeking to bend the rules may also structure transactions in a way that fell just outside a narrower definition but would still achieve a tax result which was contrary to the intentions of the legislation.

The Welsh Ministers want to be able to, potentially, address the broadest meaning of tax avoidance, and so it is appropriate not to define this term and instead to allow the phrase “tax avoidance” to take its ordinary meaning.

I am therefore unable to accept this recommendation.

Recommendation 6. Subject to Recommendation 8, the Minister should table an amendment to the Bill to exclude the general anti-avoidance provisions in Part 3A of the Tax

Collection and Management (Wales) Act 2016 from the scope of the regulation-making power in the Bill.

I believe I have set out clearly in my response to the Chair of the Finance Committee prior to the General Principles debate that there may be future scenarios where it may be necessary to use this power to make changes to the general anti-avoidance rule provisions in Part 3A of the TCMA. I am therefore unable to accept this recommendation.

Recommendation 7. Given the potential extent to which the regulation-making power may be exercised in connection with the purpose set out in section 1(1)(d) of the Bill, the absence of a satisfactory explanation for how the power will be used for that purpose and the acknowledgement that a need for the power in such circumstances has not yet arisen, the Minister should table an amendment to remove section 1(1)(d) from the Bill.

As with Recommendation 6, I set out in my previous response to the Chair of the Finance Committee future scenarios where it may be necessary to use this power to make changes in relation to responding to the court and tribunal decisions. I am therefore unable to accept this recommendation.

Recommendation 8. Given that the scope of the regulation-making power proposed in the Bill would enable the Minister, or any future Minister, to modify any of Parts 1 and 3 to 10 of the Tax Collection and Management (Wales) Act 2016 and in the absence of any justification or examples to explain what the power would or could be used for, the Minister should table an amendment to the Bill such that regulations under section 1 may not amend any provision contained in the 2016 Act.

I have set out clearly in my response to the Chair of the Finance Committee prior to the General Principles debate future scenarios where it may be necessary to use this power to make changes in relation to the Tax Collection and Management (Wales) Act 2016. I trust that this provides the justification requested by Committee members and I am therefore not minded to accept this recommendation.

Recommendation 9. The Minister should, in advance of the Stage 1 debate, set out likely scenarios in which regulations to be made in respect of each of the purposes listed in paragraphs (a) to (d) of section 1(1) of the Bill could:

- impose landfill disposals tax or land transaction tax by virtue of section 2(1) (a);

- impose or extend a liability to a penalty by virtue of section 2(1) (b).

I have provided the required information in my response to the Chair of the Finance Committee. That response sets out a number of examples in respect of the three Welsh Tax Acts for each of the four purpose tests and how they may impact the amount of landfill disposals tax or land transaction tax payable.

In relation to the imposing of a penalty, that will in all likelihood be triggered primarily by a response to a court case (section 1(1)(d)) or, to protect against tax avoidance. For example, perhaps the introduction of a new penalty targeted at a particular avoidance activity or behaviour by taxpayers, their advisers or the promoters of avoidance schemes.

Penalties do not impact the amount paid into the Consolidated Fund (section 1(1) (c)), and are unlikely to be impacted by international obligations (section 1(1) (a)).

Recommendation 10. The Minister should table amendments to the Bill such that the exercise of the regulation-making power in accordance with section 2(1) (c) is constrained:

▪ as regard the purpose under section 1(1)(b) relating to tax avoidance, such that it cannot take effect earlier than the date on which the Welsh Government announced in the Senedd by statement its intention to legislate;

▪ as regards the purpose under section 1(1)(c) in relation to changes to a predecessor tax, such that it cannot take effect earlier than the date that the relevant change is made by the UK Parliament (or the UK Government, should that be the case);

▪ as regards the purpose under section 1(1)(d) relating to the decision of a court or tribunal, such that it cannot take effect earlier than the date on which the Welsh Government announced by statement that it will change the law in the light of the relevant court or tribunal decision (subject to Recommendation 7).

I accept in principle this recommendation and have tabled a Government amendment to restrict the ability to legislate retrospectively back only as far as the date of a Welsh Government announcement, in cases where a change may impact negatively (tax becomes payable or an increased amount of tax becomes payable) on taxpayers.

Recommendation 11. The Minister should table an amendment to the Bill to provide that regulations made under section 1 may not amend existing regulation-making powers (or/and their associated approval procedures) in the Welsh Tax Acts.

I accept in part this recommendation and will bring forward an amendment at Stage 2 to restrict the use of the power to prohibit any changes to the approval procedures for existing regulation-making powers in the Welsh Tax Acts.

I consider that a restriction on amending the existing regulation making powers will be overly restrictive. For example, using the power in the Bill to amend Schedule 5 to the LTTA (higher residential rates) could also result in widening the existing scope of the associated regulation making power to encompass those changes made to Schedule 5).

Similarly, if the power in the Bill was used to create a new obligation for taxpayers to make a return, then it would be right to amend section 52(2) of the LTTA[1] so that the new provision would be included in the list of those provisions that could be amended by regulations, to alter the existing filing time limits. Again, such a change could be considered to amount to amending the regulation making powers.

I do not consider that the level of restriction this would impose, if the recommendation was fully accepted, is appropriate. I trust that the proposed restriction on changing the procedure, together with, in particular the limited circumstances in which the power in the Bill can be used (the four purpose tests) and the sunset clause will reassure the committee that sufficient safeguards will exist.

[1] Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 (legislation.gov.uk)

Recommendation 12. In the event that Recommendation 10 is not accepted, the Minister should table amendments to the Bill:
▪ to provide that the policy statement for regulations to be made under section 1 that have retrospective effect (and any future revisions to the statement) must be laid before, and approved by, the Senedd in addition to being published;

▪ to provide that the power in section 1 may only be exercised retrospectively in accordance with a policy statement approved by the Senedd

This recommendation is an alternative to Recommendation 10 which I have accepted in principle. I am therefore unable to accept this recommendation.

Recommendation 13. The Minister should, in advance of the Stage 1 debate, explain why a super affirmative procedure was not included in the Bill to enable Senedd Committees to have enough time to take evidence when scrutinising regulations that may be made under section 1 of the Bill.

Recommendation 14. The Minister should, in advance of the Stage 1 debate, clarify what would constitute "by reason of urgency" when choosing to use the made affirmative procedure under section 4 of the Bill.

I provided written responses to Recommendations 13 and 14 in advance of the General Principles debate. I trust that this provided clarification.

Recommendation 15. Explanatory Memoranda accompanying regulations subject to the made affirmative procedure must set out full justification for the need to act urgently.

I am pleased to accept this recommendation that future Explanatory Memorandums must set out the full justification for the need to act urgently if the made affirmative procedure is used in relation to this Bill.

Recommendation 16. The Minister should table an amendment to the Bill to introduce a minimum period of 28 days within the 60 day period referred to in section 4(5) of the Bill to provide Senedd Committees with time to scrutinise regulations subject to the made affirmative procedure before a vote on such regulations can take place.

I accept this Recommendation and will table an amendment at Stage 2 to introduce a minimum period of 28 days within the maximum 60 day period referred to in section 4(5) of the Bill to ensure the made affirmative procedure regulations cannot be voted on before that 28-day period has passed.

Recommendation 17. If the Bill is enacted, the Senedd's Standing Orders should be amended to require a minimum period of 28 days after the making of regulations subject to the made affirmative procedure before a vote on such regulations can take place.

As you will be aware, the Senedd's Standing Orders are a matter for the Senedd, not the Welsh Government and any Recommendations should be put forward to the Business Committee for consideration.

Recommendation 18. The Minister should table an amendment to the Bill such that regulations to be made in accordance with section 1(1)(b) or section 1(1)(d) which have retrospective effect should be subject to the draft affirmative procedure only (subject to Recommendation 7).

In order for regulations to proceed under the made affirmative procedure Welsh Ministers have to be satisfied that it is urgently necessary to do so. The threshold to be applied in deciding to bypass the usual draft affirmative procedure is a narrow one - it is a stringent test of both urgency *and* necessity. As such I believe that in cases where Welsh Ministers, acting in accordance with public law principles, believe it is urgent and necessary to bring the legislation into force in advance of scrutiny, debate and vote in the Senedd then I believe that it is correct to do so, and I do not consider the draft affirmative procedure to be suitable for the circumstances that may need to be addressed.

There will inevitably be times when tax law will need to be changed urgently in response to external factors and this Bill is intended as a pragmatic step to take now while we work towards an architecture for making tax changes that is right for us here in Wales.

In addition, I have accepted that the power in the Bill will be restricted to the date of an announcement of the changes, in so far as it may impact on taxpayers negatively in terms of tax payable,. I also set out in my previous response to the Chair of the Finance Committee future scenarios where it may be necessary to use this power to make changes in relation to section 1(1)(b) and section 1(1)(d) and this includes scenarios where we may wish to respond at pace using the made affirmative procedure. I consider these measures negate the need for an additional restriction limiting regulations for tackling avoidance and addressing court decisions to only be made through draft affirmative procedure regulations. I am therefore unable to accept this recommendation.