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**Llywodraeth Cymru**  
**Welsh Government**

Huw Irranca Davies MS  
Chair  
Legislation, Justice and Constitution Committee  
Senedd Cymru  
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Dear Huw,

Thank you for your follow-up letter of 15 December, regarding the Welsh Government consenting to UK Government subordinate legislation.

I look forward to receiving your further comments in due course. In the meantime, as requested, please find enclosed a copy of the Welsh Government's Principles for Correcting Deficiencies in EU-derived Domestic Legislation.

Yours sincerely,

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

## European Transition Legislation Board

### Principles for Correcting Deficiencies in EU-derived Domestic Legislation: Guidance for Officials

#### Background

1. The Welsh Ministers' powers under clause 10 of and Schedule 2 to the EU (Withdrawal) Bill<sup>1</sup> extend to making regulations which amend UK legislation (i.e. made by Parliament or a Minister of the Crown), so far as that amendment is within the Welsh Ministers' devolved competence (as defined in the Withdrawal Bill). These powers overlap with those conferred on Ministers of the Crown under clause 7, which allow Ministers of the Crown to make provision within the Welsh Ministers' competence. It is therefore open to the Welsh Ministers to agree that the UK Government amend UK legislation on our behalf, even if it would be within the Welsh Ministers' competence to do so.
2. The Cabinet Sub-Committee on European Transition has discussed this issue and agreed that, in the exceptional circumstances of the UK's withdrawal from the EU, UK legislation can be corrected by UKG SIs under clause 7, if the deficiencies are purely technical in nature and there would be no significant devolved policy interests at risk if the deficiencies were to be corrected by UKG.
3. A working group – with representatives from Legal Services, the European Transition Team and Environment, Planning and Rural Affairs – was set up under the auspices of the European Transition Legislation Board Sub-Group on Secondary Legislation to discuss and propose principles for how the Welsh Ministers should approach dealing with deficiencies in:
  - a. UK legislation –, the modification of which is within the Welsh Ministers' 'devolved competence' (as defined in the Withdrawal Bill).
  - b. Composite instruments – i.e. made individually by the Welsh Ministers and a Minister of the Crown, albeit in a single composite SI.
  - c. Joint instruments – i.e. made by both the Welsh Ministers and a Minister of the Crown acting together in a single SI.
4. It was accepted that the Welsh Ministers will, alone, make any necessary modifications to Wales-only legislation (i.e. made by the Assembly or by the Welsh Ministers in an SI given a separate number in the Welsh series published by

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<sup>1</sup> References to clause numbers are based on the EU (Withdrawal) Bill as introduced and are subject to updating.

National Archives)), It was further noted that UK Government must make any necessary modifications which are outside the Welsh Ministers' powers under the Withdrawal Bill.

5. The working group produced a set of principles (see **Annex A**) and examples of how Welsh Government ('WG') policy divergence with UK Government might inform their application (**Annex B**).
6. However, officials are reminded that Ministerial consent must be obtained for the approach they propose to take for the correction of deficient instruments.

## **Annex A: Principles to inform how the Welsh Ministers should approach the correction of ‘deficiencies’ , where there is an overlap between the powers of the Welsh Ministers and Ministers of the Crown under the EU (Withdrawal) Bill**

### *A. Provision in UK legislation that extends and applies to England and Wales (excluding joint and composite instruments)*

1. This would include provisions in Acts of Parliament and provisions in subordinate legislation made by UK Ministers that extends and applies to England and Wales (whether or not it also extends and applies to other territories).

2. The following principles should apply to corrections to this type of provision:

- a. UK Ministers should use their powers to correct the deficiency unless —**
  - i. there is divergence between the Welsh Government and the UK Government on the policy for the correction, or**
  - ii. the substance of the correction is politically sensitive.**
- b. If a. i. or ii. apply, and it is within their powers under the Withdrawal Bill, the Welsh Ministers should use these powers to correct the deficiency.**

### *B. Provision in Composite instruments*

1. Composite legislation is a single instrument in which more than one person legislates – each with a different territorial application (creating, in effect, two versions of the same legislation). Composite England-Wales legislation is subject to both Assembly and Parliamentary procedures. Making legislation by way of composite instrument is a matter of choice (often for reasons of accessibility / efficiency where there is no policy divergence), and does not flow from a statutory requirement to do so. It is widespread within certain policy areas (for instance the environment and, to a lesser extent, agriculture and fisheries).
2. Legislation made on a composite basis can, under the Withdrawal Bill, be amended either by the Welsh Ministers (in relation to Wales) or a Minister of the Crown (in relation to England or England-and-Wales) acting alone or by way of a composite amending instrument.
3. There are strong policy, legal and practical arguments in favour of simplifying amendments to composite instruments such that only one amending instrument be used. This will help to ensure that the legislation as amended remains accessible, does not require that currently identical legislation be split into Wales- and England-

only versions (again, important in terms of stakeholder accessibility) and maximises the efficiency of available resource in both WG and UKG to focus on areas of greater existing policy divergence. It is noted, however, that there may be instances in which the WG and UKG policy approach to corrections does not align (**Annex B**).

4. The following principles should apply to corrections to provisions in composite instruments:
  - a. **If there is no policy divergence between WG and UKG and the substance of the correction is not politically sensitive:**
    - i. **UKG agreement and co-operation be sought to make those amendments on a composite basis.**
    - ii. **Where UKG does not agree to make amendments on a composite basis, WG requests that UKG makes those amendments in relation to England and Wales.**
    - iii. **Where UKG does not agree to make amendments in relation to Wales, amendments be made by the Welsh Ministers alone.**
  - b. **If there is policy divergence between WG and UKG but it is agreed that this can be accommodated in a composite instrument, the amendments may be made on a composite basis.**
  - c. **If there is policy divergence between WG and UKG which cannot be accommodated in a composite amending instrument, or if the substance of the correction is politically sensitive, amendments be made by the Welsh Ministers alone.**

### *C. Provision in Joint instruments*

5. A joint instrument is a single piece of legislation made by more than one party with a single territorial application (e.g. 'England and Wales'). The parties are normally *required* to exercise the relevant power together, but may in some circumstances be expressly empowered to make legislation jointly. Joint legislation is relatively rare, but common in some areas (such as water).
6. The Welsh Ministers are prohibited from making amendments to joint instruments<sup>2</sup> other than by way of an amending instrument made jointly with the relevant Minister

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<sup>2</sup> ... or, more accurately, to a 'matter in respect of which a power to make subordinate legislation otherwise than under this Act is exercisable by the Welsh Ministers acting jointly with a Minister of the Crown, unless... made jointly with the Minister of the Crown' – which is a broader restriction in that it also prohibits making any provision equivalent to such amendment.

of the Crown by paragraph 7(2) of Schedule 2 to the Withdrawal Bill. Such joint amending instruments are, however, provided for by paragraph 1(2) of that Schedule. It should be noted that Ministers of the Crown are not similarly restricted – and are, therefore, able to modify joint instruments unilaterally.

7. The following principle should apply to corrections to provisions in joint instruments:

**Policy colleagues with responsibility for joint instruments containing deficiencies contact their opposite numbers in Whitehall to ascertain how UKG proposes to amend such instruments and offer to work with them on the production of joint amending instruments where appropriate.**

*D. Provision in UK legislation that applies only in relation to Wales*

8. This includes provisions in Acts of Parliament and provisions in subordinate legislation made by UK Ministers that applies only in relation to Wales (or applies only for the purpose of enforcing or making effective provision that applies only in relation to Wales). This would include provision that was originally enacted or made to apply in relation to Wales and other territories but which has subsequently been amended so that it applies only in relation to Wales.

9. The following principles should apply to corrections to this type of provision:

**a. If it is within their powers under the Withdrawal Bill, the Welsh Ministers should use these powers to correct the deficiency unless—**

- i. there are other provisions applying in relation to England (or England and Wales) that require correction in the same legislative instrument in which the deficient Wales only provision is contained,**
- ii. the connections between the provisions make it impractical from the drafting and handling perspectives for the corrections to be dealt with in two separate SIs,**
- iii. there is agreement between the Welsh Government and the UK Government on the policy for the correction, and**
- iv. there are no political sensitivities on the substance of the correction.**

**b. If a. i, ii, iii and iv. apply, UK Ministers should use their powers to correct the deficiency along with the deficiencies in other provisions applying in relation to England (or England and Wales).**

## **Annex B: Examples of policy divergence between the Welsh Government and the UK Government**

*The transfer of functions from the European Commission to a Minister of the Crown or to an existing or newly established UK-wide public authority*

1. Regulations under clause 7/Schedule 2 can provide for functions of EU entities (such as the European Commission) to be exercisable by a public authority in the UK, including a newly established public authority or one established for the purpose.<sup>3</sup>
2. The transfer of functions from the European Commission to a Minister of the Crown or to an existing UK-wide public authority may be something on which there is a policy divergence between UKG and WG. The Welsh Government may consider that it would be more appropriate for the functions to be transferred to the Welsh Ministers or to a devolved public authority. Or WG may consider that it would not be appropriate for some of the functions which were exercised by the Commission to be exercised by a UK body, for example powers of inspection.

*Modifications to obligations under existing reciprocal arrangements*

3. One of the items which are regarded as a deficiency under clause 7(2) is reciprocal arrangements which are no longer appropriate. The Explanatory Notes to the Withdrawal Bill refer to reciprocal arrangements between states which include reciprocal rights of citizens and note that the obligations under those arrangements (both UK obligations and EU member states' obligations to the UK) will fall away at the point where the UK leaves the EU. Any obligations beyond that time would only exist if they were agreed between the EU and the UK as part of the arrangements for a future relationship. However, without a correction, the UK's law would still include recognition of EU citizens' rights. The power to deal with deficiencies can therefore modify, limit or remove the rights which domestic law presently grants to EU nationals.
4. One of the examples of UK obligations under reciprocal arrangements is the requirement in the UK regulations for mutual recognition of professional qualifications which transpose the UK's obligations under EU Directive 2005/36. Once the obligations under these arrangements fall away there are policy choices to be made as to whether the equivalent professional qualifications of EU nationals will continue to be recognised. Where the regulation of professions is devolved, it may be that WG policy diverges from UKG policy, such that it would not be

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<sup>3</sup> A UK government amendment to Clause 7 will remove the power to create a new public body. The effect of this change will be that any new public body required as a result of EU exit would be created via primary legislation.

appropriate for regulations made by a Minister of the Crown to modify retained EU law in way which is not consistent with WG policy.

#### *Common legislative frameworks*

5. It may be that in areas where UKG believes a common legislative framework is required / desirable (whether taking the form of UK Parliamentary legislation alone, or alongside equivalent provision by the DAs) their approach to operability differs from ours. It may be, for instance, that the UKG preference in such cases is for more limited, or even temporary, 'corrections' than WG would like – which might give rise to circumstances in which the WMs wished to exercise their own powers more broadly.