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Ein cyf/Our ref MA-L/FM/0117/19

Mick Antoniw AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
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05 March 2019

Dear Mick,

I am writing to you in your capacity as Chair of CLAC, to bring The Challenges to Validity of EU Instruments (EU Exit) Regulations 2019 to your attention.

Chris Heaton-Harris MP, Parliamentary Under Secretary of State at DExEU, wrote to me regarding this SI as a courtesy, to notify the Welsh Ministers of plans to confer new functions on them. I have written to him acknowledging this SI, and confirming that the Welsh Ministers do not object to the conferral of these new functions. I am also laying a written statement in the National Assembly regarding this SI.

This SI legislates in a reserved area, and as such the Intergovernmental Agreement does not apply nor do the requirements of Standing Order 30C. However, unusually, this SI confers new functions on the Welsh Ministers. In the interests of transparency, and to give a more complete picture for CLAC's scrutiny of the UK EU Exit SI programme, I considered it appropriate to draw your attention to the SI.

Currently, UK courts and tribunals can make a preliminary reference to the Court of Justice of the European Union ('CJEU') where a decision on a question is necessary to enable the court or tribunal to give judgment. A reference can be made for a ruling on whether the relevant EU law is actually valid. Following the UK's exit from the EU, UK courts and tribunals will no longer be able to make preliminary references to the CJEU. Therefore, in the UK, the CJEU will have no role in questions of interpretation or validity with regard to retained EU law after exit and consequentially.

Paragraph 1 of Schedule 1 to the EU (Withdrawal) Act provides that, after the UK's departure from the EU, there will be no right in domestic law to challenge retained EU law on the basis that, immediately before exit day, an EU instrument was invalid. However, there is a power conferred on a Minister of the Crown to make regulations which, notwithstanding the general prohibition, allow for certain types of challenges to retained EU law.

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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.

The Welsh Government's preferred position is that where cases have begun before exit day it is important that they are able to continue where possible. This is in line with the Welsh Government's general policy of continuity. This is also the policy position of the UK Government for court cases that will fall into these circumstances. Consequently, the Regulations under paragraph 1 of Schedule 1 make transitional provision so that UK courts and tribunals can consider the validity of EU law instead of the CJEU.

This approach is pragmatic. It avoids the possibility of cases getting caught in a legal limbo, whereby they cannot progress until a UK court or tribunal receives a ruling from the CJEU that will never arrive.

The draft regulations propose giving Welsh Ministers a power to intervene in cases. This reflects the fact that there may be cases where validity challenges are made concerning EU law with an impact in or on Welsh devolved matters. The likelihood of this power needing to be exercised is very low, but the existence of this power is essential should such a challenge be made before exit day. Additionally for parity, and to ensure all devolved administrations are treated equally, the regulations specify that where a court or tribunal is planning on issuing a declaration of invalidity, it must notify Welsh Ministers, as well as UK Ministers, Scottish Ministers and a Northern Ireland department.

As this SI legislates in relation to a reserved matter, there are no implications for the legislative competence of the National Assembly.

These powers would be time limited to deal only with cases that are already in progress before exit. There are only two current pending cases which would definitely be caught by these proposals if the UK's exit were taking place today. We cannot know how many other validity challenges will be made before exit day, but as there have only been ten such references in the last four years, it is unlikely to be a large number.

Yours sincerely,

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