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Llywodraeth Cymru
Welsh Government

David Rees AM
Chair
External Affairs and Additional Legislation Committee

Mick Antoniw AM
Chair
Constitutional and Legislative Affairs Committee

26 February 2018

Dear David and Mick

Joint EAAL/CLAC Committee session 12 February: the Trade Bill and trade policy

Thank you for the opportunity to give evidence to the Committees on 12 February on Welsh Government's trade policy and on the first Bill of many which we will no doubt consider together over the course of our withdrawal from the EU. It was my pleasure to be able to assist the Committee and I stand ready to offer any further assistance which you believe I can give.

During the course of the session there was discussion about the role that the Trade Bill plays in enabling international trade agreements to be entered into, the nature of what implementation means in the context of the clause 1 and 2 powers, and the question of powers to open up market access to the NHS under international trade agreements. I offered a note from lawyers which I enclose here in the hope that it will be of assistance.

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.

ANNEX

Trade Bill Legislative Consent Memorandum: Joint CLAC/EAAL Committee session 12 February 2018 Cabinet Secretary for Economy and Transport's evidence session follow up note

The Trade Bill powers and entering into international trade agreements

1. The Trade Bill does not give the UK Government power to enter into the GPA¹ or international trade agreements; it already has the power to do that under the Royal Prerogative².
2. The Bill gives devolved and UK ministers powers to implement the GPA and international trade agreements. Broadly speaking the core of what this means is that it gives ministers powers to change UK law in whatever way is thought appropriate-
 - (a) to ensure that there is nothing in UK law to prevent or impede the UK's compliance with an agreement, or the enjoyment of the rights conferred by an agreement;
 - (b) to enable or assist obligations under the agreement to be complied with or rights to be enjoyed.
3. The power to implement trade agreements can only be used to implement agreements with states who already have trade agreements with EU on exit day, or on the day the implementing regulations are made, if sooner. It does not give powers to implement trade agreements with states who do not already have trade agreements with the EU.

The meaning of *implementing* agreements

4. International trade agreements create rights and obligations which are enforceable by the contracting state parties, and sometimes also by nationals of the contracting state parties. These rights and obligations form part of international law, and are enforced at the international level, e.g. via a dispute resolution procedure created or authorised under the agreement itself. Without more, these rights and obligations stay at the international level; they do not flow into domestic law and so cannot be enforced in UK courts.
5. Some of these international rights and obligations may need to be created in UK law as well, so that they can be enforced in UK courts, or UK law may need to be changed in some way to ensure that the UK is compliant with an obligation that an international agreement imposes, e.g. an agreement might impose a requirement on the contracting

¹ Agreement on Government Procurement, a non-mandatory agreement, one of the WTO Agreements.

² There is useful material on the Royal Prerogative in this 2017 House of Commons Briefing Paper:

<http://researchbriefings.files.parliament.uk/documents/SN03861/SN03861.pdf>.

state parties to ensure that nationals of the other party are given rights to challenge state decisions of one kind or another in the other state's domestic legal system.

6. The nature and scope of the changes needed to UK law will vary, depending on what kind of international rights and obligations are involved, and how different they are to what exists in UK law already, for example-
 - (a) if a right to be enjoyed under the agreement by nationals of the other contracting party already exists in UK law and applies to everyone, it is likely that no changes will be needed;
 - (b) if the right already exists in UK law for some individuals or entities and just needs to be extended to nationals or entities of the other contracting state party, the change needed to UK law might be as simple as adding that state party to an existing list of countries in the UK legislation which creates the existing UK right;
 - (c) if the right or obligation is entirely new to UK law or is subject to caveats or qualifications then theoretically at least, the change needed to UK law could be complex; it might encompass for example, the setting up of a new statutory scheme involving criteria or tests to be met, procedural rules to be followed, penalties for breach, consequential amendments to other legislation, and so on.
7. It is likely that any of these changes could fairly be said to amount to *implementation*.

International agreements and the NHS

8. Because it is not the Bill which gives the UK Government the power to enter into an international trade agreement it is not the Bill which would allow the UK Government to commit itself under a trade agreement to opening up market access to the NHS internationally, or to refrain from subsidising the NHS or to limit the ability to regulate it.
9. But if the UK Government did do those things, and if the House of Commons did not object (assuming it was consulted under CRAGA³), the powers in the Bill could be used to change UK law in whatever way was thought appropriate to ensure that the UK complied with those NHS related international obligations. Because there are no express limits on how UK Ministers can use concurrent powers under the Bill it seems that UK Ministers could make the necessary changes to devolved law, regardless of whether devolved consent was forthcoming or not. Whether they could make changes that were not essential for compliance is a more complicated question and beyond the scope of this note.
10. Two points are notable. The first is that the clause 2 power to implement international trade agreements can only be used to amend primary legislation which is *retained EU*

³ The Constitutional Reform and Governance Act 2010, Part 2: *ratification of treaties*.

law. It seems inherently unlikely that primary legislation establishing the NHS amounts to *retained EU law* and so if any changes to that establishing legislation were necessary to comply with market access related international obligations, an Act of Parliament (or the Assembly) is likely to be required.

11. The second point is that the Committee may wish to seek its own legal advice about the extent to which Standing Order 30A might be relevant to the exercise of concurrent Trade Bill powers, or the extent to which it might be within the Assembly's legislative competence to un-do changes made in devolved areas by UK ministers using concurrent Trade Bill powers.