

UK MINISTERS ACTING IN DEVOLVED AREAS

115 - The Agriculture (Legislative Functions) (EU Exit) (No 2) Regulations 2019

Laid in the UK Parliament: 14 February 2019

Sifting

Subject to sifting in UK Parliament?	No
Procedure:	Affirmative
Date of consideration by the House of Commons European Statutory Instruments Committee	N/A
Date of consideration by the House of Lords Secondary Legislation Scrutiny Committee	W/C 25/02/2019
Date sifting period ends in UK Parliament	N/A
Written statement under SO 30C:	Paper 52
SICM under SO 30A (because amends primary legislation)	Not required

Scrutiny procedure

Outcome of sifting	N/A
Procedure	Affirmative
Date of consideration by the Joint Committee on Statutory Instruments	Not known
Date of consideration by the House of Commons Statutory Instruments Committee	Not known
Date of consideration by the House of Lords Secondary Legislation Scrutiny Committee	Not known

Commentary

These Regulations are proposed to be made by the UK Government pursuant to section 8(1) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018.

This instrument changes the identity of the public authority which carries out the specific functions under the EU Regulations set out in the Welsh Government statement. It also converts EU procedures to UK procedures, as appropriate. The functions are conferred on the Secretary of State, Scottish Ministers, Welsh Ministers and DAERA in Northern Ireland to exercise in their respective areas as detailed in section 6.1-6.2 in this explanatory memorandum. The Secretary of State may also exercise the functions on behalf of a devolved administration, but only with their consent.

The regulations are to be subject to the affirmative procedure at Westminster.

Legal Advisers make the following comments in relation to the Welsh Government's statement dated 19 February 2019 regarding the effect of these Regulations:

A The statement states:

"The 2019 Regulations contain provision which enables the Welsh Ministers to exercise functions in relation to Wales without encumbrance and for the Welsh Ministers to provide consent to the Secretary of State to exercise those functions in relation to Wales.

*Functions transferred to the Secretary of State to be exercised concurrently with the consent of the Welsh Ministers may constitute functions of a Minister of the Crown for the purposes Schedule 7B to the Government of Wales Act 2006. **This may be a relevant consideration in the context of the Assembly's competence to legislate in the future in these areas.** [our emphasis]*

*Functions transferred so that they are exercisable by the Secretary of State alone or to the Secretary of State but which are only exercisable with the consent of the Welsh Ministers in relation to Wales constitute functions of a Minister of the Crown for the purposes of Schedule 7B to GoWA 2006. **A future Assembly Bill seeking to remove or modify these functions could trigger a requirement to consult the UK Government.**" [our emphasis]*

Standing Order 30C.3(ii) requires the written statement to "specify the impact the statutory instrument may have on the Assembly's legislative competence and/or the Welsh Ministers' executive competence;" This statement (and in particular the sentences highlighted above) suggests rather than specifies.

Clarification was sought by the Committee on a similar point in relation to the Nutrition (Amendment etc.) (EU Exit) Regulations 2019. In her response of 7 February 2019 to the Committee's letter of 31 January 2019, the Minister referred to her response to queries raised in relation to the Plant Breeders' Rights (Amendment etc.) (EU Exit) Regulations 2018. Here, the Minister states that:

"Welsh Government officials are in contact with the Wales Office about the unintended restrictions on the Assembly's competence created by powers conferred in EU Exit SIs and other legislation, which engages paragraphs 8, 10 and 11 of Schedule 7B of the Government of Wales Act. Officials are examining the issue in detail and considering how it can

best be resolved. The Welsh Government will keep the National Assembly, including the Constitutional and Legislative Affairs Committee, informed about the progress of these discussions.”

B Paragraph 6.1. of the Explanatory Memorandum states as follows:

*“The corrections made by this instrument relate will create regimes for the UK that will respect the UK devolution settlements. In most instances, where regimes are devolved, the powers will be transferred to the relevant Ministers or department of Scotland, Wales and Northern Ireland, but with provision for the Secretary of State to act on behalf of Scottish Ministers, Welsh Ministers or the Department of Agriculture, Environment and Rural Affairs (“DAERA”) in Northern Ireland, with consent. The ability of the Secretary of State to be able to act for one or more of the devolved administrations will allow for powers to be exercised uniformly across the UK or across certain constituent nations, where it is convenient to do so. **In certain cases, the ability of the Secretary of State to act with the consent of Ministers does not apply to Wales.**” [our emphasis]*

The Explanatory Memorandum does not explain what those cases are. The Welsh Government statement does not refer to this point, let alone explain when it applies or why a different approach has been taken in those cases. The Committee may wish to seek clarification from the Minister.

C The drafting of some amendments such as those made by regulation 88 give rise to particular concern. As is generally the case in EU Exit regulations, powers are conferred upon “the appropriate authority”. However, in these Regulations the Secretary of State is the appropriate authority if the Welsh Ministers consent. In other regulations, the devolved administrations remain the relevant or appropriate authority but may consent to the Secretary of State making regulations. The drafting seen here permits a more formal transfer of authority to the Secretary of State. Neither the Welsh Government statement nor the Explanatory Memorandum make reference to this. The Committee may wish to seek clarification from the Minister.

Subject to the above, the statement and the Explanatory Memorandum to these Regulations confirm their effect and the extent to which these Regulations would enact new policy in devolved areas.

Legal Advisers do not consider that any significant issues arise under paragraph 8 of the Memorandum on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks in relation to these Regulations. However, it is unclear from the Welsh Government’s

statement dated 19 February 2019 what impact the Regulations may have on the Assembly's legislative competence.