

Scrutiny of regulations under the European Union (Withdrawal) Act 2018: Progress report

February 2019

The European Union (Withdrawal) Act 2018

1. The *European Union (Withdrawal) Act 2018*¹ (the 2018 Act) provides UK Ministers and the Welsh Ministers with regulation-making powers to amend existing primary and secondary legislation² in order to correct deficiencies in UK law that may arise following the UK's departure from the EU.
2. As explained in our guide,³ the powers permit UK Ministers to act in Wales in devolved areas, i.e. UK Ministers and the Welsh Ministers hold some powers concurrently.
3. In an agreement between the UK and Welsh Governments (the Intergovernmental Agreement),⁴ the UK Government commits not to act in devolved areas without the agreement of the Welsh Government. It states:

“The UK Government will be able to use powers under clauses 7, 8 and 9 to amend domestic legislation in devolved areas but, as part of this agreement, reiterates the commitment it has previously given that it will not normally do so without the agreement of the devolved administrations. In any event, the powers will not be used to enact new

¹ [European Union \(Withdrawal Act\) 2018](#)

² Secondary legislation is also referred to as subordinate or delegated legislation

³ Constitutional and Legislative Affairs Committee, [Scrutiny of regulations under the European Union \(Withdrawal\) Act 2018: A guide](#), January 2018

⁴ [Intergovernmental Agreement on the European Union \(Withdrawal\) Memorandum and the Establishment of Common Frameworks](#)



policy in devolved areas; the primary purpose of using such powers will be administrative efficiency.”⁵

4. All regulations to correct deficiencies in EU law, whether made by UK Ministers or the Welsh Ministers, can be identified by the inclusion of the phrase “(EU Exit)” in their title.

Form of regulations scrutinised

5. As part of its scrutiny of legislation arising from the UK’s exit from the EU, we have been considering the following:

- i. **Regulations made by the Welsh Ministers**

Under the 2018 Act, regulations made by the Welsh Ministers to correct deficiencies in EU law can be subject to the negative procedure or the affirmative procedure.⁶ In each case, the particular procedure is determined by the 2018 Act itself.

Regulations which the Welsh Ministers propose to make using the negative procedure are subject to sifting (see our guide for further information about the process followed). Such regulations are being referred to as proposed negatives because they are draft regulations that the Welsh Ministers propose to make formally under the negative procedure. As a result of the sifting process, we may recommend that such regulations are subject to the affirmative procedure rather than the negative procedure. However, there is no obligation on the Welsh Government to accept that recommendation.

Regulations that have been sifted, and those that did not need to be sifted because they were already subject to the affirmative procedure, are then scrutinised by the Committee in accordance with Standing Orders 21.2 and 21.3. The outcome of that scrutiny is reported to the National Assembly.

⁵ Intergovernmental Agreement on the European Union (Withdrawal) Memorandum and the Establishment of Common Frameworks, (Second) paragraph 8

⁶ The procedures are formally described in Standing Order 27. Standing Orders are available on the National Assembly’s website.

In order to manage the number of regulations that may come forward from the Welsh Ministers, we entered into a [Protocol](#)⁷ with the Welsh Government, which provides in particular for notice two weeks in advance of regulations that are likely to come forward.

ii. Regulations made by UK Ministers acting alone in devolved areas (with consent of the Welsh Ministers)

UK Ministers are able to make regulations in devolved areas acting alone under sections 8 and 9 of the 2018 Act. However, under the terms of the Intergovernmental Agreement they can only do so with the consent of the Welsh Ministers. Such regulations made by UK Ministers are laid before the UK Parliament only.

New Standing Order 30C (attached at Annex 1) requires that for such regulations made or to be made by UK Ministers under the 2018 Act, the Welsh Government must lay a statement (30C Written Statement) notifying the National Assembly of the regulations in question, normally within 3 working days of them being laid before the UK Parliament.

Where the regulations amend primary legislation, the Welsh Government must also lay a Statutory Instrument Consent Memorandum under Standing Order 30A. Any member may then table a motion to require the National Assembly to formally give consent to the regulations, provided they lay their own memorandum.

For regulations proposed to be made under the negative procedure by UK Ministers in devolved areas and with the Welsh Government's consent, they too will be subject to a sifting process in the UK Parliament.

iii. Regulations made by UK Ministers acting alone in devolved areas (without the consent of the Welsh Ministers)

UK Ministers are able to make regulations in devolved areas under section 23 of the 2018 Act, without the consent of the Welsh Government (because regulations made by UK Ministers under section 23 of the 2018 Act fall outside the scope of the Intergovernmental

⁷ *Scrutiny of regulations arising from the UK's exit from the European Union – Protocol between the Welsh Government and the Constitutional and Legislative Affairs Committee of the National Assembly for Wales, October 2018*

Agreement). These regulations will also be laid before the UK Parliament only.

The requirements of Standing Order 30C and Standing Order 30A also apply to such regulations.

These regulations will also be subject to sifting by the relevant UK parliamentary committees.

Analysis

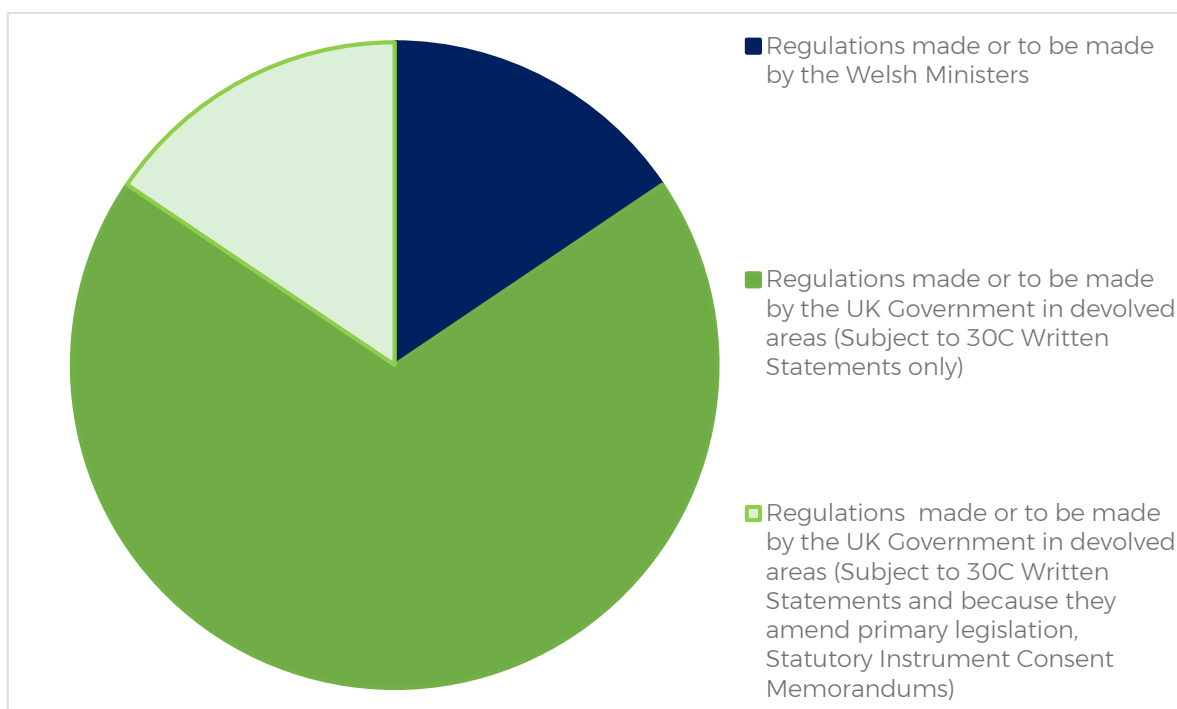
6. The table below identifies all exit-related regulations in devolved areas considered by this Committee until the end of January 2019 (whether made, or proposed to be made, by the Welsh Ministers or UK Ministers).

Meeting Date	Proposed negatives scrutinised ⁸	Proposed negatives recommended for affirmative procedure?	Brexit regulations scrutinised under SO 21 ⁹	Statutory Instrument Consent Memorandums scrutinised	30C Written Statements scrutinised	30C Written Statements with issues reported
5-Nov-2018	0	0	0	2	4 (2 of which SICM-related)	0
12-Nov-018	0	0	0	0	4	0
19-Nov-2018	0	0	0	0	1	1
26-Nov-2018	0	0	0	0	12	3
3-Dec-2018	0	0	0	2	8 (2 of which SICM-related)	0
10-Dec-2018	0	0	0	2	13 (2 of which SICM-related)	4
7-Jan-2019	3	0	0	3	17 (3 of which SICM-related)	6
14-Jan-2019	4	0	0	5	14 (5 of which SICM-related)	3
21-Jan-2019	3	1	0	0	0	0
28-Jan-2019	4	0	0	0	3	2
Total	14	1	0	14	76	19

⁸ This does not include proposed negatives laid in January but not due to be sifted until February

⁹ This does not include proposed negative regulations sifted by the Committee that have since been made but have yet to be scrutinised by the Committee under Standing Orders 21.2 and 21.3

Some of the information is also represented in the pie chart below.



7. All the regulations, and the associated reports on their scrutiny, are available on our [webpages](#).

8. As regards our **scrutiny of 30C Written Statements**, we have identified three key issues that have necessitated writing to the Welsh Government seeking clarification. These are as follows:

- We have been concerned at the lack of detailed information contained in written statements, particularly as regards identifying the specific provisions within regulations to which the Welsh Ministers are giving consent. Our letter of 14 January 2019¹⁰ to the Minister for Finance and Trefnydd, to which we look forward to receiving a response in due course, said:

“The Welsh Government’s response states that the Welsh Ministers consider and consent to the statutory instrument (SI) as a whole, rather than confine their consideration to the devolved areas. While that may be the case, we are unclear why the written statement cannot detail the specific provisions for which consent is being given, i.e. which parts of each SI make provision in devolved areas.

For that reason, we would be grateful if you could confirm that the specific provisions for which consent is being given are identified before

¹⁰ [Letter to the Minister for Finance and Trefnydd, 14 January 2019](#)

the Welsh Ministers make a decision to give that consent to the UK Ministers. In our view this would be necessary to ensure compliance with the intergovernmental agreement relating to the use of concurrent powers.”

- The Welsh Government has consented to the UK Government making negative procedure statutory instruments that restrict the legislative competence of the National Assembly for Wales, without the Assembly having a role. We have written¹¹ to the Welsh Government about The Plant Breeders’ Rights (Amendment etc.) (EU Exit) Regulations 2018 and have raised our concerns with the House of Lords Secondary Legislation Scrutiny Committee given the role it has in scrutinising these regulations.¹² We have identified similar concerns with the following 30C written statements:
 - The Pesticides (Maximum Residue Levels) (Amendment etc.) (EU Exit) Regulations 2019;
 - The Ozone-Depleting Substances and Fluorinated Greenhouse Gases (Amendments etc) (EU Exit) Regulations 2018;
 - The Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2019;¹³
 - The Nutrition (Amendment etc) (EU Exit) Regulations 2019.¹⁴
- We have identified two sets of regulations that appear to be in breach of the Intergovernmental Agreement in that they do not comply with the requirement that the UK Government’s powers under the 2018 Act will not be used to enact new policy in devolved areas; we believe the Welsh Ministers should have made these regulations. We are seeking clarification¹⁵ from the Welsh Government about the approach adopted for these regulations, namely:
 - The Animal Welfare (Amendment) (EU Exit) Regulations 2018;

¹¹ [Letter to the Minister for Finance and Trefnydd, 14 January 2019](#)

¹² [Letter to Lord Trefgarne, Chairman, House of Lords Secondary Legislation Scrutiny Committee, 14 January 2019](#)

¹³ [Letter to the Minister for Finance and Trefnydd, 31 January 2019](#)

¹⁴ [Letter to the Minister for Finance and Trefnydd, 31 January 2019](#)

¹⁵ [Letter to the First Minister, 14 January 2019](#) and [related correspondence](#)

- The Floods and Water (Amendment etc.) (EU Exit) Regulations 2019.

9. Other issues we have identified include:

- incorrect references within the statement to the existing legislation that is being amended;
- lack of clarity within the statement regarding the existing legislative framework and how that impacts on the approach pursued in the regulations;
- lack of clarity within the statement regarding the effect of the amendments being made by the regulations;
- the statement failing to highlight to what degree the National Assembly's legislative competence is effected by the regulations;
- the statement failing to highlight to what degree the Welsh Minister's legislative competence is effected by the regulations;
- the statement appearing to accompany regulations that relate to a non-devolved area;
- the statement containing incomplete details of which regulations are being amended.

10. On two occasions the Welsh Government has laid revised 30C written statements related to air quality regulations to correct serious errors.¹⁶

11. As regards **Statutory Instrument Consent Memorandums** laid, the Welsh Government has not tabled any motions seeking the consent of the National Assembly to the regulations that are the subject of the memorandums.¹⁷ The Welsh Government has provided a range of explanations for this approach in correspondence with us:

- not believing a debate on the relevant Statutory Instrument Consent Memorandums would be a productive use of "valuable plenary time";

¹⁶ [Revised written statement – The Air Quality \(Amendment of Domestic Regulations\) \(EU Exit\) Regulations 2018](#); [Revised written statement – The Air Quality \(Miscellaneous Amendment and Revocation of Retained Direct EU Legislation\) \(EU Exit\) Regulations 2018](#)

¹⁷ [Statutory Instruments requiring Assembly consent \(Statutory Instrument Consent Memorandums\)](#)

- the relevant regulations are restricted to making corrections to deficiencies in law that will arise as a result of the UK leaving the EU;
- the provisions of the relevant regulations are technical in nature, and there is no divergence in policy between the Welsh Government and the UK Government;
- the Welsh Government's interest in the relevant regulations is restricted to operability amendments that will arise as a result of the UK leaving the EU.

12. Suzy Davies AM did table a motion in respect of one Statutory Instrument Consent Memorandum¹⁸ (and also laid her own memorandum¹⁹). As a result, the National Assembly consented to the making of regulations that amended primary legislation within the legislative competence of the Assembly.²⁰

13. On 4 December 2019, the Llywydd wrote to the First Minister²¹ expressing concern on behalf of Committee Chairs at the extent to which UK Ministers are acting on the behalf of the Welsh Ministers. In his response, on 11 January 2019, the First Minister said that:

“If we had taken the decision that all EU Exit legislation in devolved areas was to be made in Wales, then between September 2018 and March 2019 it would have required an additional 200 SIs and 4-6 Bills to be laid in the Assembly. Even if it were possible to suspend all other business of the Government and the Assembly for this period, the Brexit legislation programme would have required six months of the Assembly's and the Government's time to be spent making more legislation than is normally made in a year in Wales. It would only be possible to pass the necessary Bills in that time by following a fast track procedure which would limit their scrutiny by the Assembly.

I currently expect 140-150 UK Government EU Exit SIs to be made in areas devolved to Wales ahead of exit day, though this number is subject to change as SIs are merged or disaggregated and new ones emerge. Almost all of these will require the consent of the Welsh

¹⁸ In accordance with Standing Order 30A.10

¹⁹ As required by Standing Order 30A.3

²⁰ RoP, 16 January 2019

²¹ [Letter from the Llywydd to the First Minister, 4 December 2018](#)

Ministers through the process set out in the Intergovernmental Agreement.

The Welsh Ministers only consent to the UK SIs where there is no divergence on policy between Wales and the UK, and on that basis the SIs are not politically sensitive. These SIs are for the purpose of making the corrections so that the statute book will be operable at the point of EU exit and are being made by the UK Government, with the consent of the Welsh Ministers.”²²

14. He also said:

“I understand that the Constitutional and Legislative Affairs Committee is intending to produce a report on the written statements laid so far. I look forward to receiving that report and to considering any improvements the Committee recommends.”²³

Commentary

15. We had not anticipated the extent to which the UK Government has been acting in devolved areas through primary and subordinate legislation.

16. This report focuses mainly on the use of subordinate legislation being made by the UK Government; our views and concerns on the use of primary legislation have been expressed in our reports on the Welsh Government’s Legislative Consent Memorandums laid in respect of the [Agriculture Bill](#)²⁴ and the [Healthcare \(International Arrangements\) Bill](#)²⁵.

17. We note the observations of the First Minister expressed in his letter of 11 January 2019. In our view, the concerns expressed relate to the capacity and priorities of the Welsh Government in dealing with the volume of legislation needed to correct the Welsh statute book, rather than the ability of the National Assembly to undertake appropriate scrutiny of that legislation. It is a matter for the Business Committee to determine the way in which the business of the

²² [Letter from the First Minister to the Llywydd, 11 January 2019](#)

²³ [Letter from the First Minister to the Llywydd, 11 January 2019](#)

²⁴ [Constitutional and Legislation Affairs Committee Report. The Welsh Government’s Legislative Consent Memorandum on the Agriculture Bill, January 2019](#)

²⁵ [Constitutional and Legislation Affairs Committee Report. The Welsh Government’s Legislative Consent Memorandum on the Healthcare \(International Arrangements\) Bill, January 2019](#)

Assembly is conducted and if necessary, to manage any increase in workload that arises from the UK's departure from the EU.

18. The First Minister's letter of 11 January states "The Welsh Ministers only consent to the UK SIs where there is no divergence on policy between Wales and the UK, and on that basis the SIs are not politically sensitive". However, this is at odds with the Intergovernmental Agreement which states that "the powers will not be used to enact new policy in devolved areas; the primary purpose of using such powers will be administrative efficiency". **We consider this apparent contradiction to be a matter that requires an urgent response from the First Minister.**

19. While we accept that the Welsh Government is under time and resource pressure, we believe that it has not got the balance right between permitting the UK Ministers to act on behalf of the Welsh Ministers and making its own legislation.

20. Addressing the need to correct the Welsh statute book as a consequence of the UK's exit from the EU is an important function. The National Assembly should have a greater role in scrutinising that process. We believe that the Welsh Government has been too reliant on the UK Ministers to act on the Welsh Ministers behalf and should have taken on responsibility for more of this work itself. As we highlight above, the existing approach has led to the identification of a reduction in the National Assembly's legislative competence *after* consent has been given by the Welsh Ministers. Not only does this represent a change in policy it is also in our view politically sensitive and is therefore difficult to understand on what basis the Welsh Government has consented to the regulations in question.

21. Moreover, the general approach being taken is also at odds with the Welsh Government asking for, and being given, the power to make correcting regulations, but then not using it all in respect of retained direct EU law.²⁶ When the National Assembly agreed the Legislative Consent Memorandum on the 2018 Act,²⁷ it seems to us that it did so, in part at least, on the basis that the Welsh Government had secured amendments to the Bill that gave the Welsh Ministers additional powers to make regulations.²⁸ Now, the Welsh Ministers are not using

²⁶ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No. 2\) European Union \(Withdrawal\) Bill](#), April 2018, paragraph 8, 4th bullet point

²⁷ RoP, 15 May 2018

²⁸ And given the wording of the Supplementary LCM laid by the Welsh Government on the Bill, it seems that giving these additional powers to the Welsh Ministers was one of the key reasons why the Welsh Government was able to recommend the Assembly consent to the Bill.

those powers extensively (as at 31 January 2019, the Welsh Ministers have made only six sets of regulations under the 2018 Act). Instead, they are relying heavily on UK Ministers to make regulations that correct EU-derived domestic legislation in devolved areas, and they are relying completely on UK Ministers to make regulations that correct direct EU legislation in devolved areas.

22. Unless there is a delay to the UK's exit from the EU, we recognise that the adopted approach cannot be changed. However, it remains unclear why this position has arisen.

23. We believe the Welsh Government can change its approach to 30C Written Statements. **The quality of these statements and the information they contain must be improved by addressing the concerns we have highlighted in paragraph 9 above.**

24. While not the original intention, the Intergovernmental Agreement would appear to have become a mechanism for bypassing the scrutiny of changes in Welsh Government policy. It is also facilitating an apparent reduction, with the consent of the Welsh Ministers, of the legislative competence of the National Assembly.

25. On issues of consent, we are also concerned that the Welsh Government is not using the Statutory Instrument Consent Memorandum process as it should be. We have not, to date, commented on whether a Statutory Instrument Consent Memorandum should be subject to a consent motion, because we do not believe that it should become a matter for routine decision by this Committee, particularly when the Welsh Government would be under no obligation to accept any recommendation we make.²⁹

26. **We believe that all Brexit-related Statutory Instrument Consent Memorandums should be subject to a consent motion tabled by the Welsh Government.** As matters currently stand, the Statutory Instrument Consent Memorandum process is being used as a means for the Welsh Ministers to provide consent by default. To use a relatively familiar analogy, the consent process has taken on the features of the negative procedure process for the consideration of statutory instruments; consent is deemed to have been given

²⁹ We have however made a recommendation that motions should be tabled for Statutory Instrument Consent Memorandums laid as a consequence of the UK Government's Healthcare (international Arrangements) Bill. See paragraphs 46-50 and recommendation of our report, The Welsh Government's Legislative Consent Memorandum on the Healthcare (International Arrangements) Bill.

unless an Assembly Member intervenes. That is neither appropriate nor within the spirit of Standing Order 30A.³⁰

27. In reaching this view, we do not believe that it is appropriate to place the burden for tabling a motion on a backbench Assembly Member, given that they are obliged to table their own Statutory Instrument Consent Memorandum in order to do so. If the Welsh Government is right that such issues are technical and non-controversial, the National Assembly can approve a motion with little or no debate.

28. More worryingly, if the Welsh Government has established the principle with the UK Government that the consent of the National Assembly is not generally required, then it is not clear what effect a decision of the National Assembly to vote down a consent motion (ie to refuse consent) would have.

29. There is one final observation we would like to make regarding the way in which the Welsh Government is seeking to justify its reasons for consenting to the UK Government acting in devolved areas.

30. We have noted that in its Statutory Instrument Consent Memorandums, as justification for why it is appropriate for the regulations to make the relevant provision, the standard form of words tends to be:

“There is no divergence between the Welsh Government and the UK Government on the policy for the amendment. Therefore, making separate SIs in Wales and England would lead to duplication, and unnecessary complication of the statute book. This approach promotes clarity and accessibility during this period of change.”

31. Similar wording is used when consenting through the 30C Written Statements process, with the following wording also appearing regularly:

“Consenting to a UK wide SI ensures that there is a single legislative framework across the UK which promotes clarity and accessibility during this period of change. In these exceptional circumstances, the Welsh Government considers it appropriate that the UK Government legislates on our behalf in this instance.”

32. This justification on grounds of clarity and accessibility lacks credibility and seems a strange approach to advocate particularly in the context of devolution.

³⁰ Business Committee, [Proposed amendments to Standing Orders 29 and 30: Consent in Relation to UK Parliament Bills](#), April 2013

33. While we understand the complexities in correcting the statute book because of the UK's exit from the EU and the need for administrative efficiency, we are concerned that the approach being adopted makes the Welsh statute book less accessible. This is a point we made recently in our report on Welsh Government's LCM on the Agriculture Bill)³¹ and that also arose in an evidence session on the Welsh Government's Legislation (Wales) Bill,³² which aims to make legislation more accessible to Welsh citizens.

³¹ Constitutional and Legislation Affairs Committee Report, The Welsh Government's Legislative Consent Memorandum on the Agriculture Bill, January 2019, paragraph 109

³² CLA Committee, RoP, [5-20], 10 December 2018

Annex 1

STANDING ORDER 30C – Notification in Relation to Statutory Instruments made by UK Ministers in devolved areas under the European Union (Withdrawal) Act 2018 not laid before the Assembly Statutory Instruments Requiring Notification to the Assembly

- 30C.1 In Standing Order 30C, “relevant statutory instrument” means a statutory instrument, or draft statutory instrument, made, or to be made, by a UK Minister acting alone under sections 8, 9 or 23 of, or Schedule 4 to, the European Union (Withdrawal) Act 2018 which contains provision within the legislative competence of the Assembly or the executive competence of the Welsh Ministers. Written Statements in Relation to Relevant Statutory Instruments.
- 30C.2 A member of the government must lay a written statement giving notification of any relevant statutory instrument, normally within three working days of it being laid before the UK Parliament.
- 30C.3 The written statement must:
- i. summarise the purpose of the statutory instrument;
 - ii. specify any impact the statutory instrument may have on the Assembly’s legislative competence and/or the Welsh Ministers’ executive competence; and
 - iii. where the Welsh Ministers consented to UK Ministers making the relevant statutory instruments, explain the reasons why consent was given.