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Llywodraeth Cymru
Welsh Government

The Rt Hon the Lord Fowler
Lord Speaker
House of Lords
Westminster
London
SW1A 0PW

15th March 2018

Dear Lord Speaker

We are writing further to our letter of 23 January in response to the letter from the Chancellor of the Duchy of Lancaster to all peers dated 12 March about the amendments which have been tabled by the UK Government setting out its revised approach to clause 11 of the Bill.

The Scottish Government and the Welsh Government acknowledge that this represents a change of position but the amendments do not have their support. In this letter we set out our concerns about the amendments and proposals for changes to them.

The UK Government amendments would provide a power to make regulations in devolved areas currently subject to EU law and would prevent the devolved legislatures from taking action in the areas covered in regulations. The UK Government say this is intended to be a temporary measure to provide certainty upon EU exit and to allow common frameworks to be put in place where it is agreed that these are necessary.

Alongside the amendments the UK Government has published a list of 158 areas of intersection of devolved competence with EU law, noting that it envisages regulations temporarily restricting devolved legislatures' competence (in advance of more substantive arrangements in primary legislation) in up to 24 of those areas.

It should be noted these 24 areas – all of which apply to both Wales and Scotland – cover a very significant part of devolved responsibilities, including agricultural support, fisheries management, environmental policy, public procurement and food standards.

These areas are of vital importance for the industries and economies of Scotland and Wales. The effect of the amendments now tabled in the House of Lords will be to allow the UK Government to make regulations in any or indeed all of these devolved areas – the 24 areas identified, or indeed the remaining 131 areas in its analysis.

The Scottish Government and the Welsh Government agree common frameworks are appropriate in some cases given the role of EU law in currently regulating action in all parts of the UK in these areas. But the devolved administrations and the devolved legislatures – whose legislative competence is being constrained - must agree any arrangements to ‘freeze’ EU law pending the development of such frameworks. However, the UK Government amendment allows it to make regulations – and also further primary legislation to establish frameworks - in these and in any other area it deems appropriate without any involvement of the legislatures and merely after consulting the devolved administrations. In being asked to give legislative consent to the EU (Withdrawal) Bill on this basis, the devolved legislatures would be being asked to agree to the creation of this power with no certainty about where frameworks will be established, how these will work, how they will be governed and how we will go from temporary restrictions to longer term solutions.

These shortcomings mean that the two Governments could not recommend consent to the amendment as it stands. They remain committed to working positively with the UK Government and propose the following changes to build on the position reflected in their current amendments:

I Further amendments to ensure that the temporary restriction of legislative competence in areas where new frameworks are intended to be created requires the consent of the devolved legislatures. This is in line with normal practice for legislation affecting devolved competence: amendments to competence, either by way of primary legislation or through Orders in Council under the Scotland Act 1998 or the Government of Wales Act 2006, must be the subject of devolved legislatures’ consent.

II Further amendments to put beyond doubt that primary legislation to establish frameworks in these areas in the future (and release the restrictions on legislative competence) must be agreed by the devolved parliaments, as is normally the case under the Sewel convention for Westminster legislation relating to devolved matters. The effect of the UK proposal may well be to reserve those matters, meaning the devolved legislatures may have no say on such legislation.

III Further amendments to ensure that any power to make regulations as a precursor to frameworks is temporary: similar ‘sunset clauses’ are included in the case of other powers in the Bill which are temporary to allow laws to be updated in light of Brexit. There is no reason for this clause 11 power to stand as a permanent feature of the constitution when there are well established and successful legal mechanisms in place to adjust devolution.

IV Further amendments to place a ‘sunset clause’ on the restrictions of competence themselves. Whilst the two Governments accept that it may take time to put frameworks in place, regulations must not be open-ended and pressure to agree frameworks should apply to all parties. And while regulations restricting devolved legislatures’ competence remain in force, it should be a joint responsibility of the Secretary of State, the Scottish Ministers and the Welsh Ministers to prepare periodic reports and lay them before Parliament, the Scottish Parliament and the National Assembly for Wales, explaining what progress is being made to remove those restrictions.

The two Governments would be pleased to put forward detailed amendments if it proves impossible to reach agreement with the UK Government.

The two Governments have also asked that the UK Government agree a level playing field and make a commitment not to bring forward legislation in respect of England in those areas where it is agreed common frameworks are to be established.

We would be very grateful if this letter could, like the Chancellor of the Duchy of Lancaster's, be circulated to all Peers. We are copying it to the Leader of the House, the shadow Leader, the Convenor of the cross-bench peers and the Leader of the Liberal Democrats in the Lords, as well as to David Lidington, the Secretary of State for Scotland and the Secretary of State for Wales.

A handwritten signature in black ink, appearing to read 'Nicola Sturgeon'.

NICOLA STURGEON

A handwritten signature in black ink, appearing to read 'Carwyn Jones'.

CARWYN JONES