

The Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No. 2) on the Trade Bill

December 2020

1. Background

1. The UK Government's Trade Bill 2019-21 (the Bill)¹ was introduced to the House of Commons on 19 March 2020. It is sponsored by the Department for International Trade.

2. The Bill moved to the House of Lords on 21 July 2020.²

The Welsh Government's Legislative Consent Memorandum

3. On 2 April 2020, the Minister for International Relations and the Welsh Language, Eluned Morgan MS, laid before the Senedd a Legislative Consent Memorandum (LCM)³ in respect of the Bill.

4. We reported on the LCM on 30 July 2020 (first report).⁴ The first report sets out in more detail the background to the Bill, including the Trade Bill 2017-19 (the

¹ [Trade Bill, as introduced](#) [HC Bill 120]

² [Trade Bill](#) [HL Bill 128]

³ Welsh Government, [Legislative Consent Memorandum, Trade Bill](#), April 2020

⁴ Legislation, Justice and Constitution Committee, [Report on the Welsh Government's Legislative Consent Memorandum on the Trade Bill](#), July 2020



2017-19 Bill), to which it is similar in a number of respects. The first report also summarises the purpose and extent of the Bill.

5. The Minister for International Relations and the Welsh Language responded to our report on 11 September 2020.⁵

Matters relating to the Minister's response to our first report

6. In our first report, we raised concerns that the Bill, in clause 2(6)(a), permits UK Ministers to make regulations that amend the *Government of Wales Act 2006* (the 2006 Act). We said that the UK Government's ability to amend Wales' key devolution legislation alone via subordinate legislation is not something that should be negotiated using the non-binding practice of despatch box commitments in the UK Parliament.⁶

7. As such, recommendation 4 of our first report stated:

“The Minister should seek an amendment to clause 2(6)(a) of the Bill to the effect that it cannot be used by UK Ministers to make regulations that amend the *Government of Wales Act 2006*.”

8. In accepting this recommendation, the Minister said:

“To mitigate the risk of clause 2 being used by UK Ministers in this way, the Welsh Government has worked to secure commitments from the UK Government, albeit intergovernmental, non-legislative and non-binding, that clause 2 powers will not be used in areas of devolved competence. (...)”

However, whilst the UK Government has previously indicated that it is not minded to exercise the clause 2 powers to make amendments to [the 2006 Act] and has made commitments at the despatch box that it will not normally do so, and we do not envisage a situation when this action would ever be required, we do recognise that there is a small risk that UK Ministers could utilise these powers. We agree with the Senedd that it is not acceptable for UK Ministers to use secondary powers to amend the core primary legislation underpinning the devolution settlement.

⁵ [Letter from the Minister for International Relations and the Welsh Language](#), 11 September 2020

⁶ Legislation, Justice and Constitution Committee, Report on the Welsh Government's Legislative Consent Memorandum on the Trade Bill, July 2020, paragraph 47

The Welsh Government will therefore write to the Speaker of the House of Lords requesting an amendment is tabled to clause 2 which would have the effect of preventing the regulation making powers from being exercised by UK Ministers to make amendments to [the 2006 Act].⁷

9. We are aware that the Minister wrote to the Lord Speaker on 11 September 2020 in line with her response to recommendation 4 in our first report.^{8 9}

10. In our first report, we also commented on the power in clause 2(7) of the Bill, that would enable regulations made by UK Ministers to extend the time during which both UK and the Welsh Ministers may make clause 2 regulations for a further period of up to 5 years, without needing to consult the Welsh Ministers or seek the consent of the Senedd.

11. We said that regulations made under clause 2(7) should be subject to the consent of the Senedd.¹⁰ As we set out in our first report¹¹, in our view, it would be more appropriate for the consent of the Senedd to be obtained before the ability of the Welsh Ministers to exercise executive powers in Wales is extended.

12. Recommendation 7 of our first report stated:

“The Minister should seek an amendment to the Bill to secure a requirement on the UK Government to obtain the Senedd’s consent before it makes regulations under clause 2(7).”

13. The Minister rejected this recommendation. In her response to our first report, she said:

“The Welsh Government previously reached a position where it was content to recommend legislative consent to clause 2(7) on the basis of

⁷ Letter from the Minister for International Relations and the Welsh Language, 11 September 2020

⁸ ~~Letter from the Minister for International Relations and the Welsh Language to the Rt Hon the Lord Fowler, Lord Speaker, House of Lords~~, 11 September 2020

⁹ The letter was also copied to the Leader of the House; the Shadow Leader; the Convenor of the Crossbench Peers; Lord Grimstone of Boscobel Kt, Minister for Investment, UK Government; Viscount Younger of Leckie, Lord in Waiting (Government Whip), UK Government; Ivan Mckee MSP, Minister for Trade, Investment and Innovation, Scottish Government; and Diane Dodds MLA, Minister for the Economy, Northern Ireland Executive.

¹⁰ Legislation, Justice and Constitution Committee, Report on the Welsh Government’s Legislative Consent Memorandum on the Trade Bill, July 2020, paragraph 53

¹¹ Legislation, Justice and Constitution Committee, Report on the Welsh Government’s Legislative Consent Memorandum on the Trade Bill, July 2020, paragraph 71

the non-legislative commitments secured from the UK Government during the passage of the Trade Bill 2017-19, which included a despatch box commitment to engage with devolved administrations before extending the period during which clause 2 powers can be used under the Bill. The Senedd accepted this position and provided legislative consent on this basis.

(...) despatch box commitments have been accepted as a legitimate, although not ideal device that devolved governments can use to hold the UK Government to account in relation to UK Bills. It would therefore be consistent with the approach taken to other legislation to rely on a despatch box commitment in this instance.

It is noted however, that this commitment was made on 17 July 2018 and has not been explicitly restated by the Minister for State for Trade Policy in relation to extending the sunset period. The Welsh Government will therefore write to the UK Government requesting that this commitment is explicitly restated by Ministers at the despatch box during the House of Lords stages.”

14. We are aware that the Minister wrote to the Minister for State for Trade Policy on 11 September 2020 in line with her response to recommendation 7 in our first report.^{12 13}

The Welsh Government's Supplementary Legislative Consent Memorandum

15. On 4 November 2020 the Counsel General¹⁴, Jeremy Miles MS, laid before the Senedd a Supplementary Legislative Consent Memorandum (Memorandum No. 2) (LCM No. 2) in respect of the Bill.¹⁵

¹² Letter from the Minister for International Relations and the Welsh Language to Greg Hands MP, Minister of State for Trade Policy, 11 September 2020

¹³ The letter was also copied to Lord Grimstone of Boscobel Kt, Minister for Investment, and Viscount Younger of Leckie, Lord in Waiting (Government Whip).

¹⁴ Following a reshuffle of the Welsh Government Cabinet on 8 October 2020, the Counsel General took-over responsibility for the Trade Bill and for shadowing the UK's international trade negotiations.

¹⁵ Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No. 2), Trade Bill, November 2020

16. The Business Committee agreed that the Legislation, Justice and Constitution Committee (the Committee) and the External Affairs and Additional Legislation Committee should report on LCM No. 2 by 18 December 2020.¹⁶ The reporting deadline was later revised to 11 December 2020.¹⁷

Provision for which the Senedd's consent is required

17. The Welsh Government's LCM laid on 2 April 2020 covered Part 1, Clauses 1 to 4 and Schedules 1, 2 and 3 of the Bill. The Welsh Government did not consider that the provisions in Parts 2 or 3 of the Bill as introduced engaged Standing Order 29.

18. Paragraphs 9 to 11 of LCM No. 2 describe the amendments made to the Bill, with the introduction of new clauses 9 and 10 in Part 3 of the Bill (at House of Commons Report stage) which require the Senedd's consent.

19. Part 3 of the Bill, as introduced, contained provision regarding the disclosure of information by HM Revenue and Customs (HMRC). Part 3 has since been amended, to include provision regarding the disclosure of information by other public authorities.

20. Clause 9(1) provides that a specified public authority may disclose information for the purposes of facilitating the exercise of a Minister of the Crown's functions relating to trade. Specified public authorities, as set out in clause 9(3), include a port health authority constituted under section 2 of the *Public Health (Control of Disease) Act 1984*. The definition of a port health authority captures Welsh port authorities that exercise functions in relation to Wales and is broad enough to enable such authorities to disclose information relating to non-reserved matters to a Minister of the Crown. The other specified public authorities referred to in clause 9(3) are reserved authorities.

21. Clause 9(9) provides that a Minister of the Crown may amend the list of specified authorities in clause 9(3) by statutory instrument, subject to the affirmative procedure. That power is capable of being exercised to add or remove devolved Welsh authorities from the list.

¹⁶ Business Committee, [Timetable for the consideration of the Supplementary Legislative Consent Memorandum on the Trade Bill](#), November 2020

¹⁷ Business Committee, [Revised Timetable for the consideration of the Supplementary Legislative Consent Memorandum on the Trade Bill](#), November 2020

22. Clause 10 makes provision for a new offence in relation to the disclosure of information specified in clause 9. Clause 10 provides that it would be a criminal offence for a person to disclose identifiable personal information in breach of the requirements in clause 9 in certain specified situations. A prosecution for the offence in England and Wales may be brought only with the consent of the Director for Public Prosecutions. A person guilty of such an offence is punishable by a fine and/or a term of imprisonment of up to a period of two years on indictment or up to 12 months on summary conviction.

23. The LCM states that:

“The UK Government requires a legal mechanism to enable it to request access to, and share information held by a wide range of public authorities. Gaining access to a wider range of devolved and reserved data could improve the UK Government’s capability to respond to border issues, design traffic management initiatives and enhance trade flows.”¹⁸

24. While supportive of the amendments, the Welsh Government has sought the following assurances to ensure benefits can be accrued in Wales:

- that the UK Government will share any analysis relevant to the delivery of devolved responsibilities with the Welsh Ministers. (Clause 9(5) could enable a Minister of the Crown to disclose data to the Welsh Ministers in circumstances where the data is relevant to the Welsh Ministers’ devolved functions relating to trade, such as traffic management around key ports);
- that the UK Government will consult with the Welsh Ministers before adding or removing any Welsh public authorities from the data sharing gateway in clause 9.¹⁹

25. The Welsh Government considers that it has received sufficient assurances²⁰ in response to these requests, and also notes the following two despatch box commitments made at House of Lords Committee stage on 15 October 2020²¹:

¹⁸ LCM, paragraph 12

¹⁹ LCM, paragraph 13

²⁰ LCM, paragraph 14

²¹ House of Commons Debate, 15 October 2020, col 1247

“First, the data shared under Clause 9 will be used by the border impact centre and the Cabinet Office to develop strategic insights. They are committed to sharing strategic analysis related to flow of trade, where it will support the more effective management of flow through the border. I understand that Cabinet Office officials have been working closely with counterparts in the devolved Administrations to ensure that relevant analysis and information relating to trade and management of the border can be shared to support devolved functions. Examples of the types of information that the border impact centre intends to share with relevant parties in the devolved nations are flow patterns through ports. The Cabinet Office will continue to work with the devolved Administrations to ensure that the border impact centre provides strategic benefit to management of flow through key ports.

Secondly, the UK Government commit to consulting the devolved administrations before any devolved authorities are added to, or removed from, the list of specified authorities that can share data under Clause 9.”²²

26. On the basis that the assurances provided are sufficient to ensure that the Welsh Ministers will be able to access more detailed information to increase border management capabilities and enhance trade flow data, the Welsh Government recommends that consent is given.²³

²² LCM, paragraph 15

²³ LCM, paragraphs 16-17

2. Committee consideration

27. We considered LCM No. 2 at our meeting on 9 November 2020.²⁴

Our view

28. Our conclusions and recommendations for further action are detailed in the following paragraphs. Our report on LCM No. 2 should be read alongside our first report on the Bill.

29. We acknowledge the Minister's response to the recommendations in our first report. We are disappointed that the Minister rejected the majority of our recommendations. Furthermore, we consider the Minister's reasoning, in a number of instances, to be unsatisfactory.

30. For example, recommendation 1 in our first report asked the Minister to make representations to the UK Government seeking a review of the procedure to be applied to regulations made under clause 1 of the Bill. In rejecting this recommendation, the Minister told us that the current UK Government is in a "strengthened position" and it was "therefore extremely unlikely that any representations [the Welsh Government] should make to the UK Government on this matter would receive serious consideration"²⁵. In our view, this response, and the principle on which it is based, is unacceptable.

31. With regards to recommendation 4 in our first report, while we welcome the Minister's acceptance of this recommendation, and note that she wrote to representatives of the UK Parliament seeking an amendment to clause 2(6)(a) of the Bill, we are unclear why the Minister did not raise this matter directly with UK Ministers and request that the UK Government bring forward the necessary amendment. Furthermore, we remain unclear whether any such amendment has been tabled and accepted.

Recommendation 1. The Counsel General should explain, in advance of any vote on a legislative consent motion for the Bill, why the Welsh Government did not pursue the amendment of clause 2(6)(a) with UK Ministers to the effect that it cannot be used by UK Ministers to make regulations that amend the *Government of Wales Act 2006*.

²⁴ Legislation, Justice and Constitution Committee, 9 November 2020

²⁵ Letter from the Minister for International Relations and the Welsh Language, 11 September 2020

Recommendation 2. The Counsel General should, in advance of any vote on a legislative consent motion for the Bill, confirm whether clause 2(6)(a) of the Bill has been amended to the effect that it cannot be used by UK Ministers to make regulations that amend the *Government of Wales Act 2006*.

32. We are also unclear whether the Minister's correspondence with the UK Minister of State for Trade Policy in relation to recommendation 7 in our first report has resulted in the relevant despatch box commitment being given.

Recommendation 3. The Counsel General should, in advance of any vote on a legislative consent motion for the Bill, confirm whether the UK Government has made the despatch box commitment, that it will engage the Welsh Government in the decision-making process in advance of any decision to use the power in clause 2(7) of the Bill to extend the sunset period.

33. It is disappointing that the Welsh Government has not updated us, or the Senedd, with relevant developments in the UK Parliament in relation to both these matters. In our view, it would have been appropriate to provide such update in LCM No. 2.

34. With regards to LCM No. 2, we note that it is the view of the Welsh Government that new clauses 9 and 10 of the Bill require the Senedd's consent.

35. Specifically in relation to the regulation-making power in clause 9(9) of the Bill, we note that this is a Henry VIII power in that it enables regulations to be used to amend the list of specified public authorities in clause 9(3). We further note that such regulations will be subject to the affirmative procedure.

36. Furthermore, we acknowledge that a statutory instrument consent memorandum will be required in accordance with Standing Order 30A should a Minister of the Crown make provisions in relation to Wales, by amending the list of public authorities in clause 9(3) to include non-reserved authorities.

37. Our final comments relate to the Welsh Government's reasons for making the relevant provisions for Wales in the Bill. We acknowledge the conclusion reached in LCM No. 2 that the assurances provided by the UK Government are sufficient to lead the Counsel General to recommend the Senedd gives consent.

38. The Welsh Government is aware of our concerns regarding the repeated use of varying forms of intergovernmental agreements, whether they be memoranda of understanding or commitments spoken at the despatch box. We remain apprehensive of the increasing use of such non-binding agreements.