

The Welsh Government's Legislative Consent Memoranda on the Data Protection and Digital Information (No. 2) Bill

July 2023



1. Background

The UK Government's Data Protection and Digital Information (No. 2) Bill

- 1.** The Data Protection and Digital Information Bill was laid in the House of Commons on 18 July 2022. However this Bill was subsequently placed on pause prior to its second reading.
- 2.** The Data Protection and Digital Information (No. 2) Bill¹ (the Bill) was introduced into the House of Commons and had its first reading on 8 March 2023. It is sponsored by the Department for Science, Innovation and Technology.
- 3.** Second reading in the House of Commons took place on 17 April 2023 and Committee Stage concluded on 23 May 2023.
- 4.** The Explanatory Notes to the Bill as introduced provide the following overview:

*"This Bill is intended to update and simplify the UK's data protection framework with a view to reducing burdens on organisations while maintaining high data protection standards."*²

- 5.** The long title to the Bill states that it is a Bill:

"to make provision for the regulation of the processing of information relating to identified or identifiable living individuals; to make provision about services consisting of the use of information to ascertain and verify facts about individuals; to make provision about access to customer data and business data; to make provision about privacy and electronic communications; to make provision about services for the provision of electronic signatures, electronic seals and other trust services; to make provision about the disclosure of information to improve public service delivery; to make provision for the implementation of agreements on sharing information for law enforcement purposes; to make provision

¹ [Data Protection and Digital Information \(No. 2\) Bill](#), as introduced (Bill 265)

² [Data Protection and Digital Information \(No. 2\) Bill, Explanatory Notes](#), March 2023

about the keeping and maintenance of registers of births and deaths; to make provision about information standards for health and social care; to establish the Information Commission; to make provision about oversight of biometric data; and for connected purposes.”

6. At the time we agreed our report, Report stage in the House of Commons was yet to be announced.

Background information

7. The General Data Protection Regulation (GDPR) is a European Union (EU) Regulation on data protection and privacy in the EU and the European Economic Area (EEA) which came into force in May 2018. It also addresses the transfer of personal data outside the EU and EEA areas.

8. The GDPR works in tandem with the UK's *Data Protection Act 2018* (the DPA 2018) to govern the processing of personal data within the UK.

9. Following the UK's departure from the EU, the GDPR was retained in domestic law as the 'UK GDPR' and continues to sit alongside the amended DPA 2018.

10. In September 2021, the UK Government published "Data: A new direction"³, a consultation document which sought views on a number of proposed reforms to the UK's current legal data protection regime, primarily to the UK GDPR. The Welsh Government contributed to the consultation.⁴

The Welsh Government's Legislative Consent Memorandum

11. Standing Orders 29.1 and 29.2 provide that a legislative consent memorandum is required when a relevant UK Bill makes provision in relation to Wales for any purpose within the legislative competence of the Senedd or which modifies the Senedd's legislative competence.

12. On 29 March 2023, Mark Drakeford MS, First Minister of Wales (the First Minister), laid before the Senedd a Legislative Consent Memorandum (the Memorandum) in respect of the Bill.⁵

³ [UK Government Consultation: 'Data: A New Direction'](#), 10 September 2021

⁴ ['Data: a new direction': Welsh Government response](#), 13 January 2022

⁵ Welsh Government, [Legislative Consent Memorandum, The Data Protection and Digital Information \(No. 2\) Bill](#), March 2023

13. The Business Committee agreed that the Legislation, Justice and Constitution (LJC) Committee, and the Culture, Communication, Welsh Language, Sport and International Relations (CCWLSIR) Committee should report on the Memorandum by 8 June 2023.⁶ Subsequently, the Business Committee agreed a later date of 15 September 2023.⁷

Intergovernmental working

14. In the Memorandum the First Minister states that, prior to the original Bill being introduced in July 2022, the UK Government engaged with the Welsh Government “at official level via cross-UK groups” on aspects of the “direction of travel for particular areas in the Bill”, and that “UK Government officials have continued to be in regular contact with Welsh Government Officials”.⁸ The First Minister also states that a draft version of the Bill introduced in March 2023 was shared with the Welsh Government the day before it was introduced to the UK Parliament.⁹

15. In a Written Ministerial Statement of 8 March 2023, Michelle Donelan MP, Secretary of State for Science, Innovation and Technology (the Secretary of State), said the Bill introduced in March 2023 followed “a detailed co-design process with industry, business, privacy and consumer groups”¹⁰.

Provisions for which the Senedd’s consent is required

16. References in the Memorandum to provisions in the Bill are to the version of the Bill as introduced to the House of Commons.

17. The First Minister’s assessment is that the following provisions in the Bill (as introduced) require the Senedd’s consent, as set out in paragraphs 17 to 27 of the Memorandum:

- clauses 54 and 56 (Power of public authority to disclose information to registered person, and Code of practice about the disclosure of information);

⁶ Business Committee, [Timetable for consideration: Legislative Consent Memorandum on the Data Protection and Digital Information \(No. 2\) Bill](#), March 2023

⁷ See Business Committee, [Timetable for consideration: Supplementary Legislative Consent Memorandum on the Data Protection & Digital Information \(No.2\) Bill](#), June 2023

⁸ Memorandum, paragraphs 15 and 16

⁹ Memorandum, paragraph 16

¹⁰ [Data Protection and Digital Information \(No. 2\) Bill - Hansard - UK Parliament](#), Written Statement, 8 March 2023

- clauses 61 to 77 (Part 3 of the Bill, Customer Data and Business Data);
- clause 92 (Disclosure of information to improve public service delivery to undertakings);
- clause 93 (Implementation of law enforcement information-sharing agreements).¹¹

18. In the Memorandum, the First Minister provides an overview of the UK Government's position on the need for consent, informed by correspondence sent to him by Julia Lopez MP, Minister of State in the Department of Science, Innovation and Technology on 7 March 2023. He states that the UK Government:

- is seeking legislative consent from the Senedd in respect of clauses 61 to 77, clause 92 and clause 93;
- is not seeking the Senedd's consent for clauses 54 and 56.¹²

19. In relation to the UK Government's position on clauses 54 and 56, the First Minister states:

"...UK Government are of the view that [Digital Verification Services] DVS will always involve use of the internet in some way, and therefore the internet services reservation is relevant.

The UK Government's approach suggests that any service that is provided via the internet would be captured by the reserved matter of 'internet services'. This is an extraordinarily wide interpretation of this reserved matter and, in my view, cannot be correct."¹³

The Welsh Government's position

20. The First Minister's overall position on the Bill is set out in paragraphs 31 to 37 of the Memorandum, and key matters of concern are described in paragraphs 38 to 44 of the Memorandum.

21. The First Minister states:

¹¹ Memorandum, paragraphs 17 to 27

¹² Memorandum, paragraphs 28 and 29

¹³ Memorandum, paragraphs 29 and 30

*"The vast majority of the Bill concerns matters reserved as a result of the data protection reservation, the sale and supply of goods and services to consumers reservation, the telecommunications reservation and the reservation for the registrations of births, deaths and places of worship, as set out in Schedule 7A to the Government of Wales Act 2006. As such I believe it may be appropriate for these provisions to be made through a UK Bill."*¹⁴

22. However, he also states:

"...there are concerns that the Bill could lead to the undermining of individuals rights, as well as diluting the independence of the [Information Commissioner's Office] ICO as the regulator.

*In addition, there are also concerns that the introduction of the Bill creates a risk to the UK's current adequacy decision, which was granted in June 2021 by the EU for a period of 4 years initially. The potential loss of EU data adequacy is a key concern from a trade perspective as this would be a major threat for Welsh exporting businesses, whose main overseas market continues to be the EU."*¹⁵

23. Whilst considering it appropriate for the Senedd to give its consent in relation to clause 54 (Power of public authority to disclose information to registered person), the First Minister states in the Memorandum that, in relation to clause 56 (Code of practice about the disclosure of information), consideration needs to be given to the implications of the powers delegated to the Secretary of State and Treasury to publish a UK wide Code of Practice. The First Minister states that he would provide an update in due course.¹⁶

24. In paragraphs 40 to 42 of the Memorandum the First Minister sets out matters of concern in relation to clauses 61 to 77, particularly the regulation-making powers delegated to the Secretary of State and Treasury. Again, the First Minister states that consideration needs to be given to the implications of these delegated powers and he would provide an update in due course.

25. On clause 93, the First Minister states that the Welsh Ministers should be given appropriate regulation-making powers for the purpose of implementing international agreements relating to the sharing of information for the aspects of

¹⁴ Memorandum, paragraph 36

¹⁵ Memorandum, paragraphs 33 and 34

¹⁶ Memorandum, paragraphs 38 and 39

law enforcement within the Senedd's legislative competence, and that this too is subject to ongoing discussions with the UK Government.¹⁷

26. In conclusion, the First Minister's view as set out in the Memorandum is that it is appropriate for the Senedd to give its consent to clauses 54 and 92. However, at the time of laying the Memorandum, the First Minister did not consider it appropriate to recommend consent is given for clause 56, clauses 61 to 77, and clause 93 until further discussions have been held with UK Government.¹⁸

The Welsh Government's Supplementary Legislative Consent Memorandum

27. On 10 and 11 May 2023 the UK Government tabled amendments to the Bill for consideration at Commons' Committee Stage.

28. The First Minister laid a Supplementary Legislative Consent Memorandum (Memorandum No. 2)¹⁹ in respect of these amendments on 25 May 2023.

29. The Business Committee agreed that the LJC Committee and the CCWLSIR Committee should report on Memorandum No. 2 by 15 September 2023.²⁰

Provisions for which the Senedd's consent is required

30. Clause numbering in Memorandum No. 2 refers to the Bill as introduced into the House of Commons. References to new clause numbers are references to the Bill as amended in Public Bill Committee.²¹

31. As set out in paragraphs 13 to 25 of Memorandum No. 2, the First Minister's assessment is that the following provisions require the Senedd's consent:

- amendment NC3 (Information disclosed by the Welsh Revenue Authority);

¹⁷ Memorandum, paragraph 44

¹⁸ Memorandum, paragraphs 47 and 48

¹⁹ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No. 2\), The Data Protection and Digital Information \(No. 2\) Bill](#), 25 May 2023

²⁰ Business Committee, [Timetable for consideration: Supplementary Legislative Consent Memorandum on the Data Protection & Digital Information \(No.2\) Bill](#), June 2023

²¹ [Data Protection and Digital Information \(No.2\) Bill](#) as amended in Public Bill Committee, 9 June 2023

- amendment 46, relating to clause 61 (as introduced; now clause 65 in the Bill as amended in Public Bill Committee) (Customer data and business data);
- amendments 8 to 16 and NC5, relating to clause 93 (as introduced; now clause 99 in the Bill as amended in Public Bill Committee) (Implementation of law enforcement information-sharing agreements) and clause 108 (as introduced; now clause 115 in the Bill as amended in Public Bill Committee) (Regulations).

32. In Memorandum No. 2, the First Minister provides an overview of the UK Government's position²² on the need for consent for these amendments to the Bill. The First Minister states that the UK Government:

- agrees that legislative consent is required for amendment 46 which relates to clause 61, and amendments 8 to 16 and NC5 which relate to clauses 93 and 108;
- it is not seeking the Senedd's consent for amendment NC3.²³

The Welsh Government's position

33. The First Minister notes that, since the laying of the Memorandum, "UK Government and Welsh Government officials have continued to [be] in regular contact", and further notes that, on 17 May 2023, the Minister for Economy, Vaughan Gething MS, met with Sir John Whittingdale, Minister of State at the Department for Science, Innovation and Technology to discuss the Bill and the Welsh Government's concerns.²⁴

34. In Memorandum No. 2, the First Minister states that UK and Welsh Government officials have been discussing clause 55 (as introduced; now clause 57 in the Bill as amended in Public Bill Committee), which sets out that information disclosed by His Majesty's Revenue and Customs (HMRC) for the provision of Digital Verification Services (DVS) must not be shared further without the consent of the Commissioners for HMRC.²⁵

35. The First Minister states in Memorandum No. 2 that:

²² At the time we agreed the report, a revised version of the Bill's Explanatory Notes to reflect the Bill as amended in Public Bill Committee had not been published.

²³ Memorandum No. 2, paragraphs 26 and 27

²⁴ Memorandum No. 2, paragraphs 5 and 6

²⁵ Memorandum No. 2, paragraph 13

“Welsh Government officials and officials from the Welsh Revenue Authority sought similar provisions for data disclosed by the Welsh Revenue Authority (WRA), recognising the legal requirements placed on WRA around maintaining the confidentiality of ‘protected taxpayer information’ (as set out in the Tax Collection and Management (Wales) Act 2016). Similar provisions were also sought by the Scottish Government.”²⁶

36. The First Minister adds that Amendment NC3 sets out “that where the Welsh Revenue Authority discloses information under clause 54 (as introduced; now clause 56 in the Bill as amended in Public Bill Committee), this new clause prevents further disclosure of that information without the consent of the Welsh Revenue Authority.”²⁷ The First Minister is content that amendment NC3 “better reflects the legal requirements placed on the Welsh Revenue Authority” and it is therefore “appropriate to recommend consent in respect of Amendment NC3”.²⁸

37. Amendment 46 amends the definition of “business data” in clause 61 (as introduced; now clause 65 in the Bill as amended in Public Bill Committee) to ensure consistency across the definition and the given examples. The explanatory statement accompanying the tabling of the amendment by the UK Government stated “this amendment amends an example given in the definition so that it refers to what is provided, as well as what is supplied.”²⁹

38. The provisions within clauses 61 to 77 (as introduced; now clauses 65 to 81 in the Bill as amended in Public Bill Committee) were included within the Memorandum as relevant provisions. The First Minister is therefore of the opinion that legislative consent is required for amendment 46 as it falls within Part 3 of the Bill.³⁰ However, the First Minister is not content to recommend to the Senedd that it gives consent to the change made to clause 61 by amendment 46 until further discussions are had with the UK Government.³¹

39. At paragraphs 22 to 25 of Memorandum No. 2 the First Minister comments on amendments 8 to 16 and NC5 which relate to clauses 93 and 108 (as

²⁶ Memorandum No. 2, paragraph 14

²⁷ Memorandum No. 2, paragraph 16

²⁸ Memorandum No. 2, paragraphs 29 and 36

²⁹ [House of Commons, Data Protection and Digital Information \(No. 2\) Bill \(Amendment Paper\)](#), Amendment ‘Gov 46’, page 22

³⁰ Memorandum No. 2, paragraphs 18 to 21

³¹ Memorandum No. 2, paragraph 37. See also paragraph 30.

introduced; now clauses 99 and 115 in the Bill as amended in Public Bill Committee).

40. Clause 93, as introduced, confers powers on the Secretary of State to make regulations, as they deem appropriate, for the purpose of implementing an international agreement relating to sharing information for law enforcement purposes.

41. At paragraphs 22 and 23 of Memorandum No. 2 the First Minister states that discussions were held between Welsh Government and UK Government officials. He states that, throughout these discussions, Welsh Government officials “requested that concurrent plus powers be given to Welsh Ministers to make regulations for the purpose of implementing an international agreement relating to sharing information for the aspects of law enforcement within the Senedd’s competency”.

42. Amendments 8 to 16 and NC5 were tabled as a result of these discussions. Paragraph 24 of Memorandum No. 2 sets out in detail the effect of these amendments.

43. The main effect of amendments 8, 10 and NC5 is to enable the regulation-making power conferred by clause 93 (as introduced; now clause 99 in the Bill as amended in Public Bill Committee) to be exercised concurrently by the Secretary of State and, in relation to devolved matters, the Welsh Ministers and Scottish Ministers. However, no consent mechanism is included meaning the Secretary of State can exercise the power without seeking the approval of the Welsh Ministers. The regulation-making powers would be subject to the negative resolution procedure.

44. At paragraph 31 of Memorandum No. 2 the First Minister states:

“Whilst these amendments were tabled by UK Government in response to our request for appropriate regulation making powers for Welsh Ministers, the amendments as currently drafted only provide Welsh Ministers with a concurrent power, with no consent mechanism in response to the potential exercise of the power by UK Government.”

45. The First Minister adds that the Welsh Government continues to oppose the use of such concurrent powers, and is “continuing to engage with the UK Government on these amendments”. His view is that it would not be appropriate

to recommend consent to clauses 93 and 108 as amended by amendments 8 to 16 and NC5 without further discussion and further amendments.³²

46. The amendments were agreed at the Committee Stage in the House of Commons.

UK-EU dynamic

EU adequacy decision

47. In the Memorandum, the First Minister states that one of the Welsh Government's overarching concerns to UK proposals is the potential loss of EU Adequacy and the impact on Wales.³³

48. The European Commission has the power to determine whether a country outside the EU offers adequate levels of data protection. An adequacy decision means that no further safeguards are necessary for the flow of personal data from the EU, Norway, Liechtenstein and Iceland to third countries, such as the UK.³⁴

49. The UK successfully obtained an adequacy decision on 28 June 2021³⁵ following its withdrawal from the EU for personal data sharing and for law enforcement cooperation, including as envisaged by the Trade and Cooperation Agreement (TCA).³⁶

50. The UK's adequacy decision was the first to include a sunset provision, meaning it is time-limited to four years, up to June 2025.

51. In September 2021, the UK Government launched a consultation on reforms to the UK's data protection regime.³⁷ The Welsh Government responded to the consultation.³⁸ Throughout its response, the Welsh Government highlighted the need to avoid negative impacts on the adequacy decision.

52. The First Minister does not revisit these issues in Memorandum No. 2, and no mention is made of the adequacy decision.³⁹

³² Memorandum No. 2, paragraph 32

³³ Memorandum, paragraph 13

³⁴ European Commission, [Adequacy decisions](#)

³⁵ European Commission, [Data protection: Commission adopts adequacy decisions for the UK](#), 28 June 2021

³⁶ Official Journal of the European Union, [Trade and Cooperation Agreement](#), 30 April 2021

³⁷ [Consultation outcome 'Data: a new direction'](#), UK Government, accessed July 2023

³⁸ ['Data: a new direction': Welsh Government response](#), 13 January 2022

³⁹ Memorandum No. 2

53. We wrote to the First Minister on 15 May 2023 and requested more information on the implications for Wales should the adequacy decision be lost.⁴⁰

54. In his response, the First Minister states:

“Most businesses in Wales, and especially those in financial services and tech sectors, rely on cross-border data flows; being able to smoothly transfer personal data about their customers or staff to offer goods and services, and to operate cloud-based email or file storage.”⁴¹

55. The First Minister sets out the consequences of the loss of adequacy, including the need for further safeguards, resulting in disruption, additional costs and administrative and reporting requirements for Welsh and EU businesses. This, he told us, “could potentially make Wales and the UK less attractive for investment from EU companies”.⁴²

56. The First Minister added that the Bill “does not appear to assess the risk” of changes to the UK’s data regime, and concludes:

“Our view is that changes to the UK’s GDPR regime as outlined in the Bill could jeopardise the EU GDPR adequacy decision, which is constantly monitored and can be withdrawn at any time.”⁴³

57. The First Minister told us that the Welsh Government has raised the matter several times with the UK Government at official level, who have provided assurances that “they see no threat to the adequacy agreement”. The First Minister has requested a copy of the UK Government’s risk assessment but has not yet received this.⁴⁴

UK-EU obligations

58. In addition to the terms of the UK’s EU adequacy decision, the Bill also intersects with UK-EU obligations.

59. The TCA places duties on the UK and EU regarding matters covered by the Bill, specifically on personal data protection, cross-border data transfers, and law

⁴⁰ [Letter to the First Minister](#), 15 May 2023, question 7

⁴¹ [Letter from the First Minister](#), 14 June 2023, response to question 7

⁴² Letter from the First Minister, 14 June 2023, response to question 7

⁴³ Letter from the First Minister, 14 June 2023, response to question 7

⁴⁴ Letter from the First Minister, 14 June 2023, response to question 7

enforcement cooperation. For example, the TCA sets out eight bases for current and future UK-EU cooperation, one of which is personal data protection. The parties also recognise that individuals have a right to the protection of personal data and privacy and that high standards in this regard contribute to trust in the digital economy and to the development of trade.⁴⁵

60. Part 3 of the TCA governs UK-EU cooperation on law enforcement and judicial cooperation in criminal matters. Examples of cooperation include the exchange of DNA, fingerprint and vehicle registration data, and criminal record information. Part 3 can be suspended with 3 months' notice by either party in the event of "serious and systemic deficiencies within one Party as regards the protection of fundamental rights or the principle of the rule of law".⁴⁶

Reports from committees in the UK Parliament

61. The Joint Committee on Human Rights (JCHR) put out a call for evidence, which closed 26 May.⁴⁷

62. At the time we agreed our report, the JCHR was yet to publish its report.

2. Committee consideration

63. We considered the Memorandum at our meeting on 9 May 2023.⁴⁸ As noted above in paragraph 53 we wrote to the First Minister on 15 May 2023, and received a response on 14 June.

64. We considered Memorandum No. 2 on 19 June 2023.⁴⁹

65. We agreed our report on 10 July 2023.⁵⁰

Our view

Intergovernmental working

66. As highlighted above in paragraphs 14 and 15, and as noted in paragraphs 15 and 16 of the Memorandum, we note that there has been sustained engagement

⁴⁵ Trade and Cooperation Agreement, Article 769, page 149/980

⁴⁶ Trade and Cooperation Agreement, Article 693, page 149/876

⁴⁷ Human Rights (Joint Committee), [Legislative Scrutiny: Data Protection and Digital Information Bill](#)

⁴⁸ [Legislation, Justice and Constitution Committee](#), 9 May 2023

⁴⁹ [Legislation, Justice and Constitution Committee](#), 19 June 2023

⁵⁰ [Legislation, Justice and Constitution Committee](#), 10 July 2023

on the development of the Bill at official level across the UK and Welsh governments.

67. Given this engagement, it is unfortunate that there are outstanding matters of concern, as we describe and consider in the following paragraphs.

Legislative consent

68. We note the First Minister's assessment of the provisions within the Bill that require the consent of the Senedd, as set out in the Memorandum and Memorandum No. 2.

69. In our letter to the First Minister on 15 May we asked him to clarify why, if the Welsh Government is of the view that devolved areas are engaged for clauses 54 and 56 of the Bill (as introduced; now clauses 56 and 60 in the Bill as amended in Public Bill Committee), the Senedd's consent should not also be sought for other substantive provisions in Part 2 of the Bill.⁵¹

70. In his response on 14 June the First Minister wrote:

"Clauses 54 and 56 confer a power on public authorities to provide personal information about individuals (subject to consent) to organisations providing Digital Verification Services (DVS). The purpose is to facilitate the provision of DVS and improve the service offered to the user. Unlike the other clauses in Part 2, they do not relate to the regulation of DVS."⁵²

71. We agree with the First Minister that the Senedd's consent is required for clauses 61 to 77, 92 and 93 (as introduced; now clauses 65 to 81, 98 and 99 in the Bill as amended in Public Bill Committee) as set out in the Memorandum. We also agree that the Senedd's consent is required for Amendment NC5 (clause 100 in the Bill as amended in Public Bill Committee) and the amendments made to clauses 61, 93 and 108 (as introduced; now clauses 65, 99 and 115 in the Bill as amended in Public Bill Committee) as described in Memorandum No. 2.

72. With regards to clauses 54 and 56 of the Bill (as introduced; now clauses 56 and 60 in the Bill as amended in Public Bill Committee), and the amendments to those clauses, we note that the First Minister considers that the UK Government has taken an "extraordinarily wide interpretation" of the reserved matter of 'internet services', whereas the First Minister believes these clauses relate to the

⁵¹ Letter to the First Minister, 15 May 2023

⁵² Letter from the First Minister, 14 June 2023

devolved matters of public services, economy, and business and are therefore relevant provisions for the purpose of Standing Order 29.

Conclusion 1. We disagree with the First Minister that clauses 54 and 56 of the Bill (as introduced; now clauses 56 and 60 in the Bill as amended in Public Bill Committee) require the consent of the Senedd. We also disagree that consent is required for Amendment NC3 (clause 58 in the Bill as amended in Public Bill Committee).

Conclusion 2. We consider that clauses 61 to 77, 92, 93 and 108 of the Bill (as introduced; now clauses 65 to 81, 98, 99 and 115 in the Bill as amended in Public Bill Committee), and the amendments made to those clauses, plus Amendment NC5 (clause 100 in the Bill as amended in Public Bill Committee), fall within a purpose within the legislative competence of the Senedd, as described in Standing Order 29, and therefore require the consent of the Senedd.

Comments regarding specific clauses of the Bill

Clause 56

73. In our letter to the First Minister we referred to his comments at paragraph 39 of the Memorandum that, in relation to clause 56 of the Bill (as introduced; now clause 60 in the Bill as amended in Public Bill Committee), further consideration needed to be given to the devolved implications of a UK-wide Code of Practice about the disclosure of information, and we asked if he was in a position to provide an update.⁵³

74. The First Minister responded that his officials were “considering whether the powers provided to the Secretary of State in relation to clause 56 are appropriate as the resulting Code of Practice would apply to Welsh public bodies.”⁵⁴

Recommendation 1. The First Minister should provide an update to this Committee and to the Senedd by 6 September 2023 or in the laying of any next supplementary legislative consent memorandum, whichever is the earlier, on the Welsh Government's consideration of the devolved implications of a UK-wide Code of Practice about the disclosure of information and the powers provided to the Secretary of State in relation to clause 56 of the Bill (as introduced; now clause 60 in the Bill as amended in Public Bill Committee).

⁵³ Letter to the First Minister, 15 May 2023, question 2

⁵⁴ Letter from the First Minister, 14 June 2023, response to question 2

Clauses 61 to 77

75. We also asked the First Minister for an update in relation to clauses 61 to 77 (as introduced; now clauses 65 to 81 in the Bill as amended in Public Bill Committee), as in paragraph 42 of the Memorandum he stated further consideration needed to be given to the devolved implications of the regulation-making powers in those clauses.⁵⁵

76. The First Minister responded that his officials were “considering whether the powers provided to the Secretary of State and Treasury in respect of clauses 61-77 are appropriate and whether it would be appropriate for Welsh Ministers to have powers in this area”.⁵⁶

Recommendation 2. The First Minister should provide an update to this Committee and to the Senedd by 6 September 2023 or in the laying of any next supplementary legislative consent memorandum, whichever is the earlier, on the Welsh Government's consideration of the devolved implications of the regulation-making powers in to clauses 61 to 77 of the Bill (as introduced; now clauses 65 to 81 in the Bill as amended in Public Bill Committee).

Clause 92

77. We asked the First Minister to confirm that the amendments made by clause 92 (as introduced; now clause 98 in the Bill as amended in Public Bill Committee), extend a pre-existing Henry VIII power exercisable by Welsh Ministers, and to clarify the reasoning behind the omission of this information from the Memorandum.⁵⁷

78. The First Minister confirmed in his response that “the amendments made by clause 92 extend a pre-existing Henry VIII power, exercisable by the Welsh Ministers, by enabling the sharing of information to improve the delivery of public services to 'undertakings'”.⁵⁸

79. He told us that reference to this was not made in the Memorandum “as this is a modification of an existing power, rather than a conferral of a power”. The First Minister confirmed that the regulation-making power in section 35 of the *Digital*

⁵⁵ Letter to the First Minister, 15 May 2023, question 3

⁵⁶ Letter from the First Minister, 14 June 2023, response to question 3

⁵⁷ Letter to the First Minister, 15 May 2023, question 4

⁵⁸ Letter from the First Minister, 14 June 2023, response to question 4

Economy Act 2017 (the power being modified), is subject to the affirmative procedure.⁵⁹

Conclusion 3. While we acknowledge the explanation provided by the First Minister, we consider that it would have been more appropriate and helpful if a more transparent and explicit reference to the extension to the pre-existing Henry VIII power contained within clause 92 of the Bill (as introduced; now clause 98 in the Bill as amended in Public Bill Committee) had been made in the Memorandum.

Clause 93 and concurrent powers

80. In question 5 of our letter of 15 May we referred to the First Minister's comments in the Memorandum that Welsh Ministers should be given appropriate powers to make regulations for the purpose of implementing an international agreement relating to sharing information for the aspects of law enforcement within the Senedd's competency and that this issue is subject to ongoing discussions with UK Government. We asked the First Minister for an update on the discussions, as well as the Welsh Government's view of the reserved and devolved matters in this area.

81. We also requested an example of how international agreements falling under clause 93 (as introduced; now clause 99 in the Bill as amended in Public Bill Committee), might fall to the Welsh Government and/or devolved public bodies to deliver. Furthermore, we asked if he is aware of upcoming international agreements that would be implemented via the Bill's powers.

82. The First Minister responded:

"This is an area where we have continued to have discussions with the UK Government. (...)

*Amendments 8-16 and NC5 would give Welsh Ministers concurrent powers to make regulations for the purpose of implementing an international agreement relating to sharing information for the aspects of law enforcement within the Senedd's competence."*⁶⁰

83. The First Minister stated that the Welsh Government is "opposed to concurrent powers without constitutional safeguards", and this is something the

⁵⁹ Letter from the First Minister, 14 June 2023, response to question 4

⁶⁰ Letter from the First Minister, 14 June 2023, response to question 5

Welsh Government was continuing to discuss with the UK Government.⁶¹ (See below for further commentary on concurrent powers).

84. The First Minister added:

“Our understanding is that Clause 93 primarily relates to the I-LEAP programme, which is broadly designed as a successor to the European Union Schengen Information System II which we had access to before leaving the EU. The I-LEAP programme is designed to increase international cooperation through improving access and use of the INTERPOL system.”

85. He further told us:

“The Senedd has competence to make provision for the prosecution of criminal offences and execution of criminal penalties on a range of devolved matters such as environmental or wildlife crime. On this basis, there is a possibility that the Welsh Government could have an interest in any activity delivered through I-LEAP which interfaces with these areas.

Under the current devolution settlement we expect this interest to be fairly limited in practice. We also do not expect it to place any notable additional requirements on Welsh Government or on any public bodies under the current devolution settlement, especially as I-LEAP would broadly replace an existing set of arrangements in place during our time in the EU.

From a constitutional perspective it is our firm view that the devolution settlement should be protected and the competence of the Senedd respected.

Moreover, in preparation for a future where policing is devolved in line with the recommendations of the Silk Commission and Thomas Commission, it is important to ensure that legislation drafted now is prepared for the more substantive future powers we expect Welsh Ministers to have in this space in the future.”⁶²

⁶¹ Letter from the First Minister, 14 June 2023, response to question 5

⁶² Letter from the First Minister, 14 June 2023, response to question 5

86. The Welsh Government's principles for UK Bills state that "UK Bills should not create concurrent powers".⁶³ Definitions of concurrent and concurrent plus powers (from Welsh Government guidance) is included at Box 1:

Box 1: Definitions

A concurrent power is a power which can be exercised:

(a) by Welsh Ministers, in relation to Wales; or

(b) by UK Ministers in relation to Wales (for example, where UK Ministers are exercising powers in relation to the whole of the UK; or in relation to England and Wales).

UK Ministers should not normally exercise their powers in relation to Wales without the agreement of the Welsh Ministers, but (unless it is a concurrent plus power – see below) they are not legally required to obtain consent in order to legislate.

A "concurrent plus" power is a special type of concurrent power which can be exercised:

(a) by the Welsh Ministers, in relation to Wales; or

(b) provided that the Welsh Ministers consent, by UK Ministers in relation to Wales.

When the Welsh Ministers are considering whether to give consent to UK Ministers exercising a concurrent plus power, they are exercising a statutory function. If they do not consent, UK Ministers cannot exercise these powers in relation to Wales.

87. The Welsh Government guidance includes the following principle:

"Principle 8: New concurrent functions should only be created in very exceptional circumstances and teams should ensure that a carve out will apply such that no consent will be required when removing them (to protect legislative competence), and

⁶³ ~~Letter from the Minister for Climate Change~~, 6 August 2021, Annex B: Guidance for Welsh Government officials on concurrent powers

*that they are concurrent plus (to protect executive competence)."*⁶⁴

88. We note that negotiations between the Welsh and UK Governments has resulted in the Welsh Ministers being provided with a concurrent power to make regulations for the purpose of implementing an international agreement relating to sharing information for the aspects of law enforcement within the Senedd's competence. We further note that this is not a 'concurrent plus' power, meaning there is no requirement for the consent of the Welsh Ministers to be sought before the UK Government exercises the power in a devolved area.

89. As highlighted above in paragraph 45, we acknowledge that the Welsh Government continues to oppose the use of concurrent powers and is still engaged in discussions with the UK Government on these matters. We also note that the First Minister is recommending that the Senedd withholds its consent for clause 93 (as introduced; now clause 99 in the Bill as amended in Public Bill Committee).⁶⁵

Conclusion 4. We take the opportunity to repeat a view we have previously expressed and to remind the Welsh Government of our concerns regarding its approach to concurrent powers. While we acknowledge that a concurrent plus power may be favoured over a concurrent power, because of the added Ministerial consent mechanism, concurrent plus powers remain sub-optimal as they do not provide a role for the Senedd to undertake scrutiny of subordinate legislation made in devolved areas.

Conclusion 5. We take the opportunity to also repeat a view we have previously expressed on the implementation of international healthcare agreements, that the Welsh Ministers should make any necessary regulations in devolved areas for the purpose of giving effect to those agreements. We note that this conclusion could be reapplied to international agreements whose implementation falls within devolved competence.

Recommendation 3. Where the Welsh Ministers do not make regulations to implement international agreements, and powers to do so are instead exercised by the Secretary of State, the Welsh Ministers must provide full detail and an explanation to the Senedd in advance of such regulations being made by the Secretary of State.

⁶⁴ Letter from the Minister for Climate Change, 6 August 2021, Annex B

⁶⁵ Memorandum No. 2, paragraph 32

Clause 36

90. In question 6 of our letter to the First Minister we asked for clarification on the Welsh Government's chosen and preferred position on clause 36 (as introduced; now clause 38 in the Bill as amended in Public Bill Committee), and whether the Welsh Government has had discussions with the UK Government about the drafting of this clause and its effect in Wales.

91. This clause inserts into the DPA 2018 new section 148A which makes provision about interview notices, which can be used to require a person to attend an interview and answer questions when required by the Information Commissioner (the Commissioner).⁶⁶

92. Additionally, clause 36 inserts into the DPA 2018 new section 148B, which places certain restrictions on the circumstances in which the Commissioner can require a person to answer questions under an interview notice. Subsection (9) lists bodies to whom the Commissioner cannot give an interview notice, including "the Office for Standards in Education, Children's Services and Skills in so far as it is a controller or processor in respect of information processed for the purposes of functions exercisable by His Majesty's Chief Inspector of Education, Children's Services and Skills by virtue of section 5(1)(a) of the Care Standards Act 2000."

93. The functions referenced relate to the registration of children's homes in England, residential family centres in England, fostering agencies in England or, where the activities of a fostering agency are carried on from two or more branches, the branches in England, voluntary adoption agencies whose principal office is in England, and adoption support agencies in England or, where the activities of an adoption support agency are carried on from two or more branches, the branches in England. No similar exemption is contained in the Bill for functions related to registration of similar establishments and agencies in Wales meaning that the Commissioner will be able to issue an interview notice in relation to those matters in Wales but not in England.

94. The First Minister responded:

"I agree with your assessment that clause 36 of the Bill inserts new sections 148A-148C into the Data Protection Act 2018 which confer powers on the information commissioner to require certain persons to attend for interview where it is suspected that a person is not complying

⁶⁶ We note that, in practice, the reference to the Commissioner will be read as a reference to the newly-formed Information Commission, courtesy of section 102(2) of the Bill.

with particular requirements of the DP legislation. Further, that within new section 148B, sub-section (9) places certain restrictions on the circumstances in which the Commissioner can require a person to answer questions under an interview notice, and excludes certain persons from the ambit of the power.”⁶⁷

95. The First Minister added:

“I have asked my officials to consider our position with regard to these provisions, where Welsh Ministers are the regulator for the equivalent services in Wales, namely Care home services provided wholly or mainly for children, Residential family centres, Fostering services and Adoption services.”⁶⁸

Recommendation 4. The First Minister should provide an update to this Committee and to the Senedd by 6 September 2023 or in the laying of any next supplementary legislative consent memorandum, whichever is the earlier, on the Welsh Government's consideration of clause 36 of the Bill (as introduced; now clause 38 in the Bill as amended in Public Bill Committee).

UK-EU dynamic

96. As we note above in paragraphs 47 to 60, the First Minister has highlighted concerns that the introduction of the Bill creates a risk to the UK's current adequacy decision, which was granted in June 2021 by the EU for an initial period of 4 years.

97. As the Committee responsible for the constitutional impacts of external affairs, we recognise that the Bill intersects with UK-EU obligations. It engages multiple aspects of our remit, including UK-EU governance and international obligations compliance. It is from this perspective that we have considered this aspect of the Bill.

98. We note and welcome the clarity and detail of the Welsh Government's position, as set out in its consultation response that preceded the Bill, the Memorandum, and the First Minister's response to our letter of 15 May. We particularly welcome the level of detail provided by the First Minister on the implications for Wales of the loss of adequacy.

⁶⁷ Letter from the First Minister, 14 June 2023, response to question 6

⁶⁸ Letter from the First Minister, 14 June 2023, response to question 6

Recommendation 5. We support the Welsh Government's request to the UK Government that it should share a copy of its risk assessment on the Bill and the loss of the adequacy decision as a matter of urgency.

Conclusion 6. We share the concerns of the Welsh Government regarding the potential risk of loss of adequacy and its implications for Wales, the UK and the EU.

99. Our concerns extend beyond the areas outlined by the Welsh Government, which primarily relate to trade, to all data sharing covered by the Bill and adequacy decision, including law enforcement cooperation.

Recommendation 6. Given the concerns regarding the potential risk of loss of adequacy, the First Minister should escalate this issue to Ministerial level discussions as opposed to discussion at official level.

100. We note the obligations placed on the UK and EU in the TCA, including that the maintenance of high standards of personal data protection forms a basis for current and future UK-EU cooperation.

Recommendation 7. The First Minister should provide to this Committee by 6 September 2023 or in the laying of any next supplementary legislative consent memorandum, whichever is the earlier, the Welsh Government's view on the Bill as it relates to compliance under the Trade and Cooperation Agreement.