

## **LEGISLATIVE CONSENT MEMORANDUM**

### **UNITED KINGDOM INTERNAL MARKET BILL**

1. This legislative consent memorandum is laid under Standing Order 29.2. Standing Order 29 prescribes that a legislative consent memorandum must be laid, and a legislative consent motion may be tabled before Senedd Cymru if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies the legislative competence of the Senedd.
2. The United Kingdom Internal Market Bill (“the Bill”) was introduced in the House of Commons on Wednesday 9 September 2020 and passed Second Reading on Monday 14 September. The Bill can be found at: <https://services.parliament.uk/Bills/2019-21/unitedkingdominternalmarket.html>

#### **Policy Objective(s)**

3. The UK Government’s stated policy objectives are:
  - a) to continue to secure economic opportunities across the United Kingdom;
  - b) to continue to increase competitiveness and enable citizens across the UK to be in an environment that is the best place in the world to do business; and
  - c) to continue to provide for the general welfare, prosperity, and economic security of all UK citizens.

#### **Summary of the Bill**

4. The Bill is sponsored by the Department for Business, Energy and Industrial Strategy.
5. The key provisions of the Bill cover:
  - a) The principles of mutual recognition and non-discrimination of goods and services, forming the Market Access Commitment, which would apply across the UK;
  - b) Modifications to the market access commitment principles, designed to give effect to providing unfettered access of qualifying goods from Northern Ireland to Great Britain;
  - c) The recognition of professional qualifications across the UK;

- d) The Competition and Markets Authority (CMA) which would be provided with new functions, including monitoring the health of the internal market and advising and reporting on proposals and regulations and their potential or actual impact on the UK Internal Market;
- e) Measures which take steps to “clarify specific elements of the Northern Ireland Protocol in domestic law, concerning tariffs, export procedures and state aid, to remove any ambiguity”;
- f) Provisions to “ensure a uniform approach across the UK” to the application of EU State aid law under Article 10 of the Northern Ireland Protocol;
- g) The power to enable UK Government Minister to provide financial assistance to persons in any part of the UK to promote economic development, infrastructure, culture and sport, as well as educational and training activities;
- h) Specific amendment of the Government of Wales Act 2006, Scotland Act 1998, and the Northern Ireland Act 1998 to include the regulation of subsidies as a reserved matter.

#### **Provisions in the Bill for which consent is required**

- 6. Each provision of the Bill is considered to require the consent of the Senedd. This assessment would seem to be shared by the UK Government as set out in Annex A to the explanatory notes to the Bill.
- 7. Clause 49 of the Bill seeks to amend paragraph 5 of Schedule 7B to the Government of Wales Act 2006 so that the entire Bill is specified as a protected enactment. Each provision will therefore modify the legislative competence of the Senedd by adding to the category of legislation that it cannot amend and therefore engage standing order 29.1(ii). Consent is required for the Bill as a whole.
- 8. Clause 48 of the Bill (Regulation of distortive or harmful subsidies) also engages standing order 29.1(ii) in that it seeks to amend the Government of Wales Act 2006 to modify the legislative competence of the Senedd. This clause therefore also requires consent by virtue of standing order 29.1(ii).
- 9. Clauses in the Bill also engage standing order 29.1(i) and require the consent of the Senedd as set out below.

## **Part 1 – UK Market Access: Goods**

### *Clause 1 - introductory*

10. This clause sets out the intended purpose of Part 1 of the Bill, which it is stated is to promote the continued functioning of the UK internal market for goods by establishing two new market access principles in UK law.
11. The two new market access principles to be established by this Bill will apply in relation to rules on non-reserved matters. As a result, the consent of the Senedd is required for this clause under standing order 29.1(i).

### *Clauses 2-4 – mutual recognition: goods*

12. Clause 2 sets out the principle of mutual recognition for goods, including the effect of mutual recognition and the criteria a good must meet to benefit from the mutual recognition principle. It provides that where a good has been produced in or imported into one part of the UK and can be lawfully sold there, that good can be lawfully sold anywhere in the UK free from any relevant requirements that would otherwise apply. This includes where there are no requirements in place in the place that the good was produced in or imported into – the good could be lawfully sold without having to meet any relevant requirements that existed elsewhere in the UK.
13. Clause 3 defines a relevant requirement. This includes any prohibition on the sale of goods, or obligation or condition of sale the failure to meet which would result in a prohibition on the sale of the good. The clause goes on to specify relevant requirements which include the characteristics of the good (age, composition, nature, quality or performance), the presentation of the goods (packaging, labelling, marking, sampling), production standards, identification or tracing of animals, inspection, assessment, registration, certification, approval or authorisation of a good, documentation or information relating to a good, and anything else which is a mandatory requirement for sale (or anything else the Secretary of State may specify in regulations).
14. Clause 4 excludes any pre-existing requirements (at the date of commencement) from the scope of the Bill. This includes any pre-existing requirements which are re-enacted in future without substantive change.
15. These clauses create an overarching rule which provides that goods that can be lawfully sold in one part of the UK (or imported into that part) can circulate freely within the UK without having to meet the rules of each part of the UK. They operate so that any regulations made by the Senedd or Welsh Ministers in future which fell within the scope of these clauses would have no effect on any goods produced in, or imported into, any other part of the UK which are sold in Wales. As a result, these clauses would engage matters within the legislative competence of the Senedd

and therefore require the consent of the Senedd under standing order 29.1(i).

*Clauses 5-9 – non-discrimination: goods*

16. Clause 5 sets out the principle of non-discrimination for goods and provides that a relevant requirement applying in one part of the United Kingdom which directly or indirectly discriminates against incoming goods compared to local goods will be of no effect.
17. Clause 6 defines a relevant requirement. This includes any statutory provision applying requirements on the manner of sale of goods, and other requirements to the extent that they do not constitute requirements that need to be complied to lawfully sell a good, such as requirements on the transportation, storage, handling or display of goods. The Secretary of State is provided with a power to amend the scope of a relevant requirement, subject to consultation with devolved Ministers.
18. Clause 7 provides an explanation of direct discrimination for the purposes of clause 5. This is where an incoming good (whether produced in or imported and passing through another part of the United Kingdom) receives unfavourable treatment compared to a local good.
19. Clause 8 provides an explanation of indirect discrimination for the purposes of clause 5. This is where incoming goods are not directly discriminated against, but where a relevant requirement disadvantages incoming goods and distorts the market by creating an 'adverse market effect.' A regulator can derogate from the rules on indirect discrimination in order to meet certain legitimate aims. This clause also provides the Secretary of State with a power to alter the list of legitimate aims by regulations with no requirement to consult or obtain consent of devolved Ministers.
20. Clause 9 provides that existing statutory provision (at commencement) is excluded as a relevant requirement for the purposes of the principle, unless it is re-enacted with substantive change.
21. The non-discrimination principle established by these clauses will apply in relation to any future regulation in scope of the Bill in non-reserved areas. The clauses will have the effect of essentially setting aside any relevant regulations made by the Senedd and the Welsh Ministers which would be caught by the non-discrimination principle, insofar as they would otherwise apply to goods produced in, or imported into, any other part of the UK. Due to this effect on rules on matters within the legislative competence of the Senedd, the consent of the Senedd is required under standing order 29.1(i).

### *Clause 10 and Schedule 1 – exclusions*

22. Clause 10 introduces Schedule 1 and therefore both are considered together. Schedule 1 specifies exclusions from the market access principles.
23. The exclusions in paragraphs 1 and 2 of the Schedule relate to pest and disease control, food safety, chemicals and taxation. Paragraphs 1 and 2 also confer functions on the Welsh Ministers in relation to notifications of any measures falling within these exclusions.
24. The last exclusion in paragraph 10 provides that indirect discrimination does not apply to requirements made by, or under, Acts of Parliament where these requirements apply both to goods in the originating and destination parts of the UK.
25. To the extent that the rules require consent of the Senedd, the exclusions to those rules, and the powers to modify those exclusions, would also engage matters within the legislative competence of the Senedd. The only exception to this is the exclusion in paragraph 10 of Schedule 1 which concerns an exclusion to the rule on indirect discrimination. This exclusion concerns the application of any requirements found in or under an Act of Parliament. To fall within the exclusion the same, or substantially the same, requirement would need to apply in both the originating and destination parts of the UK. This provision operates on matters beyond the legislative competence of the Senedd as the operation of the clause is dependent on the operation of rules beyond Wales, and therefore it does not engage standing order 29.1(i). However, to confirm, paragraph 10 of Schedule 1, along with all other clauses in the Bill, nevertheless falls within standing order 29.1(ii) and requires the consent of the Senedd on that basis.

### *Clause 11 – Northern Ireland Protocol*

26. This clause sets out modifications to the market access principles for goods in relation to the sale of goods from Northern Ireland in Great Britain.
27. This clause will operate on the rules in Part 1 of the Bill which apply in non-reserved areas and therefore requires the consent of the Senedd under standing order 29.1(i).

### *Clause 12 – sale of goods complying with local law*

28. Clause 12 provides that nothing contained in Part 1 of the Bill prevents goods produced in or imported into a part of the UK being sold in another part of the UK if the sale complies with any requirements applicable in that part (or if there are no such requirements).

29. This clause also operates alongside, and clarify, the rules in Part 1 of the Bill, which apply in non-reserved areas. As a result, the consent of the Senedd is required under standing order 29.1(i).

*Clauses 13 and 14 - interpretation*

30. These clauses provide for the interpretation of Part 1 and are therefore parasitic on the rest of the clauses in Part 1. They therefore require consent to the extent that the remainder of the clauses in Part 1 require consent under standing order 29.1(i).

**Part 2 – UK Market Access: Services**

*Clause 15 – services: overview*

31. This clause sets the parameters and define the operation of Part 2 of the Bill. It therefore establishes the extent that the following clauses will apply in relation to matters within the legislative competence of the Senedd. As noted below, the following clauses will require consent and therefore to the extent that those clauses require consent, then this clause will also require consent under standing order 29.1(i).

*Clause 16 and Schedule 2 – services: exclusions*

32. This clause introduces Schedule 2 which specifies a number of types of service provision which are outside of scope of Part 2. To the extent that the main proposition of this Part requires consent, then in principle it is also the case that to specify any excluded non-reserved service provision would also require consent. Some of the exclusions contained in Schedule 2 relate to reserved services, however, a number of the categories of exclusions (for example social services) are within the legislative competence of the Senedd.

33. Clause 16 also provides a power for the Secretary of State to add to or modify that list. There is no requirement on the Secretary of State to seek the consent of, or consult with, the Welsh Ministers before making any such regulations. To the extent that the list itself requires consent, the power of the Secretary of State would also require consent under standing order 29.1(i).

*Clause 17: mutual recognition of authorisation requirements*

34. This clause establishes a principle of mutual recognition of authorisations to provide services. It provides that an authorisation requirement, which would normally be required to be met to carry out a service in one part of the UK, does not apply if the service provider has been authorised to provide that service in another part of the UK.

35. There is an exemption to the general rule for a situation where a service regulator imposes regulatory requirements in response to a public health

emergency. Where such an emergency can be reasonably justified the mutual recognition principle does not apply.

36. This rule will apply in relation to the regulation of services that fall within the legislative competence of the Senedd. It will have the effect of setting aside any relevant rules put in place by the Senedd and Welsh Ministers in future in relation to the provision of services that fall within scope of this Part. As a result, it requires the consent of the Senedd under standing order 29.1(i).

*Clauses 18 and 19 – Direct and Indirect discrimination in the regulation of services*

37. Clauses 18 and 19 provide that any regulatory requirements imposed by a services regulator which directly or indirectly discriminate against a service provider will be of no effect. As noted above, a regulatory requirement is defined at clause 16 of the Bill as a legislative requirement that would, if not satisfied, whether at a particular point or on a continuing basis, prevent a service provider from carrying on a business of providing particular services.
38. Clause 18 provides that direct discrimination in this context is explicitly or obviously based on where a provider is from within the UK, but can be reasonably justified if it is a response to a public health emergency.
39. Clause 19 provides that indirect discrimination in this context would not seek to explicitly discriminate against service providers based on where they are from within the UK, but would have the effect of putting them at a disadvantage compared to a comparable service provider from another part of the UK. There is a carve out for any measures which can be justified as a necessary means of achieving a legitimate aim. A legitimate aim is defined in clause 19(6) and means the protection of life or health of humans, animals or plants, the protection of public safety or security and the efficient administration of justice. Clause 19 also provides the Secretary of State with a power to alter the list of legitimate aims by regulations with no requirement to consult or obtain consent of devolved Ministers.
40. This rule will apply in relation to the regulation of services that fall within the legislative competence of the Senedd and will have the effect of setting aside any relevant measures insofar as they would be considered discriminatory against any to service providers from any other part of the UK. As a result, it requires the consent of the Senedd under standing order 29.1(i).

*Clauses 20 and 21 - interpretation*

41. Clause 20 defines the concept of a regulator for the purposes of Part 2 and clause 21 makes further provision in relation to the interpretation of Part 2. As these clauses are parasitic on the rest of the clauses in Part 2,

they are considered to require consent, to the extent that they provide interpretative rules of the elements of Part which also require consent under standing order 29.1(i).

### ***Part 3 – Professional Qualifications and Regulation***

#### *Clause 22 - Access to professions on grounds of qualifications or experience*

42. Clause 22 sets out when a professional qualified in one part of the UK is automatically treated as qualified in respect of that profession in another part of the UK (the automatic recognition principle). This clause also explains the situations where the automatic recognition principle does not apply. It provides that where a provision limits access to a profession in the relevant part of the UK to those that have certain qualifications or experience, UK residents who are “qualified” in another part of the UK will be treated as if they were qualified to practise that profession in the relevant part.

43. This clause will have the effect of modifying the application of any future rules governing the recognition of professional qualifications in relation to professions within the legislative competence of the Senedd. As a result, the consent of the Senedd is required under standing order 29.1(i).

#### *Clause 23 – meaning of “qualified” UK resident*

44. This clause sets out when an individual is considered a ‘qualified’ UK resident for the purposes of being able to rely on automatic recognition principle as set out in clause 22. To the extent that clause 22 requires consent, clause 23 would also require consent under standing order 29.1(i).

#### *Clause 24 - Exception from section 22 where individual assessment offered*

45. This clause provides that the automatic recognition principle in clause 22 will not apply where a process which complies with the clause enables a UK resident to seek recognition of their professional qualifications or experience in order to practise the profession concerned. This does not affect the position of any individual who has practised the profession before the process was available (who will still be able to rely on automatic recognition).

46. It further provides that those that have qualifications or experience obtained in one part of the UK should be treated equally to like qualifications or experience obtained in the part where recognition is sought, and should be able to be relied on to demonstrate the necessary knowledge and skills requires to access the profession.

47. Where an applicant cannot rely on qualifications and experience alone to demonstrate the necessary knowledge and skills required to access a



specific profession, the process should allow the applicant to undertake a test or assessment in order to be able to demonstrate that they do in fact have the knowledge and skills that are not demonstrated by their qualifications or experience.

48. If the applicant can demonstrate the necessary knowledge and skills, either on the basis of the qualifications or experience they can evidence, or through the test or assessment, the regulatory body should recognise the applicant and allow them to practise the profession in that part of the UK.
49. This provision will modify the application of future rules on the recognition of professional qualifications of professions within the legislative competence of the Senedd. As a result, the clause requires the consent of the Senedd under standing order 29.1(i).

*Clause 25 - Other exceptions from section 22*

50. Clause 25 provides that the automatic recognition principle does not apply to existing provision except where, after the Bill is passed, that a part or a different part of the UK makes provision that affect the circumstances in which individuals are qualified in respect of the profession concerned.
51. This clause will alter the effect of rules within the legislative competence of the Senedd and requires consent under standing order 29.1(i).

*Clause 26 – Professional regulation not within section 22: equal treatment*

52. This clause provides that a UK resident practising a profession in a part of the UK with qualifications or experience obtained in another part of the UK, must be treated on the same basis, in respect of ongoing professional requirements, as a locally qualified professional. This includes those who have been recognised through the automatic recognition principle or through a process complying with clause 24 but also applies to other UK residents with qualifications or experience obtained in the UK.
53. A professional who holds qualifications or experience from outside of the part of the UK in which they are practising must be treated as if their qualifications or experience were the same as the qualifications or experience held by a locally qualified professional. If the qualifications or experience are different in type and cannot be obtained in the relevant area, the applicant should be treated on the same basis unless more onerous requirements can be justified due the differences in the qualifications or experience.
54. This clause will modify the application of future rules on the recognition of professional qualifications of professions within the legislative competence of the Senedd. As a result, the clause requires the consent of the Senedd under standing order 29.1(i).

### *Clause 27 – Interpretation of Part 3*

55. This clause defines certain terms used in this Part of the Bill (or provides for them to be read in certain ways in certain cases). To the extent that this provides interpretative rules regarding any clause in Part 3 that requires consent, this clause will also require consent under standing order 29.1(i).

### ***Part 4: Independent Advice on and Monitoring of UK Internal Market***

#### *Clauses 28-39*

56. These clauses confer new functions on the newly established Office of the Internal Market (OIM) within the Competition and Markets Authority (CMA) to cover monitoring of the 'health of the market', as well as reporting and providing advice on the economic impact of specific proposals and regulations in any part of the UK on the UK internal market, including its impact on intra-UK trade, investment, and competition. These functions are aimed at providing all administrations, legislatures, and external stakeholders with published reporting on developments in the UK internal market. The existing information gathering powers are provided for under section 174 of the Enterprise Act 2002, though have been modified to apply to UK internal market functions.

57. The provisions in this Part creates functions which concern matters within the legislative competence of the Senedd. As a result, the consent of the Senedd is required under standing order 29.1(i).

### ***Part 5: Northern Ireland Protocol***

#### *Clause 40 - Northern Ireland's place in the UK internal market and customs territory*

58. This clause places a duty on all UK authorities, including relevant devolved governments, administering the Protocol to have the highest possible regard to: (i) Northern Ireland's integral place in the UK's internal market as set out in Article 6(2) of the Protocol; (ii) Northern Ireland's place in the UK customs territory; and (iii) the need to facilitate the free flow of goods between Great Britain and Northern Ireland.

59. Article 6(2) of the Northern Ireland Protocol provides that "[h]aving regard to Northern Ireland's integral place in the United Kingdom's internal market, the Union and the United Kingdom shall use their best endeavours to facilitate the trade between Northern Ireland and other parts of the United Kingdom, in accordance with the applicable legislation and taking into account their respective regulatory regimes as well as the implementation thereof".

60. The Welsh Ministers have functions in relation to the implementation of the Protocol, including those functions created by section 8C of the EU

(Withdrawal) Act 2018. To seek to modify or inform the way in which such functions, in relation to matters within the legislative competence of the Senedd are exercised, also therefore engage matters within the legislative competence of the Senedd. This clause therefore requires the consent of the Senedd under standing order 29.1(i).

#### *Clause 41 - Unfettered access*

61. This clause requires appropriate authorities not to exercise their functions in a way that would result in a new check, control or administrative process on the direct movement of qualifying Northern Ireland goods from Northern Ireland to Great Britain. Additionally, an exercise of function should not result in an existing check, control or administrative process being used for the first time, or for a new purpose or to a new extent.
62. Direct movement is defined as movement which does not involve transit through the territory of any other state than the United Kingdom
63. This clause will modify how Welsh Ministers' functions in relation to matters within the legislative competence of the Senedd will be exercisable. It will therefore engage matters within the legislative competence of the Senedd and therefore requires the consent of the Senedd under standing order 29.1(i).

#### ***Part 6 – Financial Assistance Powers***

64. Clauses 46 and 47 provide a general power to the Secretary of State to provide financial assistance for the purposes of economic development, culture, sporting activities, infrastructure, domestic educational and training activities and exchanges, and international educational and training activities and exchanges.
65. This clause engages matters within the legislative competence of the Senedd and therefore the consent of the Senedd under standing order 29.1(i).

#### ***Part 7 – Final Provisions***

##### *Clause 50 - Further provision in connection with the Northern Ireland Protocol*

66. The first element of this is to disapply clause 11 at the point where Article 5 to 10 of the Protocol cease to apply. To the extent that clause 11 requires consent, the same is applicable in relation to clause 50(1)(a).
67. Clause 50(2) clarifies that the Internal Market Bill does not impact on the powers to implement the Protocol in section 8C of the EU (Withdrawal) Act 2018. Those powers include Welsh Ministers' powers, and therefore this sub-clause also engage matters within the legislative competence of the Senedd and requires consent.

68. Clause 50(3) inserts a restriction into section 8C of the EU (Withdrawal) Act 2018 (power to implement the Protocol) which links back to section 41, and would therefore require consent of the Senedd under standing order 29.1(i).

#### *Clauses 51 and 52 – Regulations*

69. To the extent that various Secretary of State and Minister of the Crown powers to make regulations are created in the Bill, and could be replicated for the Welsh Ministers in any corresponding Senedd Act, then this clause, which sets the Parliamentary procedure for the regulations, would be within the legislative competence of the Senedd and requires consent under standing order 29.1(i).

#### *Clause 53 – Interpretation: general*

70. To the extent that this clause provides interpretive rules for the application of other clauses in the Bill which require consent, this clause would also require consent under standing order 29.1(i).

#### *Clause 54 - Extent, commencement and short title*

71. To the extent that this clause provides for the commencement of other clauses in the Bill which require consent, this clause would also require consent under standing order 29.1(i).

### **Reasons for making these provisions for Wales in the Internal Market Bill**

72. The Welsh Government does not accept that the measures proposed in the Bill are in any way proportionate to the objectives which the UK Government claims for it. The Welsh Government is not opposed to the principle of an internal market for the UK, nor are we opposed to a UK-wide subsidy regime. However, the proposals in the Bill go far beyond the structure that may be needed to ensure economic and regulatory cooperation between the nations of the UK and, if enacted, would undermine the long-established powers of the Senedd and Welsh Ministers to regulate in relation to matters within devolved competence.

### **Welsh Government position on the Bill as introduced**

73. The Welsh Government will not be able to recommend to the Senedd that it gives consent to the Bill as currently drafted.

74. The Welsh Government objects to elements of each part of the Bill.

75. We object to Parts 1 to 3 on the grounds that they automatically apply market access principles in a comprehensive way, without appropriate

exceptions, without any requirement to maintain high standards, and without requiring intergovernmental agreement be reached in the first instance, through Common Frameworks. The rules created in these Parts will have the effect of setting aside any Welsh-made rules (made after commencement of these Parts) as they apply to any goods or services originating from (or imported into, in the case of goods) any other part of the UK. These elements of the Bill open the door to a 'race to the bottom' *inter alia* in terms of setting environmental standards and standards relating to food safety and quality.

76. On Part 4, the Welsh Government is open to the creation of an independent Office of the Internal Market with an advisory role but does not believe that the Competition and Markets Authority as currently constituted is a suitable vehicle for this.
77. The Welsh Government objects to Part 5 on the basis that clauses in that part breach international law. Clauses 42 and 43 provide powers to UK Ministers to override terms in the Withdrawal Agreement, specifically the Protocol on Ireland and Northern Ireland, agreed between the UK Government and the EU. These clauses therefore breach the terms of the Withdrawal Agreement.
78. In relation to Part 6, the Welsh Government's position is that this section should be deleted from the Bill. There is no mechanical link between the market access principles set out in Parts 1-4 and the new financial assistance powers to be exercised by UK Government Ministers, set out in Part 6. The powers are not necessary and will serve to undermine spending decisions made by the Senedd and the Welsh Ministers.
79. While the Welsh Government favours the creation of a UK-wide subsidy regime, we do object to Part 7 (clause 48) amending GoWA 2006 to reserve State aid. Such a regime should be achieved through discussion and negotiation between the four parts of the UK.
80. We also object to clause 49, via which the Bill in its entirety would become a protected enactment. Such protections should only operate on a narrow basis, by agreement between the legislatures.
81. The Welsh Government is working on proposed amendments to the Bill which will address our concerns, and which we will publish in due course.

### **Financial implications**

82. It is unclear on the face of the Bill whether there will be direct financial implications for the Welsh Government or the Senedd arising from the powers under the Bill.
83. While the UK Government has stated that the financial assistance powers set out in Part 6 would be in addition to the funding currently received via

the block grant, there is no detail or commitment contained within the provisions of the Bill which would provide a legal basis for this assurance.

## **Conclusion**

84. As set out above, the Senedd's consent is required for the United Kingdom Internal Market Bill. But the Welsh Government will not be in a position to recommend that consent be given unless the Bill is substantially amended to address our significant concerns.

**Jeremy Miles MS**  
**Counsel General and Minister for European Transition**  
**25 September 2020**