

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

February 2022



1. Background

The UK Government's Subsidy Control Bill

1. The Subsidy Control Bill¹ (the Bill) was introduced into the House of Commons and had its first reading on 30 June 2021. It is sponsored by the Department for Business, Energy and Industrial Strategy.

2. The Bill completed its stages in the House of Commons on 13 December 2021 and received its first reading in the House of Lords on 14 December 2021.² At the time this report was agreed, the Bill had completed its Committee Stage in the House of Lords,³ with a date for Report Stage to be announced.

The Welsh Government's Legislative Consent Memorandum

3. 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.

4. On 13 July 2021 Rebecca Evans MS, Minister for Finance and Local Government and Vaughan Gething MS, Minister for the Economy (the Ministers), laid before the Senedd a Legislative Consent Memorandum⁴ (the original Memorandum) in respect of the Bill.

5. We reported on the Memorandum on 7 December 2021 (first report).⁵

¹ [Subsidy Control Bill, as introduced](#) [HC Bill 135 2021-22]

² [Subsidy Control Bill, as brought from the Commons](#) [HL Bill 84]

³ [Subsidy Control Bill, as amended in Grand Committee](#) [HL Bill 113]

⁴ Welsh Government, [Legislative Consent Memorandum, Subsidy Control Bill](#), July 2021

⁵ Legislation, Justice and Constitution Committee, [The Welsh Government's Legislative Consent Memorandum on the Subsidy Control Bill](#), December 2021

The Welsh Government's Supplementary Legislative Consent Memorandum No. 2

6. On 6 January 2022, the Ministers laid a Supplementary Legislative Consent Memorandum⁶ (Memorandum No. 2) in respect of the Bill.

7. The Business Committee agreed that the Economy, Trade and Rural Affairs Committee and the Legislation, Justice and Constitution Committee should report on Memorandum No. 2 by 3 March 2022.⁷ The date was subsequently brought forward to 1 March 2022.⁸

Provisions for which Senedd consent is required

8. In our report on the original Memorandum, we noted the lack of clarity as to whether the Welsh Government considers that the Senedd's consent is required for clauses 41 and 42 of the Bill.⁹ For that reason, we made the following recommendation:

"Recommendation 1. For the avoidance of doubt, the Ministers should clarify whether the Welsh Government believes that clauses 41 and 42 require the Senedd's consent and, accordingly, whether it is seeking the Senedd's consent for them."

9. The Economy, Trade and Rural Affairs Committee also noted the ambiguity in its report on the Memorandum:

*"The Welsh Government's view is that Senedd consent is required for clauses 35-40, 43, 44, and 45-51. It is unclear from paragraph 19 of the Welsh Government's LCM, whether it believes that clauses 41 and 42 require Senedd consent, as the wording is not explicit. The UK Government considers that Senedd consent is required for all of the clauses in Part 3 (clauses 35-51)."*¹⁰

⁶ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No. 2\), Subsidy Control Bill](#), November 2021

⁷ Business Committee, [Timetable for consideration of the Supplementary Legislative Consent Memorandum for the Subsidy Control Bill](#), January 2022

⁸ Business Committee, [Revised Timetable for consideration of the Supplementary Legislative Consent Memorandum for the Subsidy Control Bill](#), February 2022

⁹ Legislation, Justice and Constitution Committee, [Report on the Welsh Government's Legislative Consent Memorandum on the Subsidy Control Bill](#), December 2021, paragraphs 12 and 42

¹⁰ Economy, Trade and Rural Affairs Committee, [Report on the Legislative Consent Memorandum for the Subsidy Control Bill](#), November 2021, paragraph 28

10. In paragraph 3 of Memorandum No. 2, the Ministers state:

"This Supplementary LCM clarifies the Welsh Government position on two clauses (clauses 41 and 42) identified in the original LCM as requiring consent."

11. Paragraphs 9 to 11 of Memorandum No. 2 confirm that the Welsh Government does consider that the Senedd's consent is required in relation to clauses 41 and 42, alongside the reasoning for this view:

"These provisions lay down requirements in respect of minimal financial assistance and Services of Public Economic Interest Assistance (SPEI).

An LCM is required in relation to clauses 41 and 42, covering mergers & acquisitions, exemptions for SPEI assistance, and supplementary and interpretative provisions...

Subsidy control is a reserved matter under Schedule 7A to GOWA, and the Bill applies to England, Wales Scotland and Northern Ireland. However, despite it being a reserved matter, it impacts on the non-reserved matter of economic development, and the impact on this non-reserved area raises some concerns. UK Government have legislated in this way as they want a UK-wide approach to subsidy control."

The Welsh Government's position

12. Paragraph 17 of Memorandum No. 2 sets out the Ministers' conclusion:

"As we have set out in paragraphs above, clauses 41 and 42 of the Bill make provision within the devolved competence of the Senedd and therefore Senedd's consent is required. However, we will not be in a position to recommend that consent be granted to the inclusion of clauses 41 and 42 in the Bill, or the other provisions as set out in the original LCM, unless the Bill is amended to address our concerns."

2. Committee consideration

13. We considered Memorandum No. 2 at our meeting on 7 February 2022 and agreed our report on 14 February 2022.¹¹

Our view

14. We welcome the Ministers' decision to lay Memorandum No 2 before the Senedd. In so doing, recommendation 1 of our first report has been addressed and the lack of clarity concerning the Welsh Government's view on clauses 41 and 42 has been resolved.

15. We agree that the Senedd's consent is required for clauses 41 and 42 of the Bill. We note the Ministers are not in a position to recommend that consent be granted to the inclusion of these clauses in the Bill (or the other provisions as set out in the original Memorandum) unless the Bill is amended to address the Welsh Government's concerns.

16. In our first report, we concluded that we would be supportive of amendments to the Bill that addressed the concerns of the Welsh Government (outlined in the original Memorandum) in respect of a number of clauses, including clause 10.

17. Clause 10 concerns streamlined subsidy schemes, which are intended to allow the UK Government to make provisions to allow lower-risk subsidies to be given by public authorities more quickly and easily, without needing to assess compliance with the subsidy control principles in the Bill. Clause 10(5) of the Bill provides that a streamlined subsidy scheme must be laid before the UK Parliament after it is made.

18. Our report noted that the Welsh Government objects to this clause and believes the power to make streamlined subsidy schemes should be extended to the Welsh Ministers "given the subsidy control regime impacts upon areas of devolved responsibility", with the addition of a requirement to lay such schemes before the Senedd.¹²

¹¹ [Legislation, Justice and Constitution Committee, 7 February 2022](#) and [Legislation, Justice and Constitution Committee, 14 February 2022](#)

¹² Legislation, Justice and Constitution Committee, Report on the Welsh Government's Legislative Consent Memorandum on the Subsidy Control Bill, December 2021, paragraphs 16 and 17

19. On 13 January 2022, the House of Lords Delegated Powers and Regulatory Reform (DPRR) Committee laid its report on the Bill.¹³ In considering clause 10, it said:

"The Government acknowledge ... that Parliament will be rightly interested in the categories of subsidies that can be given in accordance with streamlined subsidy schemes. The Government nevertheless conclude that the economic or analytic nature of the subject matter is consistent with the making of a scheme rather than regulations.

We take the view that, precisely because Parliament will be interested in streamlined subsidy schemes (as the Government acknowledge), the matter should be included in regulations subject to a parliamentary procedure.

The Government mention two precedents from the health and agricultural sectors where schemes are used rather than regulations. But the current Bill involves schemes potentially applying across all sectors.

We recommend that the power to establish streamlined subsidy schemes in clause 10 should be exercised by regulations, and that the negative procedure would be appropriate."¹⁴

20. The DPRR Committee also makes recommendations on clauses in the Bill which require consent as identified in the original Memorandum, namely clauses 16, 25, 26, 27 and 47.

21. We draw the report of the House of Lords DPRR Committee to the attention of the Welsh Government and the Senedd.

22. On 9 February 2022, Baroness Andrews, Chair of the House of Lords Common Frameworks Scrutiny Committee wrote to the Rt Hon George Eustice MP, Secretary of State for Environment, Food and Rural Affairs.¹⁵ The letter included the following observations about the relationship between the Bill and common frameworks:

"We are also increasingly concerned about the impact of the Subsidy Control Bill currently progressing through Parliament and its interaction with

¹³ Delegated Powers and Regulatory Reform Committee, House of Lords, 17th Report of Session 2021–22, [Subsidy Control Bill](#), HL Paper 140, January 2022

¹⁴ Delegated Powers and Regulatory Reform Committee, House of Lords, 17th Report of Session 2021–22, [Subsidy Control Bill](#), HL Paper 140, January 2022, paragraphs 22–24

¹⁵ [Letter from Baroness Andrews, Chair, House of Lords Common Frameworks Scrutiny Committee to The Rt Hon George Eustice MP, Secretary of State for Environment, Food and Rural Affairs](#), 9 February 2022

common frameworks. While we acknowledge Subsidy Control is a reserved area, powers and requirements within the Bill could have implications for agricultural policy across the UK. Within the Bill, we note that there are powers under which the Secretary of State can refer subsidies or subsidy schemes made by the devolved Governments to the Competition and Markets Authority (CMA) which could potentially have the effect of overriding the devolved governments when it comes to proposing subsidies (clauses 52 and 60). We are therefore concerned about how provisions in the Bill can be harmonised with the explicit equality of the Parties provided for in the framework in respect of agricultural support. Our concern not only relates to the provisions to which we have referred but also to clause 10(5) (streamlined subsidy schemes), clause 70(5) (standing before Competition and Markets Tribunal) and schedule 3 (review by the High Court or Court of Session for compliance with subsidy control principles of primary legislation of the devolved Parliaments which makes provision for subsidies or subsidy schemes).

We would therefore be grateful if you could first clarify which devolved areas covered by the scope of this framework could be impacted by the Subsidy Control Bill? Second, can you also clarify what would happen if the CMA or Competition Appeal Tribunal, High Court or Court of Session made a different decision on subsidies to one proposed or agreed within the framework?"

23. In a subsequent letter on 11 February to Lord Callanan, Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy, Baroness Andrews made the same observations but added:

"This is an extremely serious matter which bears on the functioning of the Union. We would invite you to explain how you see the relationship between common frameworks and the Bill; and how will you ensure that the Bill will not threaten the operability of frameworks? And, of course, how you propose to reconcile common frameworks, especially the JMC principles which ensure

parity and an increase in decision-making powers for the devolved administrations, with the Bill?"¹⁶

24. We share the concerns of the House of Lords Common Frameworks Scrutiny Committee regarding the interaction of the Bill with common frameworks and its implications for devolved policy. We therefore also draw these matters to the attention of the Senedd.

¹⁶ Letter from Baroness Andrews, Chair, House of Lords Common Frameworks Scrutiny Committee to Lord Callanan, Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy, 11 February 2022. For JMC principles, see pages 4-5 of the [Frameworks Analysis 2021](#)
