

LEGISLATIVE CONSENT MEMORANDUM

Economic Activity of Public Bodies (Overseas Matters) Bill

1. This legislative consent memorandum (LCM) is laid under Standing Order (“SO”) 29.2. SO29 prescribes that a legislative consent memorandum must be laid, and a legislative consent motion may be tabled, before Senedd Cymru¹ 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 Economic Activity of Public Bodies (Overseas Matters) Bill (“the Bill”) was introduced in the House of Commons on 19 June. The Bill can be found at: [Economic Activity of Public Bodies \(Overseas Matters\) Bill \(parliament.uk\)](https://www.parliament.uk/bills/2020-21/economic-activity-of-public-bodies-overseas-matters)
3. On 27 June I wrote to the Llywydd to explain that this LCM would not be laid within the usual timescales given the broad coverage of the Bill, and to ensure Committees have a comprehensive LCM for consideration, there would be a delay.

Policy Objectives

4. The UK Government (UKG) has stated that the Bill intends to prevent “*public bodies when making decisions about procurement and investment from considering a country or territory of origin or other territorial considerations in a way that indicates political or moral disapproval of a foreign state.*” They also confirm that it would “*also prevent public bodies from making statements indicating that they would have done so if it were lawful*”.
5. UKG have stated that a policy objective of the Bill is to ensure that there is a consistent approach to UK foreign policy, by stopping public bodies from pursuing their own foreign policy agenda contrary to that of the UKG. UKG says that this Bill seeks to enable the UKG to meet its commitments to ensure the UK speaks with a coherent voice internationally by ensuring public bodies make procurement and investment decisions that align with UKG foreign policy.

Summary of the Bill

6. The Bill is sponsored by the Department for Levelling Up, Housing and Communities.

¹ Please note in accordance with Welsh Government policy we refer to the legislature in Wales as “Senedd Cymru” on first use and “the Senedd” thereafter unless the context stipulates otherwise.

7. It should be noted that there has been no involvement of the Welsh Government in the development of this Bill.
8. The aims of the Bill are said to include the following:
 - a) Prevent public bodies when making decisions about procurement and investment from considering a country or territory of origin or other territorial considerations in a way that indicates political or moral disapproval of a foreign state. Such boycotts or divestments (reduction of existing investments) by public bodies would potentially be liable to investigation and fines under the legislation.
 - b) Stop councils and other publicly funded bodies from “pursuing their own foreign policy agendas.” UKG has cited concerns that campaigns in universities and local authorities on investment decisions relating to certain countries lead to community tensions.
 - c) UKG have said that the Bill does not prevent public bodies from complying with formal UKG legal sanctions, embargoes, and restrictions.
9. The Bill contains seventeen clauses and one schedule addressing issues relating to boycotts, divestments and sanctions imposed by public bodies. By way of brief summary:
 - a) Clause 1 of the Bill sets out a prohibition preventing public authorities from having regard to a country or territory which indicates moral or political disapproval of that country or territory’s conduct when making decisions about procurement or investment. It is said in the Explanatory Notes that this clause is designed to catch both open participation in boycotts or divestment campaigns, and more subtle ways of singling out countries or territories that could produce similar results.
 - b) Clause 2 sets out the procurement decision and investment decisions to which the prohibition in Clause 1 applies, as well as definitions for “procurement decision”, “investment decision”, and “asset”.
 - c) Clause 3 states that exceptions to the prohibition in Clause 1 are set out in the Schedule. Clause 3 also contains power for the Secretary of State to amend the Schedule.
 - d) Clause 4 prohibits public bodies who are subject to Clause 1 from publishing a statement indicating that they intend to have regard to territorial considerations in a way that indicates moral or political disapproval of foreign state conduct, when making decisions about procurement or investments. This Clause also prohibits such bodies from publishing statements indicating that they would participate in such activity if it were lawful to do so. The Explanatory Notes explain

that this stops public bodies from expressing support for themselves engaging in boycotts and divestment campaigns.

- e) In addition to containing specific provision in respect of procurement and pensions legislation, the Bill also includes an enforcement regime and ability for the Secretary of State or the Minister for the Cabinet Office to make regulations in certain circumstances.
- f) Clauses 5 to 11 deal with enforcement of the obligations.
- g) Clause 12 provides that the Clause 1 prohibition applies to a fund investment decision made by a scheme manager of a funded local government scheme, while Clause 13 deals with the enforcement powers in relation to a decision within Clause 12.
- h) Clause 14 to 16 deal with supplemental and general provisions. Clause 14 applies Clause 1 of the Bill to provisions of the Procurement Bill and makes provision as to how the two pieces of legislation should operate together. Clause 15 makes related amendments to the local government contracting restrictions legislation. Clause 16 deals with regulations made under the Bill.
- i) Clause 17 outlines the extent, application, commencement, and short title for the Bill.

Provisions in the Bill for which consent is required

10. I consider that Senedd Cymru consent is required in relation to the clauses identified below in so far as they make provision with regard to devolved matters:

Clause 1

- 11. Clause 1(2) provides that in relation to decisions to which Clause 1 is to apply, a decision-maker must not have regard to a “territorial consideration” in a way that would cause a reasonable observer of the decision-making process to conclude that the decision was influenced by political or moral disapproval of “foreign state conduct”.
- 12. It is also stated (at Clause 1(7)) that the disapproval referred to above means disapproval on the part of (a) the decision-maker; or (b) any person seeking to persuade the decision-maker to act in a certain way – and in the case where the decision-maker is not an individual, the reference to decision-maker is to include the individuals who in fact make the decision for the decision-maker.
- 13. It is confirmed that there are exceptions to the above as contained at Clause 3 – these provisions are further summarised below.
- 14. It is our view that clause 1 has regard to devolved matters including (but not limited to) the following:

- a) Economic Development – It is arguable that the provisions in Clause 1 have regard to economic development given that they directly impact the procurement and investment decisions of those entities which fall within the remit of the Bill.
 - b) Procurement – Clause 1 applies to a procurement decision defined in clause 2. Procurement is considered to fall within the Senedd’s legislative competence.
 - c) Devolved Welsh Authorities – Given the application of the provisions in Clause 1 are to entities within the remit of s.6 of the Human Rights Act 1998 (see Clause 2 below), the provisions at Clause 1 are likely to affect the procurement and investment decisions of most (if not all) Devolved Welsh Authorities. It is also arguable that the provisions will affect the Welsh Minister’s executive competence in respect of such bodies.
15. It is our view that clause 1 also affects the executive functions of the Welsh Ministers as we consider that they will be required to comply with the provisions of Clause 1 in the exercise of their own functions as applicable.

Clause 2

16. Clause 2 sets out the procurement decisions and investment decisions to which the prohibition in Clause 1 applies, as well as definitions for “procurement decision”, “investment decision”, and “asset”. I have therefore applied the same rationale as for Clause 1 as why the provisions of this Clause are included in this LCM.

Clause 3

17. Clause 3 (save in respect of 3(3)(b) (which relates to the Scottish Ministers), 3(3)(d) (which relates to a Northern Ireland Department), 3(3)(f) (which relates to a district council in Northern Ireland) and 3(3)(g)). Clause 3(1) refers to the Schedule which makes exceptions from the application of the ban in Clause 1. Part 1 of the Schedule lists exceptions for certain bodies and functions, whilst Part 2 of the Schedule lists exceptions for certain types of consideration.
18. Clause 3(4) states that for Part 2 of the Schedule, it is irrelevant (unless that Part provides otherwise) whether a consideration relates to matters arising before or after the coming into force of the Bill as an Act of Parliament or of regulations under Clauses 3(2)(b) or (c).
19. Clause 3 also includes regulation making powers for the Secretary of State and Minister for the Cabinet Office as follows –
20. Clause 3(2) provides that the Secretary of State or the Minister for the Cabinet Office may, by regulations, amend the Schedule so as to (a) add a description of decision to Part 1 of the Schedule (exceptions for certain bodies and functions); (b) add a description of consideration to Part 2 of the

Schedule (exceptions for certain types of consideration); or (c) amend or remove a description of decision or consideration added under previous regulations under Clause 3(2).

21. It is to be noted that Clause 3(3) provides that regulations made under Clause 3(2)(a) (i.e. to add a description of decision to Part 1 of the Schedule) may not relate to a decision of the public bodies listed in Clause 3(3), which are as follows: (a) a Minister of the Crown, within the meaning of the Ministers of the Crown Act 1975; (b) the Scottish Ministers; (c) the Welsh Ministers; (d) a Northern Ireland department; (e) an authority listed in Schedule 2 to the Local Government Act 1988 (public authorities subject to the contracting restrictions in section 17 of that Act); (f) a district council in Northern Ireland; or (g) the scheme manager of a funded local government scheme (within the meaning of Clause 12).
22. Clause 3(5) also provides that the Secretary of State or Minister for the Cabinet Office may, by regulations, specify a country or territory as one in relation to which Clause 1 does not apply. It is confirmed at Clause 3(6) that the effect of this would be as if the country or territory specific in the regulations were not a “foreign territory” for the purposes of Clause 1(6). It is also confirmed at Clause 3(7) that regulations under Clause 3(5) may not specify, and regulations under Clause 3(2) may not result in a description of decision or consideration relating specifically or mainly to (a) Israel; (b) the Occupied Palestinian Territories; or (c) the Occupied Golan Heights.
23. It follows that Clause 3 is, by its nature, an extension to the application of Clauses 1 and 2, and that therefore, our analysis at Clauses 1 and 2 have the same relevance to Clause 3 and we therefore consider that Clause 3 (other than those provisions referenced above) has regard to devolved matters.

Clause 4

24. Clause 4 is said in the Explanatory Notes to prohibit public bodies who are subject to Clause 1 from publishing a statement indicating that they intend to have regard to territorial considerations in a way that indicates moral or political disapproval of foreign state conduct, when making decisions about procurement or investments. This Clause is also said to prohibit such bodies from publishing statements indicating that they would participate in such activity if it were lawful to do so. Clause 4(3) confirms that Clause 4 does not apply to a statement by a Minister of the Crown (within the meaning of the Ministers of the Crown Act 1975) in connection with a proposed exercise of the powers to add or amend exceptions in Clause 3. The Explanatory Notes states that this will allow a Minister of the Crown to justify their intention to use the power in Clause 3(5) to disapply the ban in respect of a certain country or territory.
25. I have applied the same rationale for Clause 1 and 2 in relation to why the provisions of Clause 4 are included in this LCM.

Clauses 5 to 11

26. These Clauses contain various provision regarding monitoring and enforcement of the obligations in the Bill.
27. Given that these provisions have the primary purpose of making the core provisions of the Bill operational/justiciable, it is our view this LCM applies to these provisions in so far as an LCM may be laid in respect of the remainder of the Bill provisions.

Clause 14

28. This Clause makes provision in connection to Clauses of this Bill which will interact with provisions of the Procurement Bill.
29. We consider that the Bill legislates with regard to the devolved matter of procurement which is the subject matter of Clause 14. We are, therefore, including Clause 14 within this LCM.

Clause 15

30. Clause 15 makes changes to s.17(5) of the Local Government Act 1988.
31. It also provides the Secretary of State with a regulation making power to be able to disapply s.17(5)(f) of the Local Government Act 1988.
32. Clause 15 modifies the ability of the Welsh Ministers to exercise the power in s.115 of the Procurement Bill and it also confers a power on the Secretary of State to make regulations in relation to matters which will affect contracting authorities which are devolved Welsh authorities.
33. We consider that the Bill legislates with regard to the devolved matter of procurement which is the subject matter of Clause 15. We are, therefore, including Clause 15 within this LCM.

Clause 16

34. Clauses 16(1) and (2) provide that regulations under the Bill are to be made by statutory instrument and that a statutory instrument containing (whether alone or with other provision) regulations under any provisions of the Act except Clause 17 may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.
35. However, Clause 16(3) provides that Clause 16(2) does not apply to an instrument containing only regulations under Clause 3(2) or Clause 3(5) if the instrument contains a statement that the person making the instrument is of the opinion that, by reason of urgency, it is not appropriate for Clause 16(2) to apply. In such cases:
 - a) Clause 16(4) confirms that an instrument containing such a statement (1) must be laid before Parliament after being made; and (2) ceases to have effect at the end of the period of 28 days beginning

with the day on which it is made unless, during that period, it is approved by a resolution of each House of Parliament.

- b) Clause 16(7) states that a power to make regulations conferred by the Act (except Clause 17) includes the power to make (1) consequential, incidental, supplementary, transitional or saving provision; and (2) different provision for different purposes.
 - c) Further, clause 16(8) states that in the case of regulations under Clause 6(6), the power to make consequential, incidental or supplementary provision includes the power to amend any Act of Parliament, Act of the Scottish Parliament, Act or Measure of Senedd Cymru or Northern Ireland legislation, whenever passed or made.
36. Where the Bill refers to UKG being able to make regulations, Clause 16 provides further detail as to the application of such powers. It follows that where we consider an LCM may be laid in respect of such regulation making powers, then a LCM may also be laid in respect of the provisions at Clause 16.

Schedule, Part 2

37. Part 2 of the Schedule lists excepted considerations. The Explanatory Notes state that this means that Clause 1 will not apply to a decision made by a body or a function of a body on the basis of a consideration in this Part of the Schedule. Briefly these are listed as follows: (i) Financial and Practical Matters; (ii) National Security; (iii) International Law; (iv) Bribery; (v) Labour-related Misconduct; (vi) Competition Law Infringements; and (vii) Environment Misconduct.
38. On the basis that we consider Clause 1 to have regard to devolved matters, it follows that we also consider that a LCM may be laid in relation to Part 2 of the Schedule.

UK Government view on the need for consent

39. In the Explanatory Notes, UKG confirm that the legislative consent motion process is engaged (in respect of Wales) by Clauses 1 and 4 of the Bill only. The Explanatory Notes acknowledge that the Bill applies to the decision-making of Devolved Administrations and can be said to modify executive competence.

Financial implications

40. There are no financial implications in Wales if the Senedd consents to the provisions applying to Wales.
41. It should be noted that there are fines, subject to interest, for non-compliance with the provisions of the Bill.

Conclusion

42. It is my view that it is not appropriate to adopt these provisions in this UK Bill for Wales for reasons including the following:

- a) It is unclear what problem the UKG is seeking to address through the inclusion of Welsh Government in this disproportionate and unnecessary Bill. Welsh Government has always acted responsibly in meeting the UK's international commitments. There are already significant protections in place which require fair and equal treatment of bidders from countries where a relevant trade agreement applies. For example, in the World Trade Organization's Agreement on Government Procurement (the GPA) and current procurement law.
- b) In the one instance when UK Government determined that Russian suppliers should not be supported following the invasion of Ukraine, the Welsh Government fully supported this foreign policy and implemented similar policy. It is unclear how implementation of this Bill would have resulted in a different outcome.
- c) The provisions seek to limit the executive competency of Welsh Ministers in making decisions about procurement and investment. We do not accept that the executive competence of the Welsh Ministers should be altered in this way and it is not clear what UKG are seeking to address by doing so.

In any event, I cannot recommend consent is given whilst questions remain as to the compatibility of this Bill with convention rights and international law. In addition, I note that there has been widespread criticism of this Bill from amongst the legal and academic community, in relation to the way it has been drafted and how it is intended to operate in practice. I share those concerns and it is imperative that the UK Government deals with them during the scrutiny of the Bill in the UK Parliament.

43. I therefore recommend that the Senedd rejects the proposals and withholds its consent.

Rebecca Evans, MS Minister for Finance and Local Government
08 September 2023