

LEGISLATIVE CONSENT MEMORANDUM

UK INFRASTRUCTURE BANK BILL

1. This legislative consent memorandum is laid under Standing Order (“SO”) 29.2. SO29 prescribes that a legislative consent memorandum (LCM) 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 UK Infrastructure Bank Bill (“the Bill”) was introduced in the House of Lords on 11 May 2022. The creation of a UK infrastructure bank (“the Bank”) was first announced by the Chancellor at the Spending Review 2020. The Bank was launched on a non-statutory basis on 17 June 2021, and has already begun making investments.
3. The Bill as introduced can be found on the UK Parliament website: [UK Infrastructure Bank Bill \[HL\] - Parliamentary Bills - UK Parliament](#)
4. This LCM considers only the Bill as introduced. Welsh Government officials have sought amendments relating to the remit of the bank in areas of devolved competence to ensure devolution is respected, but to date the UK Government has not yet made any such changes.

Policy Objectives

5. The UK Government's stated policy objectives of the Bill are to set up the Bank to help tackle climate change and to support regional and local economic growth by providing access to financial instruments, including loans to local authorities to enable investment in infrastructure. It will operate on a UK-wide basis.
6. Her Majesty's Treasury (HM Treasury) published a new [National Infrastructure Strategy](#) alongside the UK Spending Review in 2021, and this outlined plans to transform UK infrastructure in order to “level up the country, strengthen the Union, and put the UK on the path to net zero emissions by 2050”. Underpinning this strategy was the intention to create a UK Infrastructure Bank to “play a leadership role in supporting private infrastructure projects to help meet the Government's objectives on economic growth, levelling up, and transitioning to net zero”.
7. In March 2021, HM Treasury published a [policy design document](#), which confirmed that in total, the UK Infrastructure Bank would have £22 billion of financial capacity to deliver on its objectives. The Bank's financial capacity consists of £12 billion of equity and debt capital, and the ability to issue £10 billion of guarantees. The bank's investments are expected to help unlock over £40 billion of overall investment.

Summary of the Bill

8. The Bill is sponsored by HM Treasury.
9. The UK Government's stated purpose of this Bill is to place the UK Infrastructure Bank ('the Bank') on a statutory footing. The Bank is an operationally independent institution wholly owned by government.

10. By placing the Bank on a statutory footing, the Bill seeks to:

- confirm and give statutory force to the Bank’s objectives and activities;
- ensure the Bank is a long-lasting institution;
- create statutory forms of transparency, accountability and governance for the Bank;
- remove legal barriers to the Bank undertaking direct lending to local authorities; and
- grant specific powers to the Treasury to provide financial assistance to the Bank.

Investment Principles

11. The Bank’s Framework Document has the following investment principles to guide which investments are within the scope of its mandate. These principles state that investments should:

- A. help to support the Bank’s objectives to drive regional and local economic growth or support tackling climate change;
- B. be in infrastructure assets or networks, or in new infrastructure technology. The Bank will operate across a range of sectors, but will prioritise in particular clean energy, transport, digital, water, and waste;
- C. intend to deliver a positive financial return, in line with the Bank’s financial framework; and
- D. be expected to crowd-in significant private capital over time.

12. The Framework Document notes that the Bank’s dual objectives of investing in projects to help mitigate and adapt to climate change, and of supporting regional and local economic growth across the UK have “huge potential synergies” but where these objectives are in tension with each other the Bank will “have regard to both of these objectives, both in setting its lending and investment policies and in assessing specific transactions”. It further notes that: “where an investment is primarily to support economic growth, the Bank will ensure that it does not do significant harm against its climate objective”.

13. As is further set out in the Framework Document, the Bank will not lend or provide other support to projects involving extraction, production, transportation and refining of crude oil, natural gas or thermal coal with very limited exemptions. These exemptions include projects improving efficiency, health and safety and environmental standards (without substantially increasing the lifetime of assets), for Carbon Capture and Storage (‘CCS’) or Carbon Capture, Usage and Storage (‘CCUS’) where projects will significantly reduce emissions over the lifetime of the asset, or those supporting the decommissioning of existing fossil fuel assets. The Bank will also not support any fossil-fuel fired power plants, unless part of an integrated natural gas-fuelled CCS or CCUS generation asset. This policy will be updated over time to reflect changes in government policy and regulatory standards.

Legal background

14. The Bank was set up in June 2021 as a company under the Companies Act 2006 (c46) and wholly owned by HM Treasury.

15. The establishment of the Bank relied on the common law capacity of the Crown to form and support companies.

16. Parliamentary authority for the funding of the Bank, and its initial establishment and exercise of activities derives *inter alia* from the Infrastructure (Financial Assistance) Act 2012 (c16) and to the extent relevant, sections 50 and 51 of the United Kingdom Internal Market Act 2020 (c27).
17. The present Bill seeks to provide a more specific and tailored Westminster Parliamentary mandate for the Bank, which is reflective of both general considerations concerning transparency, accountability and governance, as well as the current UK Government's policy priorities in relation to infrastructure investment.
18. The Bill affords a degree of flexibility for future changes to the scope of the Bank's activities (including the definition of "infrastructure") to allow for the possibility of future UK governments wishing to adjust the scope and focus of the Bank's mandate to reflect their policy priorities, and potential future changes in the market for infrastructure. This is achieved through powers to make delegated legislation subject to the affirmative procedure, as detailed in relation to clause 2 below.
19. The following legislation is relevant by way of background to the provisions of the Bill:
 - a) The Companies Act 2006. The Bank is already a registered company and bound by the Companies Act 2006. The present Bill will complement provisions already set out in Companies Act 2006, for example on governance and may in some cases overlay or modify the Bank's obligations under that Act (see for example clauses 2(1), 3(5) and 4 as described below).
 - b) The Climate Change Act 2008 (c27). This set a legally binding target for the UK to reach net zero carbon emissions by the year 2050 and is referenced in the Bill in relation to the Bank's climate change objective (see the description of clause 2(3) below).
 - c) The Infrastructure (Financial Assistance) Act 2012 and sections 50 and 51 of the United Kingdom Internal Market Act 2020. As noted above these provisions were relied upon for the setting up and initial funding and activities of the Bank. The current Bill provides a definition of infrastructure which is specifically tailored to the Bank and reflective of the current Government's policy priorities for the Bank. This definition is in some respects broader, and in other respects narrower than that set out in the 2012 and 2020 provisions and is subject to future change through delegated legislation as noted above.
20. In terms of the Bank's lending to local authorities for infrastructure purposes, the Bill is intended to remove any legal impediments to this that may derive from the existence of the detailed statutory code that currently governs public sector lending to local authorities. The relevant provisions are contained in the Public Works Loans Act 1875 (c89), section 4 of the Public Works Loans Act 1944 (c16), sections 3 to 6 of the National Loans Act 1968 (c12), the Local Loans (Procedure) Regulations 1968 (SI 1968/458) and the Public Works Loans (Fees) Regulations 1991 (SI 1991/1539). These provisions read together would likely amount to a comprehensive statutory scheme displacing any alternative or additional legal capacity to make public sector loans to local authorities for infrastructure purposes in accordance with the decision of the House of Lords in *R v Secretary of State for the Home Department; ex parte Fire Brigades Union* [1995] 2 AC 513. The Bill makes clear, as detailed in below in relation to clauses 2(4)(a) and 9, that the legal doctrine in the *Fire Brigades Union* case does not prevent the Bank undertaking infrastructure lending to local authorities.

21. The Bank in its current form has engaged in some transactions involving infrastructure lending to local authorities and private companies, however the only existing project being funded is a private sector driven solar farm in South Wales. In these transactions, the relevant loans originated through the Public Works Loans Act process, and were subsequently novated to the Bank, in observance of the current legal limitations as outlined above.

Territorial extent and application

22. The Bill extends and applies to the whole of the United Kingdom.

23. Infrastructure investment is a mixture of reserved and devolved competence. Matters relating to energy, cross-border rail and digital communications are cases where investment in infrastructure is likely to fall within reserved competence. Other matters such as rail, ports or bridges within a single devolved country or area are likely to fall within the legislative competence of the Senedd.

Provisions in the Bill for which consent is required

24. The Bill has a UK wide extent (as per clause 11(1) of the Bill) and the Bank is intended to be a UK-wide organisation. Whilst the Bank, which is wholly owned by HM Treasury, applies otherwise than in relation to Wales, for the purpose of establishing whether consent is required for the Bill, the question our analysis considers in respect of each clause of the Bill is whether the Senedd could legislate to do the same or something similar in relation to Wales. Therefore, the question considered in the below analysis is whether the Senedd could legislate with an England and Wales extent and a Wales application to achieve the same or something similar to the measures set out in this Bill, whether by first establishing a company (i.e. in the way that UK Government have established the Bank), or by using existing mechanisms, to provide financial assistance, loans, advice and support etc., with the objectives of (a) tackling climate change and (b) supporting economic growth, including at regional or local level in relation to Wales.

25. Consent of the Senedd is required on the entirety of the Bill as the Senedd has competence to legislate in the same or similar terms in relation to Wales. The main subject matter of the Bill, providing financial assistance and advisory support to projects relating to infrastructure (to include water, electricity, gas, telecommunications, sewerage, railways (including rolling stock), roads or other forms of transport and climate change), is a devolved area of the law. In our view, the following provisions of the Bill require legislative consent:

Clauses 1 (Defining the 'Bank') and 10 (Interpretation) and 11 (Extent, commencement and short title)

26. Clause 1 provides the definition of the 'Bank' for the purposes of the Bill. Clauses 10 and 11 are standard Bill provisions comprising interpretation, short title, commencement and extent.

27. Consent is required – these clauses are neither in competence or outside of competence in their own right as they are ancillary to the wider Bill. As the Bill itself (and all other clauses therein) relates to devolved matters, it is correct to treat these

clauses as being 'in competence' for the purposes establishing whether consent is required.

Clause 2 – Objectives and activities

28. This specifies what the Bank's objectives and activities are to be. The objectives of the Bank are to help tackle climate change and to support economic growth. The activities of the Bank are to provide financial assistance to projects relating to infrastructure (to include water, electricity, gas, telecommunications, sewerage, railways (including rolling stock), roads or other forms of transport and climate change), provide loans to public authorities for such projects and to provide advisory and other support services for such projects.

29. Consent is required – the Senedd can legislate to confer these functions (which, as above, themselves relate to devolved areas of law) on a body it creates.

Clause 3 – Strategic priorities and plans

30. This clause requires HM Treasury to prepare a statement of strategic priorities for the Bank and requires the Bank to secure that its articles of association provide for the Bank to publish and act in accordance with such strategic plans.

31. Consent is required - the Senedd has competence to impose such an obligation on the Welsh Ministers and on a similar body to the Bank that it has created.

Clause 4 – Directions

32. This clause provides that HM Treasury may give a specific or general direction to the Bank about how it is to deliver its objectives and that the Bank must comply with such a direction.

33. Consent is required - the Senedd has competence to impose such obligations on a similar body to the Bank that it has created.

Clause 5 – Financial assistance

34. This clause makes provision for HM Treasury to provide financial assistance to the Bank for the purpose of helping the Bank in the delivery of its objectives. HM Treasury may arrange for money to be paid out of the National Loans Fund in order to enable loans to be made to the Bank, whether directly or indirectly and where a loan from the National Loans Fund is made directly to the Bank, HM Treasury is to determine the rate of interest on the loan, and other terms and conditions.

35. Consent is required – the Senedd can legislate to provide financial assistance to a body it creates for the purpose of helping the body it creates in the delivery of its objectives (which, as above, themselves relate to devolved areas of law). Further, by ignoring the source of funds (the National Loans Fund) for the purposes of the analysis, we conclude that the Senedd could legislate to enable loans to be made more generally in the manner prescribed by this clause (noting, specifically, the Explanatory Notes to the Wales Act 2017 which states that the reservation on government lending in paragraph 15 of Part 2 of Schedule 7A of GOWA does not affect the Senedd's ability to allocate resources, whether part of its assigned budget or raised through its tax-varying powers).

Clauses 6 (Annual accounts and reports) and 7 (Directors: appointment and tenure)

36. Clause 6 requires the Bank's directors to deliver to HM Treasury a copy of the accounts and reports which they are required to prepare in accordance with section 441 of the Companies Act 2006 and to lay a copy of those accounts and reports before Parliament.
37. Clause 7 deals with corporate governance issues relating to the appointment and tenure of directors for the Bank.
38. Consent is required - the Senedd has competence to impose such obligations and corporate governance requirements on a similar body to the Bank that it has created.

Clause 8 – Duties of the Bank

39. This clause provides that any duty imposed on the Bank or its directors by or under 'this Act' is enforceable on an application by HM Treasury by injunction.
40. Consent is required - the Senedd has competence to make an application for enforcement by injunction. We specifically note that an injunction is an existing remedy and the Bill is not seeking to modify civil remedies (therefore the restriction at paragraph 8(1)(c) of Schedule 7A of GOWA does not apply to this clause).

Clause 9 - Reviews of the Bank's effectiveness and impact

41. This clause obliges HM Treasury to carry out reviews of the effectiveness of the Bank in delivering its objectives and its impact in relation to climate change and regional and local economic growth. After each review, HM Treasury must publish a report of the review and lay a copy of the report before Parliament.
42. Consent is required - the Senedd has competence to impose such obligations on a similar body to the Bank that it has created and on the Welsh Ministers regarding publishing a report of the review and laying a copy of the report before the Senedd.

UK Government view on the need for consent

43. The Economic Secretary to the Treasury has provided his analysis of the Bill regarding the UK Government's need for consent to the Bill. The Economic Secretary to the Treasury argues that the provisions of the Bill extend to the whole of the UK, but that Clauses 2, 3, 4, 5, 8 and 11 contain provisions that could fall within the legislative competence of the Senedd. It is the UK Government's view that only these clauses engage the legislative consent process. This analysis is high level and focuses on the type of possible investment of the Bank ('investment in areas such as rail, ports or bridges') and the location of that investment ('located solely in Wales').
44. Whilst the Economic Secretary to the Treasury has correctly identified that the Bank could be investing in types of infrastructure for which the Senedd has legislative competence and whilst he has correctly identified that such investment could relate to projects entirely situated in Wales, this is a narrow view of legislative competence.

45. As above, it is important to note that the Bill has a UK wide extent (as per clause 11(1) of the Bill) and whilst the Bank, which is wholly owned by HM Treasury, applies otherwise than in relation to Wales, for the purpose of establishing whether consent is required for the Bill, the question that the analysis must consider in respect of each clause of the Bill is whether the Senedd could legislate to do the same or something similar in relation to Wales. Therefore, the question that we have asked in our analysis is whether the Senedd could legislate with an England and Wales extent and a Wales application to achieve the same or something similar to the measures set out in this Bill, whether by first establishing a company (i.e. in the way that UK Government have established the Bank), or by using existing mechanisms, to provide financial assistance, loans, advice and support etc., with the objectives of (a) tackling climate change and (b) supporting economic growth, including at regional or local level in relation to Wales. It is unclear whether this approach has been adopted by the Economic Secretary to the Treasury and it is possible that he has approached his analysis from a different angle.
46. Turning to the clauses that the Economic Secretary to the Treasury does not consider to be in competence, we comment as follows:
- a) Clauses 1 and 11 – these clauses are not operative clauses (they provide the definition of the Bank (clause 1) and the extent and short title of the Bill (clause 11)) and so are neither in competence or outside of competence in their own right as they are ancillary to the wider Bill. As the Bill itself relates to devolved matters, it is correct to treat clauses 1 and 11 as being ‘in competence’ for the purposes of establishing whether consent is required.
 - b) Clauses 6 and 7 – these clauses deal with the corporate governance of an existing body corporate and as such (as the objectives and activities of the said body corporate are within competence) they are within the legislative competence of the Senedd. The Senedd has competence to impose such obligations and corporate governance requirements on a similar body to the Bank that it has created.
 - c) Clause 9 – this clause places an administrative requirement on the Bank and on HM Treasury and the Senedd has competence to impose such obligations on a similar body to the Bank that it has created and on the Welsh Ministers regarding publishing a report of the review and laying a copy of the report before the Senedd.

Welsh Government’s Current Policy Position

47. Devolution remains the settled will of the Welsh electorate, and our position must be to protect the powers of the Senedd, whereas the Bill as currently drafted threatens devolved competencies. I.e., powers are reserved for UK Ministers and HM Treasury in a manner that undermines the responsibilities and obligations Welsh legislators were elected to protect.
48. The Bill as introduced provides no role for the Senedd, the Welsh Ministers, or Welsh Government officials in the governance of the Bank, while reserving certain activities for Parliament, the Chancellor and HM Treasury, such as the power for HM Treasury to amend the Bank’s strategic direction including in areas of devolved competence without consulting the Senedd or Welsh Government.

49. I have written to the Economic Secretary to the Treasury to advocate that the Senedd, the Welsh Ministers and Welsh Government officials all exercise equivalent powers to those of our UK counterparts. This is necessary in order to be consistent with Welsh Government Cabinet principles, i.e., that “The Welsh Government must have an equal status to the UK Government’s in governance of cross-border bodies with devolved functions which are established in UK Bills.”

50. The remit of the Bank is directly linked to the UK Government’s policy approach to the Levelling Up agenda. We remain concerned at an operational level that issues demonstrated through separate analyses of the Towns Fund, Levelling Up Fund and the Shared Prosperity Fund - such as allocations not being aligned to devolved policy, allegations of political bias, the risk of poor value for money - may be exacerbated by the Bank’s operations. Equivalence among administrations concerning the governance of the Bank is required to ensure that it remains focussed on shared interests.

51. It should be noted that if the Bank is to act as a lender to Welsh Local Authorities, given the devolved funding arrangements, the implications of such agreements will be a matter impacting the Welsh Government.

52. I have today written to the Economic Secretary to the Treasury to urge him to amend the Bill to enable the Senedd and the Welsh Ministers to take their appropriate role within Governance structures to ensure proper democratic accountability.

Financial implications

53. There are no direct financial implications arising from this memorandum.

Conclusion

54. As set out above, the legislative consent of the Senedd Cymru is required for a number of clauses of the Bill. A number of these clauses are of constitutional concern to the Welsh Government. Thus, despite the merits of some of the clauses, the Welsh Ministers’ final position on whether to recommend consent is subject to the outcome of ongoing discussions with the UK Government regarding bringing forwards amendments to the Bill.

Rebecca Evans MS
Minister for Finance and Local Government
25 May 2022