

The Welsh Government's Legislative Consent Memorandum on the Economic Activity of Public Bodies (Overseas Matters) Bill

November 2023



1. Background

The Economic Activity of Public Bodies (Overseas Matters) Bill

1. The Economic Activity of Public Bodies (Overseas Matters) Bill¹ (the Bill) was introduced into the House of Commons on 19 June 2023. It is sponsored by the Department for Levelling Up, Housing and Communities.

2. The long title to the Bill states that it is a Bill to:

“Make provision to prevent public bodies from being influenced by political or moral disapproval of foreign states when taking certain economic decisions, subject to certain exceptions; and for connected purposes.”²

3. The Explanatory Notes to the Bill as introduced state 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.”³

4. As stated in its Explanatory Notes, the Bill also intends to prohibit public bodies who are subject to it 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.”⁴

5. The Bill has completed Commons Report stage; a date for Commons Third Reading is to be announced.

The Welsh Government's Legislative Consent Memorandum

6. 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.

¹ ~~The Economic Activity of Public Bodies (Overseas Matters) Bill~~, as introduced (Bill 325)

² ~~The Economic Activity of Public Bodies (Overseas Matters) Bill~~

³ ~~The Economic Activity of Public Bodies (Overseas Matters) Bill~~, Explanatory Notes, paragraph 1

⁴ ~~The Economic Activity of Public Bodies (Overseas Matters) Bill~~, Explanatory Notes, paragraph 30

7. On 8 September 2023, Rebecca Evans MS, the Minister for Finance and Local Government (the Minister), laid before the Senedd a Legislative Consent Memorandum (the Memorandum) in respect of the Bill.⁵

8. The Business Committee agreed that the Legislation, Justice and Constitution Committee and the Public Accounts and Public Administration Committee should report on the Memorandum by 24 November 2023.⁶

Provision for which the Senedd's consent is required

9. The Welsh Government's assessment is that the following provisions in the Bill require the Senedd's consent, as set out in paragraphs 10 to 38 of the Memorandum:

- clause 1 (Disapproval of foreign state conduct prohibited);
- clause 2 (Application to procurement and investment decisions);
- clause 3 (Exceptions);
- clause 4 (Related prohibition on statements);
- clauses 5 to 11 (concerning enforcement);
- clause 14 (Relationship with procurement legislation);
- clause 15 (Related changes to local government contracting restrictions);
- clause 16 (Regulations); and
- Part 2 (Exceptions for certain types of consideration) of the Schedule.

10. The UK Government's view is that the legislative consent process would only be engaged, in relation to Wales, for clauses 1 and 4 of the Bill.

11. The Explanatory Notes acknowledge that the Bill applies to the decision-making of devolved governments and can be said to modify executive competence.⁷

⁵ Welsh Government, [Legislative Consent Memorandum, Economic Activity of Public Bodies \(Overseas Matters\) Bill](#), 8 September 2023

⁶ Business Committee, [Timetable for consideration: Legislative Consent Memorandum on the Economic Activity of Public Bodies \(Overseas Matters\) Bill](#), 12 September 2023

⁷ Explanatory Notes, Annex A

Delegated powers

12. The Bill contains a range of delegated powers to be conferred on the Secretary of State and Minister of the Cabinet Office, including the standard power to commence by regulations (clause 17(4)).

13. The delegated powers contained within the Bill are as follows:

- clause 3(2) – a power for the Secretary of State or Minister of the Cabinet Office to amend the Schedule on exceptions for certain bodies and functions and for certain types of consideration to (a) add a description of decisions on exceptions for certain bodies and functions, (b) add a description for certain types of consideration, and (c) amend or remove a description of decision or consideration;
- clause 3(5) – a power for the Secretary of State or Minister of the Cabinet Office to disapply the Bill in respect of a particular country or territory;
- clause 6(6) – a power for the Secretary of State or the Minister for the Cabinet Office to change the enforcement authority (including by providing for there to be or not to be one) in relation to a particular description of decision or statement. An enforcement authority will also have the power to investigate suspected breaches, direct compliance and impose monetary fines;
- clause 10(1) – a power for the Secretary of State to determine, by regulations, the maximum monetary penalty for a person in scope of the Bill in breach of the provisions;
- clause 10(2) – a power for the Secretary of State to make provision about matters to which the enforcement authority must, or must not have regard in exercising its powers under clause 9 to impose monetary penalties;
- clause 14(6) – a power for the Secretary of State to make regulations in relation to (a) legislation repealed, revoked or modified by section 118 by the Procurement Act 2023 (repeals etc) before that Act comes into force, for the purposes similar to clause 12 on the relationship with procurement legislation or paragraph 2 of the Schedule, or (b) the Procurement Reform (Scotland) Act 2014 or any regulations under that Act;
- clause 15(3) – a power for the Secretary of State to make regulations to exclude certain matters from the scope of section 17(5)(f) of the Local

Government Act 1988 or Article 19(4)(f) of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1992 (S.I. 1992/810 (N.I. 6)); and

- clause 17(5) – a power for the Secretary of State to make transitional or saving provision in connection with the coming into force of any provision of this Act; and such regulations may make different provision for different purposes.

14. Of these nine delegated powers, clauses 3(2), 3(5), 6(6), 14(6) and 15(3) are Henry VIII powers.

The Welsh Government's position

15. The Minister sets out the reasons why she believes the Senedd should not give its consent to the Bill in paragraph 42 of the Memorandum. She states:

"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.”⁸

16. The Minister adds:

“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.”⁹

⁸ Memorandum, paragraph 42

⁹ Memorandum, paragraph 43

2. Committee consideration

17. We considered the Memorandum at our meeting on 6 November 2023.¹⁰ At the same meeting we also noted correspondence exchanged between the Public Accounts and Public Administration (PAPA) Committee and the Minister in respect of the Memorandum.¹¹

18. Further to the exchange of correspondence between the PAPA Committee and the Minister, we wrote to the Minister on 9 November 2023.¹² The Minister responded on 15 November 2023.¹³

19. On 20 November 2023, we considered the Minister's response, and agreed our report.¹⁴

Our view

General observations

20. We note that the Minister wrote to the Llywydd on 27 June 2023 to explain that, "given the broad coverage of this Bill, and to ensure Committees have a comprehensive LCM for consideration", the Memorandum would be laid outside the normal two-week deadline provided in Standing Order 29.2(i).¹⁵

21. We note that the Memorandum was subsequently laid 11 weeks following the Bill's introduction. Notwithstanding the broad nature of the Bill, we would like to remind the Minister of the importance of providing information to the Senedd relating to proposed legislation in devolved areas in a timely manner.

22. We also note the Minister's statement at paragraph 7 of the Memorandum that "there has been no involvement of the Welsh Government in the development of this Bill".

¹⁰ [Legislation, Justice and Constitution Committee, 6 November 2023](#)

¹¹ [Letter from the Chair of the Public Accounts and Public Administration Committee to the Minister for Finance and Local Government, 16 October 2023; Letter from the Minister for Finance and Local Government to the Chair of the Public Accounts and Public Administration Committee, 1 November 2023](#)

¹² [Letter to the Minister for Finance and Local Government, 9 November 2023](#)

¹³ [Letter from the Minister for Finance and Local Government, 15 November 2023](#)

¹⁴ [Legislation, Justice and Constitution Committee, 20 November 2023](#)

¹⁵ [Letter from the Minister for Finance and Local Government, 27 June 2023](#)

23. In addition, we note that the Bill contains wide delegated powers, including Henry VIII powers, to the Secretary of State and Minister of the Cabinet Office.

Provisions requiring legislative consent

24. We note there are areas of disagreement between the Welsh Government and the UK Government as to which clauses of the Bill require the Senedd's consent.

25. We note the Welsh Government's assessment of the provisions within the Bill that require the consent of the Senedd, as set out in the Memorandum.

26. We agree with the Welsh Government's assessment that clauses 1 to 11 and 14 to 16 of the Bill, and Part 2 of its Schedule, require the consent of the Senedd.

27. We note the Minister's response to the PAPA Committee, which states that clauses 12 and 13 of the Bill do not require the Senedd's consent as they apply to local government workers' pensions, which is a reserved matter.¹⁶ We agree with that assessment.

Conclusion 1. We consider that the clauses of the Bill set out in the Memorandum 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.

Provisions deemed to be modifying the powers of the Welsh Ministers

28. We note the Welsh Government's assessment that clause 15 of the Bill (Related changes to local government contracting restrictions) "modifies the ability of the Welsh Ministers to exercise the power in section 115 of the Procurement Bill".¹⁷ We note that the PAPA Committee sought clarification from the Minister in respect of this assessment, and received the following response:

"... Clause 15(3)(a) 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 (the 1988 Act). Clause 115(2) of the Procurement Act provides a power for Welsh Ministers (or a Minister of the Crown) to disapply the duty under section 17(1) of the 1988 Act so far as it relates to a relevant authority. Such

¹⁶ Letter from the Minister for Finance and Local Government to the Chair of the Public Accounts and Public Administration Committee, 1 November 2023

¹⁷ Memorandum, paragraph 32

regulations can include disapplying the duty in s.17(1) of the 1988 Act as it relates to "all non-commercial matters (see section 17(5) of the 1988 Act) or those that are specified" (clause 115(3)(d) applies). The Senedd has legislative competence in relation to any provision of the Procurement Act which confers functions on contracting authorities which are devolved Welsh authorities or which confers a power to make regulations or issue guidance in relation to contracting authorities which are devolved Welsh authorities. Therefore, clause 15(3)(a) of the Bill arguably modifies the ability of the Welsh Ministers to exercise the power in clause 115(2) of the Procurement Act. However, the modified power will continue to allow Welsh Ministers to make regulations to disapply provisions of section 17(1) of the 1988 Act for relevant Welsh contracting authorities as they see fit."¹⁸

29. We sought further clarification from the Minister in respect of this matter, and queried whether the reference to section 115(2) of the Procurement Act 2023 should instead be to section 111 of that Act.¹⁹ The Minister told us in response:

"My previous letter used clause references from a Procurement Bill print available at the time of writing. Due to amendments being made to the Procurement 'Bill' this shifted the clause numbers forward. This means, 'Disapplication of duty in section 17 of the Local Government Act 1988' has become section 116 in the Procurement Act. Therefore, please refer to section 116, and consequently section 116(3)(d), in relation to your question on the Welsh Minister's powers for the disapplication of S17 of the Local Government Act 1988 and not section 115."²⁰

30. We note the Minister's response, and agree that the reference to section 115 of the Procurement Bill within paragraph 32 of the Memorandum should instead refer to section 116 of the now Procurement Act 2023.²¹

¹⁸ Letter from the Minister for Finance and Local Government to the Chair of the Public Accounts and Public Administration Committee, 1 November 2023

¹⁹ Letter to the Minister for Finance and Local Government, 9 November 2023

²⁰ Letter from the Minister for Finance and Local Government, 15 November 2023

²¹ [Procurement Act 2023, section 116](#)

The Bill's compatibility with the European Convention on Human Rights and international law

31. We note the Minister's statement that the:

"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."²²

32. We note the example given by the Minister where:

"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."²³

33. Further, we note, and bring to the Senedd's attention, the following assertion made by the Minister within the Memorandum:

"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."²⁴

34. As a Committee, we are responsible for considering the constitutional impacts of external affairs, including international obligations.

35. The devolution settlement requires the Welsh Ministers to comply with both international obligations and the rights contained in the European Convention on

²² Memorandum, paragraph 42(a)

²³ Memorandum, paragraph 42(b)

²⁴ Memorandum, paragraph 42

Human Rights (the Convention rights).²⁵ The Welsh Government's Ministerial code also places specific duties on the Welsh Ministers to comply with international law and treaty obligations.²⁶

36. The Minister does not provide more information on the Convention rights and international law to which their assertion refers; however, we are aware of concerns brought to the attention of the Commons Public Bill Committee by international organisations,²⁷ and public law practitioners²⁸ which support this assertion.

37. With regards to our responsibility for the constitutional impacts of UK-EU affairs, the UK-EU Trade and Cooperation Agreement places the UK and EU under specific duties to comply with human rights obligations and their cooperation under the agreement, and for future agreements, is contingent on "respect for human rights and fundamental freedoms". The Universal Declaration of Human Rights and the European Convention on Human Rights are specifically listed, as is "the importance of giving effect to the rights and freedoms in that Convention domestically."²⁹ It is of great concern to us, therefore, to hear of the Minister's concerns as to the compatibility of the Bill with the Convention rights.

38. In addition, as we have expressed previously in respect of legislative consent memoranda laid on the Northern Ireland Protocol Bill³⁰ and the Illegal Migration Bill,³¹ we believe that any decision of the Senedd to consent to a Bill which is incompatible with international law could mean that it is contributing to a breach of international law. This would result in the Senedd acting incompatibly with international obligations, which would be in contrast to the spirit of the devolution settlement.

Conclusion 2. We share the concerns of the Minister about the compatibility of the Bill with international law and the European Convention on Human Rights.

Conclusion 3. We reiterate our position which we have expressed in relation to previous Bills subject to the legislative consent process, that a decision by the

²⁵ [Government of Wales Act 2006](#), sections 81 and 82

²⁶ Welsh Government, [Ministerial code](#), paragraph 1.3

²⁷ House of Commons Public Bill Committee, [Economic Activity of Public Bodies \(Overseas Matters\) Bill: Written evidence submitted by Human Rights Watch](#), September 2023

²⁸ House of Commons Public Bill Committee, [Economic Activity of Public Bodies \(Overseas Matters\) Bill: Written evidence submitted by Richard Hermer KC](#), September 2023

²⁹ Trade and Cooperation Agreement between UK and EU, Article 524 and Article 763

³⁰ Legislation, Justice and Constitution Committee, [The Welsh Government's Legislative Consent Memorandum on the Northern Ireland Protocol Bill](#), November 2022, Conclusion 7

³¹ Legislation, Justice and Constitution Committee, [The Welsh Government's Legislative Consent Memoranda on the Illegal Migration Bill](#), June 2023, Conclusion 3

Senedd to consent to the Bill could contribute to a breach of international law and would mean the Senedd acting incompatibly with international obligations, which would be in contrast to the spirit of the devolution settlement.