

# The Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No 2) on the Trade Bill

March 2019

## Background

### The Bill

1. The UK Government's Trade Bill<sup>1</sup> (the Bill) received its first reading in the House of Commons on 7 November 2017 and completed its legislative passage through that House on 17 July 2018.
2. The Bill<sup>2</sup> was introduced in the House of Lords on 18 July 2018 and started its Report Stage on 6 March 2019.
3. In summary the Bill makes provision about: the implementation of international trade agreements; establishing the Trade Remedies Authority and conferring functions on it and the collection and disclosure of information relating to trade. More detailed information about its provisions, including explanatory notes, is available on the UK Parliament website.<sup>3</sup>

### The Welsh Government's Legislative Consent Memorandum

4. On 7 December 2017, Ken Skates AM, the then Cabinet Secretary for Economy and Transport (the Cabinet Secretary), laid before the National Assembly

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<sup>1</sup> UK Government, [Trade Bill 2017-2019 Bill 122 \(as introduced\)](#)

<sup>2</sup> UK Government, [Trade Bill 2017-2019 HL Bill 127 \(as introduced\)](#)

<sup>3</sup> UK Parliament, [Trade Bill 2017-2019](#)



a Legislative Consent Memorandum (LCM) in respect of the Bill, as introduced in the House of Commons.<sup>4</sup>

5. We reported on this LCM on 16 March 2018,<sup>5</sup> following completion of Committee Stage in the House of Commons on 1 February 2018.

### Our report on regulations to be made under the Trade Bill

6. In October 2018, we published our report<sup>6</sup> on regulations to be made under the Trade Bill and sent copies of our report to the Welsh and UK Government.

7. Our report made nine recommendations and the Cabinet Secretary, responded to those in correspondence in December 2018.<sup>7</sup>

8. Six of our recommendations related to our view that regulations made under clause 1 of the Bill should be subject to the sifting mechanism included in the *European Union (Withdrawal) Act 2018* (2018 Act). In his letter the Cabinet Secretary said that he did not consider a sifting mechanism to be appropriate.

9. As regards recommendations 8 and 9, the Cabinet Secretary said:

“We welcome and support recommendation eight, relating to the application of the Intergovernmental Agreement (IGA) principles to the Trade Bill. Our expectation is that negotiations on all Brexit legislation, including the Trade Bill, should be conducted in line with the principles set out in the IGA.

We also support recommendation nine, which relates to the extension to the Welsh Ministers of the duty to lay reports under clause 5. We are happy to lay such reports before the National Assembly in the same way UK Ministers will lay reports before the UK Parliament.”

10. The Cabinet Secretary did not comment on recommendation 6 which states:

“We recommend that the Trade Bill is amended so that:

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<sup>4</sup> Welsh Government, [Legislative Consent Memorandum Trade Bill](#), December 2017

<sup>5</sup> Constitutional and Legislative Affairs Committee, [The Welsh Government's Legislative Consent Memorandum on the Trade Bill](#), March 2018

<sup>6</sup> Constitutional and Legislative Affairs Committee, [Scrutiny of regulations made under the Trade Bill](#), October 2018

<sup>7</sup> [Letter from Ken Skates AM, Cabinet Secretary for Economy and Transport to the Chair, 6 December 2017.](#)

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- the regulation-making powers in the Bill cannot be used to amend the Government of Wales Act 2006; this would replicate the limit on the use of the power in section 8 of the 2018 Act (dealing with deficiencies arising from withdrawal), which cannot be used to amend the Government of Wales Act 2006. We ask the UK Government to commit to doing the same in the Trade Bill (and indeed every other Bill, as a matter of constitutional principle);
- the use of clause 1 powers to amend any other primary legislation is subject to the affirmative resolution procedure, at least.”

**11.** We comment further on this recommendation in the “Our view” section below.

## The Welsh Government's Supplementary Legislative Consent Memorandum

**12.** On 14 February 2019, Eluned Morgan AM, the Minister for International Relations and the Welsh language (the Minister) laid a supplementary Legislative Consent Memorandum (No. 2) (LCM No 2) in respect of the Trade Bill.<sup>8</sup> The Business Committee agreed that the Constitutional and Legislative Affairs Committee and the External Affairs and Additional Legislation Committee should report on the Bill by 11 March 2019.

**13.** In summary, LCM No 2 confirms that the National Assembly's consent is required for clauses 1 to 4 and Schedules 1 to 3 of the Bill, which were considered in the first LCM. In its LCM No 2 the Welsh Government highlights the following concerns and details and how they have been addressed since that first LCM:

- Concurrent powers in clauses 1 and 2 – the Welsh Government says that concerns around consent and the extent around a sunset provision have been addressed because it has obtained commitments in the UK Parliament including:
  - UK Government Ministers will not normally use the powers in devolved areas without Welsh Ministers' consent. This is in line with the approach taken in the EU (Withdrawal) Act;

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<sup>8</sup> Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No 2\), Trade Bill](#), February 2019

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- UK Government will not use the powers to introduce new policy in devolved areas and that administrative efficiency will be the primary driver;
- engaging with devolved administrations before extending the period during which clause 2 powers can be used under the Bill.
- Restrictions on devolved Ministers' use of the implementation powers in Part 1 of the Bill – these concerns have been addressed by amendments that:
  - remove the blanket restrictions prohibiting the Scottish and Welsh Ministers from (a) modifying directly applicable EU law which the Bill incorporates into UK law; and (b) from making provision that is inconsistent with certain kinds of modifications made to that body of law by the UK Parliament or the UK Government;
  - remove the requirement for Scottish and Welsh Ministers to obtain the consent of a UK Minister before using the implementing power to make regulations that would come into force before exit day, or that would involve quota arrangements. The amendment requires devolved Ministers to consult UK Ministers instead.
- Trade Remedies Authority – while the relevant provisions are not considered to be within the National Assembly's competence, LCM No 2 notes that an amendment tabled in the House of Lords which was supported by the Welsh Government sought to establish the Devolved Governments as "interested parties" for the purpose of being informed of investigations, being afforded an adequate opportunity to submit information to investigations and being notified of decisions. The Welsh Government says it has now obtained non legislative commitments with the same purpose (but which in places have gone further) and it has listed them in LCM No 2.

**14.** LCM No 2 notes that, since the first LCM, some further amendments have also been made to the Bill that require consent, and the Welsh Government is content to provide consent to them:

- amendments to clause 1 relating to changes to the list of central government authorities in the GPA;

- amendments which change the procedure for clause 2 regulations from the negative to the affirmative; extend the regulation-making powers of the Welsh Ministers so that they can modify retained direct EU legislation; ensure that clause 2 powers cannot be used to confer a power to make subordinate legislation and reduce the duration in which the clause 2 powers can be used from five to three years (unless extended). To the extent that these changes apply to regulations within devolved competence the Welsh Government consider that they too are within devolved competence.
- amendments to paragraph 2, Schedule 1, which change the restrictions on the Welsh Ministers powers to mirror those in the EU (Withdrawal) Act, which in turn were changed following the agreement reached between the UK and Welsh Governments in the Intergovernmental Agreement and associated provisions of the EU (Withdrawal) Act.
- the addition of clause 6, which was an opposition amendment passed in the House of Commons. The Welsh Government consider that this clause is within competence to the extent that it requires Welsh Ministers either to implement any international trade agreement of the kind described, or to take whatever steps are necessary within devolved competence, to enable the UK Government to conclude an international agreement of the kind described. The Welsh Government says it believes that the UK should continue to participate in the Europeans medicines regulatory network.

## Committee consideration

**15.** We considered LCM No 2 at our meeting on the 4 March 2019. We were not in a position to take evidence from the Minister due to the tight timetable for reporting.

### Our view

**16.** We note the views of the Welsh Government as set out in LCM No 2.

**17.** We note in particular the comments of the Welsh Government regarding the exercise of concurrent powers in clauses 1 and 2 of the Bill, and the commitments it has obtained. These commitments would appear to mirror the principles set out in the Intergovernmental Agreement on the European Union (Withdrawal) Bill

and the Establishment of Common Frameworks (Intergovernmental Agreement),<sup>9</sup> as advocated in the Cabinet Secretary's letter to us of 6 December 2019.

**18.** We would welcome a commitment from the Minister to either publish a document setting out these commitments in full or to secure an appropriate amendment to the existing Intergovernmental Agreement.

**19.** We do however draw the Assembly's attention to the concerns we have expressed on the differences of interpretation between this Committee and the Welsh Government about the Intergovernmental Agreement as set out in our recent progress report on the scrutiny of regulations under the 2018 Act<sup>10</sup> and correspondence with the First Minister.<sup>11</sup> In particular, our concerns centre on a difference of opinion with regard to what constitutes new policy and unintended consequences arising for the legislative competence of the National Assembly.

**20.** There are widespread concerns about the application of the Sewel Convention as it applies to the consent of devolved legislatures in respect of UK Government Bills. As a result, **during the debate on the legislative consent motion related to this LCM, we would welcome clarification from the Minister on whether she envisages any circumstances in which, should the Welsh Ministers refuse consent, to the UK Ministers acting in devolved areas, the regulations would be made anyway by UK Ministers.**

**21.** Related to this point, **we would also welcome clarification, during the debate, on whether there are any exceptions to the commitment that UK Government Ministers will not normally use the powers in devolved areas without Welsh Ministers' consent.** We ask this because such an exception is highlighted in similar requirements set out in Part 5 of the *Devolution Guidance Note: Parliamentary and Assembly Primary Legislation Affecting Wales*.<sup>12</sup>

**22.** Standing Order 30C sets out certain requirements in circumstances where the Welsh Ministers consent to the UK Ministers acting in devolved areas under the 2018 Act. In line with the principles that have resulted in the adoption of new

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<sup>9</sup> [Intergovernmental Agreement on the European Union \(Withdrawal\) Bill and the Establishment of Common Frameworks](#)

<sup>10</sup> Constitutional and Legislative Affairs Committee, [Scrutiny of regulations under the European Union \(Withdrawal\) Act 2018: Progress report](#), February 2019

<sup>11</sup> See correspondence on our [webpage](#)

<sup>12</sup> [Devolution Guidance Note: Parliamentary and Assembly Primary Legislation Affecting Wales](#), Part 5: UKG SIs Modifying Primary Legislation within the Assembly's Legislative Competence, paragraphs 108-110 [Accessed 7 March 2019]

commitments relating to the Trade Bill, **we believe that Standing Order 30C should be amended to apply to the Trade Bill, once enacted.**

**23.** Recommendation 6 of our report on the *Scrutiny of regulations made under the Trade Bill* (see also paragraph 10 above) raised concerns about the scope of the regulation-making powers in the Bill. We also raised concerns on this issue in our report on the Welsh Government's original LCM on the Trade Bill.

**24.** Our main concern was that the Bill allowed UK Ministers to make regulations that amend the *Government of Wales Act 2006* (i.e. those provisions of the 2006 Act that amount to retained EU law, such as the definition of "food" in Schedule 7A to the 2006 Act).

**25.** It is disappointing that this has not been addressed (see clause 2(5)(a) of the Bill which expressly provides that regulations made under clause 2(1) can amend primary legislation that is retained EU law).

**26.** Any such regulations that amend the *Government of Wales Act 2006* could modify the legislative competence of the National Assembly for Wales. Further, such regulations could only be made by UK Ministers and would be laid before the UK Parliament only (although the Welsh Ministers have powers to amend primary legislation that is retained EU law under clause 2, that power does not include power to modify the legislative competence of the National Assembly).

**27.** While such regulations would now be subject to the affirmative procedure, we repeat the constitutional principle that the legislative competence of the National Assembly should not be modified by regulations made by the UK Ministers. While there have been assurances<sup>13</sup> that regulation-making powers will not be used to modify the legislative competence of the National Assembly, those assurances are not legally binding (and if such assurances are to be taken seriously, we question why they have not been included on the face of the Bill).

**28.** In our first LCM report, we said:

"We agree with the Cabinet Secretary that the phrase 'as they consider appropriate' in relation to the Welsh Ministers making regulations under the Trade Bill provides powers that are too broad and that 'as

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<sup>13</sup> For example, [letter](#) from Robin Walker MP, Parliamentary Under Secretary of State for Exiting the EU to this Committee, dated 24 October 2017 where he stated that, in respect of UK Ministers using regulation-making powers in the European Union (Withdrawal) Bill to modify the legislative competence of the National Assembly: "we are clear that wherever possible we will use existing powers in GoWA to, for example, correct any deficiencies in that Act, and we will do so in consultation with the Welsh Government".

necessary' would be sufficient. We note however that amendments to reflect this were not included in the proposed amendments to the Trade Bill published by the Welsh Government on 18 January 2018."

**29.** We would welcome an update on what discussions the Welsh Government has had in relation to the unnecessarily vague drafting of the regulation-making powers in the Bill.

**30.** We also note with interest the non-legislative commitments obtained in relation to the activities of the Trade Remedies Authority. However, there is a lack of clarity about the role of this new body, how it will operate in Wales, its status and also the impact it will have in devolved policy areas.

**31.** While non-statutory commitments have been secured by the Welsh Government, their full scope remains unclear, as does the information that the Welsh Government will make available to enable scrutiny of the activities of the Trade Remedies Authority by the National Assembly. In particular, greater clarity is needed on the role that the Welsh Government and other devolved administrations will play in recruiting Trade Remedies Authority non-executive members with regional knowledge skills and experience, as it is not clear what the impact of the suggestions that devolved administrations can make on the optimal way of conducting this recruitment will be.

**32.** We are surprised that the Welsh Government has not yet tabled a Written Statement announcing full details of the commitments secured and providing information about the operation of the Trade Remedies Authority. We believe it should do so as soon as possible.