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Dear David and Mick,

Trade Bill: Legislative Consent

Thank you for your letter of 07 May 2020 seeking further information following the laying of a Legislative Consent Memorandum (LCMemo) relating to the Trade Bill. I am grateful to both your committees for your scrutiny of the Bill and the elements for which legislative consent is being sought. In your letter, you ask a number of questions, I shall address each in turn.

Part 1, Clause 1: Implementation of the Agreement on Government Procurement (GPA)

Q1: Which Welsh public bodies will the Welsh Government be seeking to include in any revised list in Annex 1 to the United Kingdom's Annex 1 to the GPA?

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

The UK Government has agreed to update its schedules for the GPA following its accession. The Cabinet Office is leading on this work and has been regularly engaging with Welsh Government officials in relation to potential changes to the public bodies listed in Annex 1. Our expectations at this stage are that the proposed changes will be largely technical in nature, for example changing the names of the bodies listed to reflect their current titles. Hence this is where our work is currently focused.

Q2: What discussions has the Minister has with UKG about the breadth of the regulation making power in Clause 1, specifically as regards the ability of UK and Welsh Ministers to make regulations for the implementation of the GPA as they consider 'appropriate'

We have not had specific conversations regarding the breadth of the regulation making powers within clause 1 with UK Ministers. However, sub-clause (1) limits the power to the specific purposes listed, that is only in relation to the accession and membership of the UK to the GPA. To date, we have had good engagement with the UK Government Cabinet Office regarding provision needed under clause 1 which may be needed to implement the GPA. We will continue to engage with the Cabinet Office on this issue and will notify your committees in due course if the Welsh Ministers consent to any UK Government regulations under clause 1 in devolved areas.

Q3: In light of the fact that the list of Welsh public bodies appears to be in need of revision, and the reference to the need for an update in the Explanatory Notes, why do you consider the negative procedure to be the appropriate procedure for making these regulations?

The decision on Parliamentary procedure was chosen by the UK Government and we have simply reflected that decision. The reason for the UK Government's view is explained in the Delegated Powers Memorandum, namely the need for speed and the fact that the terms on which the UK accedes to the GPA will also be considered by the UK Parliament under the procedure in the Constitutional Reform and Governance Act 2010.

As the GPA is an international agreement, clause 1 of the Bill cannot be exercised to change any part of that agreement, including Annex 1. That Annex can only be updated in accordance with the process set out in Article XIX to the GPA. Clause 1 powers can then be exercised to implement the UK's international obligations into domestic law. For example, by making amendments to domestic legislation such as the Procurement Contract Regulations 2015 to ensure that the list of central government contracting authorities covered by those regulations is consistent with the UK's obligations under the GPA. As the clause 1 powers could only be exercised to implement obligations arising out of international law, the extent of discretion that could be exercised by UK Ministers or the Welsh Ministers is very limited in practice.

Q4: The Delegated Powers Memorandum indicates a need for clause 1 regulations to be able to be made with speed, whether that be, for example, in reaction to the UK's accession to the GPA as an independent member or in response to a dispute with another GPA party. The DPM suggests the negative resolution procedure provides the opportunity for UK and Welsh Ministers to act with that speed. What consideration was given to applying a made affirmative procedure to the regulations-making powers in clause 1?

As the decision on procedure was taken by the UK Government, I am not in a position to comment on the considerations that it took into account in deciding that it was unnecessary to apply the made affirmative procedure to clause 1.

Although speed has been cited by the UK Government as one of the factors in support of the negative procedure in the Delegated Powers Memorandum, I am not aware of any situations where the regulations would need to be made and brought into force in such an urgent fashion so as to justify the use of the made affirmative procedure. I am satisfied that the negative procedure strikes the right balance in this instance.

Expectations of the UK Ministers

Q5: Can you please clarify the basis on which the agreement to restate these commitments has been made? For example, was it confirmed in an exchange of letters between Ministers or was it an oral commitment?

I received assurances in an exchange of letters with the then Minister for Trade Policy, Conor Burns MP, that all commitments made to the Welsh Government during the partial passage of the former Trade Bill would be restated during the passage of the current Bill. I have also raised with and written to Greg Hands MP Minister for Trade Policy requesting confirmation that he will honour the assurances given by his predecessor and that he will repeat these commitments at the despatch box during the Commons stages of the Bill.

Q6: What action will you take should these commitments not be restated?

The Welsh Government's recommendation in the Legislative Consent Memorandum that the Senedd consent to the Bill is based on the UK Government's assurances that it will honour the commitments that it previously made in parliament during the partial passage of the original Trade Bill. If those commitments are not repeated at the despatch box, then the recommendation will be reconsidered in advance of inviting the Senedd to give legislative consent. I have made this clear to Greg Hands MP.

Q7: The Bill creates new concurrent powers that can be exercised in devolved areas by both the Welsh Government and the UK Government. Has the Welsh Government had discussions with the UK Government about the impact this has on the legislative competence of the Senedd, in particular the test set out in paragraph 11 of Schedule 7B to the Government of Wales Act 2006?

I can confirm that discussions have taken place with the UK Government about the impact of the Bill's provisions on the Senedd's legislative competence. I anticipate that a Section 109 Order will be brought forward shortly and that it will address the concurrent functions issue you have highlighted.

Extending the period within which clause 2 powers can be used

Q8: Can you confirm that the Welsh Government is content with the five-year period within which these powers can be used?

You will be aware that the Welsh Government's main request of UK Government in relation to the sunset clause has previously been ensuring that before deciding whether and how to extend the length of the sunset provision it would engage with the Devolved Administrations. I am content with the assurances that the UK Government provided in that respect. In light of the large number of trade agreements that may need to be implemented under this provision, the Welsh Government can appreciate the need for the powers to be available for a reasonable length of time. We are not currently aware of any significant issues with a five-year sunset period.

Q9: Whilst we note that you are seeking a commitment from UK Ministers to engage with Devolved Governments before extending the period during which clause 2 powers can be used under the Bill, what is your view on the suggestion that any extension of the five-year period should also be subject to the Senedd's consent, insofar as this relates to powers delegated to the Welsh Ministers?

The scope of the power in clause 2, including the potential for extension of the sunset provision by the Secretary of State has been included as a provision of the Bill for which the Senedd's consent is sought in the Legislative Consent Memorandum which was laid on 2 April 2020.

The Welsh Government took the view that the UK Government's commitments to engage with the executive rather than the legislature were appropriate in this case, given that the issue specifically concerns the exercise of a function conferred on the executive in a narrowly defined set of circumstances.

The Welsh and Scottish Governments' developed a joint set of amendments to the Bill in January 2018 which would have placed a statutory duty on the Secretary of State to consult with the Welsh Ministers and the Scottish Ministers before deciding whether and how to extend the length of the sunset provision. Although those amendments were not accepted, we were able to secure despatch box commitments from the UK Government that it would engage with the devolved administrations before extending the time period within which clause 2 regulations may be made during the partial passage of the original Trade Bill during the 2017-19 Parliamentary session.

On the basis that those commitments are restated during the passage of the current Bill, the Welsh Government has recommended that the Senedd provide consent for the Bill provision.

Q10: What is your view on the power in clause 2(6)(a) that enables a UK Minister to amend the Government of Wales Act 2006 by regulations? Why do you consider this to be an appropriate power? Have you made representations to the UK Government about this power?

I am content with the power in clause 2(6)(a) and have not made representations to the UK Government about this specific provision. Although there is no restriction which would prevent a Minister of the Crown from making amendments to the Government of Wales Act 2006 (GoWA), clause 2(6)(a) restricts any amendments to primary legislation, to the extent that a provision satisfies the definition of retained EU law in section 6(7) of the European Union (Withdrawal) Act 2018. Only a very small number of provisions in GoWA have the potential to fall within the scope of that definition and the UK Government has not indicated that it is minded to exercise the clause 2 powers to make any such amendments.

On this basis, I do not consider it necessary to secure a carve out for GoWA from the category of primary legislation which is capable of being amended by a Minister of the Crown under clause 2(6)(a).

I hope the information I have provided in response to your questions is satisfactory.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'M. E. Morgan'.

Eluned Morgan MS

Gweinidog y Gymraeg a Chysylltiadau Rhyngwladol
Minister for International Relations and the Welsh Language