

Vaughan Gething MS	Rebecca Evans MS
Minister for Economy	Minister for Finance and Local Government
Welsh Government	Welsh Government

23 June 2022

Dear Ministers,

Common Frameworks – Procurement and Late Payment

Thank you for your letters dated 25 February 2022 and 1 March 2022, respectively, addressing the Committee's initial queries on the Late Payment and Procurement Provisional Common Frameworks (the frameworks).

Having considered your respective responses, the Committee has the following observations about the frameworks and the approach to the frameworks more generally.

Dispute resolution and policy divergence

- In its letter, the Committee asked you about the impact of each framework on making law and policy in Wales. In your responses, you noted that neither framework constrained the powers of the Welsh Government or the Senedd. In relation to the Procurement framework, you told the Committee that the purpose of the framework is to "consider any impact of policy divergence on the other nations and not for the purpose of consultation or decision-making". The Committee understands the inter-governmental agreement that UK-wide frameworks to replace the EU rule book would be freely negotiated between the four UK governments and that these would be designed to manage divergence between the four administrations. The Committee notes that both frameworks include sections on decision-making and setting processes for governments to make decisions jointly in areas of devolved competence. In the event of another government disagreeing with a Welsh

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.



Government proposal, or vice versa, a dispute can be raised. However, the Committee is keen to ensure that in practice this could not constrain both the Welsh Government or the Senedd, beyond the internal market provisions within the frameworks.

- The Welsh Government should explain how it assessed the risks and benefits of entering into these common frameworks, including any potential limits to its regulatory autonomy, beyond those which existed within the EU rule book these replace.

- The Welsh Government should explain how the decision-making processes in both frameworks will work in practice.

- The Committee is keen to ensure that, by setting joint decision-making processes, the frameworks could not be used to limit the role of the Senedd in making law and policy for Wales, beyond the restrictions within the EU rule book they replace. As an example, if a Member wishes to table legislation within the scope of the Procurement framework, the Welsh Government would be subject to a commitment to notify or consult other governments three months in advance of introduction. It's unclear at present how stakeholders would be able to engage in the joint decision-making processes established by the frameworks, or whether this changes the provisions existing under the preceding EU rule book.

- The Welsh Government should seek to include a commitment to ongoing stakeholder engagement if devolved Welsh legislation is tabled which falls within the scope of the two frameworks.

- It is recommended that the Welsh Government seeks intergovernmental agreement that neither framework will lead to a dilution in the role of parliaments and stakeholders in making law and policy that falls within the scope of either framework, beyond the restrictions applying to the previous EU rule book.

- The Welsh Government should explain how it will ensure the frameworks do not limit the role of the Welsh Government, the Senedd or stakeholders in Wales when making law and policy in Wales, beyond the restrictions applying to the previous EU rule book.

- The Committee welcomes the commitment to notify the Senedd when disputes on frameworks are escalated to Ministers, however neither framework sets timescales for dispute resolution. The Late Payments framework also provides for actions under dispute to be paused.

- The Committee would welcome an explanation as to why time limits are not currently specified in the dispute resolution process, what the implications of this are and whether the Welsh Government

considers they should be. The Committee would also welcome an explanation as to why the Procurement framework does not also provide for actions under dispute to be paused.

- It's noted that the Intergovernmental Relations Review is now complete, with agreement that disputes can be escalated from frameworks to a new inter-ministerial dispute resolution process.
- The Committee is concerned the complaint handling and adjudication provisions specified within the Frameworks are insufficient to resolve policy divergence between UK nations. The importance of a robust dispute resolution is of particular importance to the Welsh economy, which is dependent on the export of products and services to other UK nations. The risk of disputes occurring is heightened by ongoing inter-governmental tensions surrounding post-Brexit constitutional arrangements.

- The Welsh Government should seek intergovernmental agreement to update each framework to reflect the outcome of the Intergovernmental Relations Review. We note that neither framework offers a role for independent advice or arbitration in dispute resolution.

- The Welsh Government should seek intergovernmental agreement to amend these frameworks to allow governments to seek independent advice or arbitration via a strengthened dispute resolution process.

- The Committee notes that the Intergovernmental Relations Review provides for the governments to seek third party advice on disputes escalated to inter-ministerial level, but does not require disputes to be resolved by binding arbitration. The Welsh Government should set out how it will mitigate any risks arising from the lack of an independent inter-ministerial dispute resolution process in these frameworks areas, in the absence of a strengthened dispute resolution process.

General

- The Committee notes that the Welsh Government carried out a "light touch" stakeholder engagement exercise on the contents of the Procurement framework, whilst a summary on the Late Payment framework was provided to stakeholders.

- The Welsh Government should provide the Committee with a list of stakeholders in Wales consulted about each framework, with a summary of their comments.

- The Welsh Government's commitment to reporting annually on the frameworks is welcomed. It's noted that any future reporting on frameworks is expected to be made public.

- The Welsh Government should seek intergovernmental agreement that any joint reports will be published. Even if such an agreement is not secured, the Welsh Government should confirm that it will commit to unilaterally publishing annual reports on each framework.

- The Welsh Government's commitment to notify the Senedd and stakeholders of upcoming review points is also welcomed, with Senedd and stakeholder recommendations to be considered as part of the review process. The recommendation of the Constitutional Frameworks scrutiny committee of the House of Lords that Government should report to parliaments following the conclusion of their reviews, and that an open stakeholder consultation should be conducted as part of the first review process is noted.

- The Committee recommends that the Welsh Government seeks intergovernmental agreement to amend the frameworks to ensure that their commitments to reporting are reflected in the frameworks. It is also recommended that intergovernmental agreement is sought to include the House of Lords recommendations on reporting to parliaments following each review, and that the frameworks should include open stakeholder consultations following the first review process, as part of the frameworks.

Procurement

- The framework states that the agreed principle for common frameworks on the management of common resources does not apply to procurement, meaning that governments will not take this principle into account when assessing policy proposals. Your explanation is that this principle doesn't apply because "the opportunity for sharing resources is not applicable". However, other frameworks suggest a broader reading of this principle, suggesting that it relates to shared environmental resources, not just government property.

- The Committee recommends that the Welsh Government seeks intergovernmental agreement that the respective governments of the United Kingdom have regard to the management of common resources when making decisions through the framework.

- The framework sets out new processes for decision-making and your comments that the framework will offer the same scope for divergence as under EU law are noted.

- The Welsh Government should set out how it will ensure the framework offers no less scope for divergence than would have been possible in the EU.

- The Committee asked you whether the Social Partnership and Public Procurement Bill fell within the scope of the framework's decision-making process, to which you responded that other governments had been informed about the Bill.

- The Welsh Government should seek intergovernmental agreement to amend the framework to clarify that its decision-making processes only apply to changes which go beyond matters applying under preceding EU law.

- The Committee recommends that the Welsh Government should inform the Senedd where any policy or legislative proposal is subject to the framework's decision-making processes.

- A core principle of the framework is to ensure the proper functioning of the UK internal market. Your comments that governments will consider the impact of divergence in procurement policy on cross-border areas through the framework are noted.

- The Committee welcomes the commitment to considering the impact of divergence in procurement policy. The Committee recommends that the Welsh Government sets out how it will consider the impact of any divergence in procurement law and policy on businesses operating across borders.

- In response to our question on the impact of the UK Subsidy Control Act for public procurement in Wales, you noted that you did not have sufficient detail to know at this stage and that much will depend on the secondary legislation and guidance accompanying the Bill. The Committee is concerned about this lack of clarity, particularly as the Senedd withheld its consent for the Bill.

- The Welsh Government should keep the impact of the Subsidy Control Act on procurement in Wales and decision-making through the framework under review and inform the Senedd of any interaction between the respective governments on this.

- One of the intentions of the framework is to ensure compliance with international obligations and to enable the negotiation and implementation of international agreements. In your response, you provided some information on UK-EU and international activity under the framework and this information is noted.

- The Welsh Government should report on any UK-EU and international activity within the scope of the framework as part of the regular reports on the framework, with details on recent Welsh Government activity, details of common stances agreed with other parties for the purposes of international engagement, and information about upcoming international development or obligations that would fall within the scope of the framework.

Late Payment

- The Committee asked you about the links between this framework and the Procurement framework, noting UK Government plans to make changes to the late payment policy as part of wider procurement reforms. We note your response that there is no link between procurement and late payment and that changes to late payment policies in procurement reforms will be taken through the procurement framework. The Welsh Government should set out how it will ensure late payment officials are involved in discussions on any relevant proposed reform to procurement law.

- One of the functions of the framework is to ensure the functioning of the UK internal market, whilst acknowledging policy divergence between the nations. The Committee notes concerns that the UK Internal Market Act 2020 could affect this framework.

- The Welsh Government should explain the impact of the Internal Market Act 2020 on late payment policy, including any risks to the practical effect of Welsh legislation and policy. It should also confirm whether any exclusions from the Act would be requested.

- The Committee recommends that the Welsh Government should seek intergovernmental agreement to update the framework to acknowledge any interaction with the Internal Market Act 2020 and facilitate a process for agreeing relevant exclusions from that Act.

- The frameworks are intended to manage changes to retained EU law. The Committee notes that the UK Government has announced plans to allow changes to be made to retained law more quickly and easily. The UK Government has also said that changes in framework areas would be taken through the frameworks, however your response noted that it was "too early to say" what process would be used.

- The Welsh Government should confirm whether a process has now been agreed upon or when it is anticipated, and what this involves.

- It's noted that one of the purposes of the common frameworks programme is to ensure compliance with international obligations and to ensure that international agreements can be implemented and negotiated. Despite this, your response stated that international obligations are "not considered" under this framework.

- The Committee recommends that the Welsh Government monitors any implications from international obligations for late payments policy and keep the Senedd informed of any action to implement international obligations.

- The Committee noted in its letter that the framework was inconsistent on the subject of review dates; however clarity has been provided in the Welsh Government's response.

- The framework should be corrected to reflect the information contained in the Welsh Government's response to the Committee.

A copy of this letter has been provided to the Senedd's Legislation, Justice and Constitution Committee, the House of Lords Common Frameworks Scrutiny Committee, the House of Commons Public Accounts and Constitutional Affairs Committee, the Scottish Parliament Economy and Fair Work Committee, and relevant officials in the Northern Ireland Assembly.

Regards,

A handwritten signature in dark ink, appearing to read 'Mark Isherwood', is written over a horizontal line.

Mark Isherwood MS
Committee Chair