Y Gwir Anrh/Rt Hon Mark Drakeford AS/MS
Prif Weinidog Cymru/First Minister of Wales

Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Chair of the Legislation, Justice and Constitution Committee

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14 June 2023

Dear Huw

I would like to thank you for your letter of 15 May regarding the Legislative Consent Memorandum: Data Protection and Digital Information (No. 2) Bill which I laid on the 24 March. You will also have seen that I laid a Supplementary Memorandum on this Bill on 25 May.

Your letter requested a response to a number of questions to help inform the Legislation, Justice and Constitution Committee's report to the Senedd on the Memorandum. A response to each of your questions is set out in the Annex.

I trust that this letter provides the Committee with the information they require.

I am copying this letter to the Minister for Economy, Minister for Social Justice, and Counsel General, along with the Economy, Trade and Rural Affairs Committee and to the Culture, Communications, Welsh Language, Sport and International Relations Committee.

Yours sincerely

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Annex

Clauses 54 (Power of public authority to disclose information to registered person) and 56 (Code of practice about the disclosure of information)

Question 1: Please would you clarify why, if the Welsh Government is of the view that the devolved areas of public services, economy and business are engaged for clauses 54 and 56, the Senedd's consent should not also be sought for other substantive provisions of Part 2 of the Bill (clauses 46 to 60).

Response:
Clauses 54 and 56 confer a power on public authorities to provide personal information about individuals (subject to consent) to organisations providing Digital Verification Services (DVS). The purpose is to facilitate the provision of DVS and improve the service offered to the user. Unlike the other clauses in Part 2, they do not relate to the regulation of DVS.

Question 2: Specifically in relation to clause 56, at paragraph 39 of the Memorandum you state that further consideration needs to be given to the devolved implications of a UK-wide Code of Practice, and that you will provide an update in due course. Are you as yet in a position to provide an update to the Senedd?

Response:
My officials are considering whether the powers provided to the Secretary of State in relation to clause 56 are appropriate as the resulting Code of Practice would apply to Welsh public bodies.

Clauses 61 to 77 (Part 3, Customer Data and Business Data)

Question 3: At paragraph 42 of the Memorandum, you state that further consideration needs to be given to the devolved implications of the regulation-making powers in clauses 61 to 77 and that you will provide an update in due course. Are you as yet in a position to provide an update to the Senedd?

Response:
My officials are currently considering whether the powers provided to the Secretary of State and Treasury in respect of clauses 61-77 are appropriate and whether it would be appropriate for Welsh Ministers to have powers in this area.

Clause 92 (Disclosure of information to improve public service delivery to undertakings)

Question 4: Please would you confirm that our understanding of the position is correct and that the amendments made by clause 92 do extend a pre-existing Henry VIII power exercisable by the Welsh Ministers, and clarify the reasoning behind this omission of information from the Memorandum.

Response:
As the Committee notes , the amendments made by clause 92 extend a pre-existing Henry VIII power, exercisable by the Welsh Ministers, by enabling the sharing of information to improve the delivery of public services to 'undertakings'. Consequently reference to this was not made in the LCM laid on 24 March as this is a modification of an existing power, rather than a conferral of a power. However, for completeness the regulation making power in

section 35 of the Digital Economy Act 2017 (the power being modified), is subject to the affirmative procedure.

Clause 93 (Implementation of law enforcement information-sharing agreements)

Question 5:
a) Could you provide an update on these discussions?
b) What is the Welsh Government's view of the reserved and devolved matters in this area?
c) Could you give an example of how international agreements falling under clause 93 might fall to the Welsh Government and/or devolved public bodies to deliver?
d) Are you aware of upcoming international agreements that would be implemented via the Bill's powers?
e) We raised concerns during our scrutiny of the Welsh Government's Legislative Consent Memorandum for the Health and Care Bill about the implementation of international healthcare agreements using secondary legislation, as proposed in this Bill. At that time, the Minister for Health and Social Services provided assurances that such agreements would be governed by an intergovernmental Memorandum of Understanding (MoU) that was updated to reflect the Bill (a version was made available to us in February 2022). Could you confirm whether similar intergovernmental arrangements will be put in place for international agreements falling under clause 93 of this Bill (if and when enacted)? Is this something the Welsh Government is advocating for?
f) During our consideration of the UK/Switzerland Convention on social security coordination in November 2021, you explained that no new requirements were being placed on Welsh Local Health Boards to deliver its arrangements. What is your view on the extent to which international agreements falling under clause 93 might place additional requirements on the Welsh Government or Welsh public bodies to deliver?

Response:
This is an area where we have continued to have discussions with the UK Government. The UK Government has tabled Amendments 8-16 and NC5 which relate to Clauses 93 and 108, and our position on these clauses is set out in Supplementary Legislative Consent Memorandum No 2 which was laid on 25 May.

Amendments 8-16 and NC5 would give Welsh Ministers concurrent powers to make regulations for the purpose of implementing an international agreement relating to sharing information for the aspects of law enforcement within the Senedd's competence. As you will be aware, we are opposed to concurrent powers without constitutional safeguards, and this is something we continue to discuss with the UK Government.

Our understanding is that Clause 93 primarily relates to the I-LEAP programme, which is broadly designed as a successor to the European Union Schengen Information System II which we had access to before leaving the EU. The I-LEAP programme is designed to increase international cooperation through improving access and use of the INTERPOL system. More information on the programme is available here.

The Senedd has competence to make provision for the prosecution of criminal offences and execution of criminal penalties on a range of devolved matters such as environmental or wildlife crime. On this basis, there is a possibility that the Welsh Government could have an interest in any activity delivered through I-LEAP which interfaces with these areas.

Under the current devolution settlement we expect this interest to be fairly limited in practice. We also do not expect it to place any notable additional requirements on Welsh Government or on any public bodies under the current devolution settlement, especially as I-LEAP would broadly replace an existing set of arrangements in place during our time in the EU.

From a constitutional perspective it is our firm view that the devolution settlement should be protected and the competence of the Senedd respected.

Moreover, in preparation for a future where policing is devolved in line with the recommendations of the Silk Commission and Thomas Commission, it is important to ensure that legislation drafted now is prepared for the more substantive future powers we expect Welsh Ministers to have in this space in the future.

Clause 36 (Interview notices)

Question 6:
a) Please would you clarify if this represents the Welsh Government's chosen and preferred position?
b) Has the Welsh Government had discussions with the UK Government about the drafting of clause 36 and its effect in Wales?

Response:
I agree with your assessment that clause 36 of the Bill inserts new sections 148A-148C into the Data Protection Act 2018 which confer powers on the information commissioner to require certain persons to attend for interview where it is suspected that a person is not complying with particular requirements of the DP legislation. Further, that within new section148B, sub-section (9) places certain restrictions on the circumstances in which the Commissioner can require a person to answer questions under an interview notice, and excludes certain persons from the ambit of the power.

I have asked my officials to consider our position with regard to these provisions, where Welsh Ministers are the regulator for the equivalent services in Wales, namely Care home services provided wholly or mainly for children, Residential family centres, Fostering services and Adoption services.

Other matters

Question 7:
a) Are you able to expand on the implications for Wales should that adequacy decision from the EU be lost?
b) b) If the Bill passes in its current form, what is your view of its impact on the EU's adequacy decision?
c) What discussions have you had with the UK Government in relation to this issue?

Response:
On point a, Data adequacy refers to the European Commission's power to determine, on the basis of article 45 of Regulation (EU) 2016/679, whether a country outside the EU offers its citizens an adequate level of personal data protection. At any time, the European Parliament and the Council may request the European Commission to withdraw any adequacy decision.

Most businesses in Wales, and especially those in financial services and tech sectors, rely on cross-border data flows; being able to smoothly transfer personal data about their customers or staff to offer goods and services, and to operate cloud-based email or file storage.

If the UK lost its data adequacy status for transfers under the GDPR, the EU would require 'appropriate safeguards', as specified under article 46 of Regulation (EU) 2016/679, to be put in place by companies transferring data between businesses/organisations in the EU and businesses/organisations in the UK.

EU businesses would be required to assess the data adequacy of UK businesses on a case-by-case basis and implement one of six specified data transfer safeguards. For example, standard EU Commission data protection clauses could be required in contracts between EU and UK businesses, or UK businesses could be required to sign up to binding corporate rules in the case of multinationals with subsidiaries located in the UK and the EU.

Implementing such additional data safeguards when trading with a UK business would mean that EU businesses would face additional administrative and reporting requirements. This increased complexity and cost could make UK, and therefore, Welsh, businesses less attractive to EU businesses as trading partners, reducing our competitiveness.

Requirements to comply with additional data safeguards would also cause disruption for Welsh businesses, as efforts will need to be made in undertaking additional compliance activities. Efforts will involve staff time, legal resources, and additional financial costs. Welsh subsidiaries of EU-owned companies would likely be most impacted, as additional costs and bureaucracy could potentially make Wales and the UK less attractive for investment from EU companies.

Data protection regulators in EU countries are responsible for ensuring companies in their territories comply with EU data protection law. Regulators can impose fines on companies which do not put in place appropriate data safeguards. For example, on 22 May, Ireland's Data Protection Commission (DPC) published a decision to impose a fine of 1.2bn euros on Meta Platforms Ireland Limited (previously known as Facebook Ireland Limited), Meta's EU HQ operation, and suspend transfers of user data between the EU and the US. The US has not been ruled as 'data adequate' by the EU. The DPC said that Meta had violated rules requiring data safeguards to be in place.

On point b, the new version of the Bill does not appear to assess the risk that amending the GDPR regime could threaten the EU GDPR adequacy decision made regarding the UK. Our view is that changes to the UK's GDPR regime as outlined in the Bill could jeopardise the EU GDPR adequacy decision, which is constantly monitored and can be withdrawn at any time.

On point c, his issue has been raised several times with UK Government at official level, who have provided assurances that they see no threat to the adequacy agreement by the Bill. Officials have also requested that UK Government share a copy of its risk assessment on the matter, which we are yet to receive. This issue was also raised at a meeting between the Minister for Economy and the Minister of State, Department for Science, Innovation and Technology on 17 May.