

## 1.0 Context

This submission on UK-EU governance draws on existing research on intergovernmental relations in the context of Wales' sub-state diplomacy in relation to the EU spanning the pre-1999 administrative devolution arrangements to the latest arrangements for UK-EU governance post-Brexit.<sup>1</sup> Research into current developments will develop further in a new project on post-Brexit IGR (see footnote 1). The submission focuses on the Welsh Government's representation in UK-EU relations and makes some points regarding the role of the Senedd in these governance arrangements. It also briefly mentions the Welsh Government's representation to the EU given the relevance to Wales' external affairs.

### 1.1 Main points raised in this submission

- Despite the differences, mechanisms for devolved government engagement with the UK's EU position post-1999 are an effective benchmark against which to analyse the post-Brexit arrangements for sub-state governments to influence UK-EU governance, particularly the nature of the principles on which relations were established, including their conception of devolved interests, and the consistency of the nature of opportunities to influence the UK's EU positions.
- The UK's withdrawal from the EU has had a fundamental impact on devolved government's ability to influence the UK Government's position in relation to the EU. Whilst the different arrangements inevitably influence Welsh devolved matters, overall, devolved government influence is more limited and variable, and seems unstructured and inconsistent. A key element in these shifts is a narrower interpretation of what is considered to be a devolved interest in relation to the EU which may have more significant long-term implications.
- Ways of strengthening devolved government input into UK-EU governance arrangements include greater clarity regarding the status of the various statements of principles with respect devolved governments in the UK-EU governance arrangements, increased formalisation and consistency of devolved government representation and greater involvement of devolved legislatures in scrutinising intergovernmental relations.
- Recent developments underline that their flexible and non-binding status provides the UK Government with the potential to constrain sub-state external relations, thus pointing to the value of considering firmer and more robust arrangements, including arrangements established on a legal basis.

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<sup>1</sup> See Royles, E. 'Sub-state diplomacy: Understanding the international opportunity structures'. *Regional & Federal Studies*, 27,4 (2017); Royles, E. (2016). 'Substate Diplomacy, Culture, and Wales: Investigating a Historical Institutionalist Approach' *Publius: The Journal of Federalism*, 46, 2 (2016); Minto, R., Rowe, C., Royles E. 'Sub-states in transition: changing patterns of EU paradiplomacy in Scotland and Wales, 1992–2021' *Territory, Politics, Governance* (2023). Current research in this area, 'Assessing the UK's new intergovernmental relations architecture post-Brexit' Carolyn Rowe, Rachel Minto and Elin Royles, supported by the James Madison Trust.

## **2.0 Post-1999 arrangements**

Though EU relations is a reserved matter, arrangements for devolved government engagement with the UK in the EU context post-1999 were well developed. The arrangements contrasted with a broader context of wide variation in the nature of inter-governmental relations, and it is an illustrative example of where there was confidence in the process of inter-governmental relations.

2.1 The Memorandum of Understanding (MoU) underpinning intergovernmental relations included a Concordat on Co-ordination of European Union Policy Issues that established principles for relations between central and devolved governments. Moreover, in recognising the interest of devolved governments in European policy-making in relation to devolved matters, it committed to 'involve the Welsh Ministers as directly and as fully as possible in decision-making on EU matters which touch on devolved areas (including non-devolved matters which impact on devolved areas and non-devolved matters which will have a distinctive impact of importance to Wales).'<sup>2</sup>

2.2 At ministerial level, the intention of involving Welsh Ministers in decision-making on EU matters was to be operationalised via a Joint Ministerial Committee (Europe). In practice, devolved Ministers sought to influence UK negotiating positions and were able to participate in UK Council of Ministers delegations, were sometimes lead minister, with the requirement to adhere to a single UK position. As regards official-level relations, devolved government Brussels officials were granted diplomatic status. At that point, full accreditation of sub-state officials was only extended in the Belgian and UK cases.<sup>3</sup> With UKREP as the main coordination point, devolved officials attended Committee of the Permanent Representation working group meetings.

2.3 Overall, there were limitations to these IGR mechanisms as they were not constitutionally entrenched, depended on tools of soft governance and vulnerable to party political influences. However, the inter-governmental structures enabled devolved administrations to influence the formation of the UK's EU negotiating positions on issues affecting devolved competence and they were also able to undertake their own activities in Brussels. These arrangements were considered in hindsight as 'a model of clarity and cooperation between the Welsh Government and the UK Government and then between the UK Government and the European Union.'<sup>4</sup>

## **3.0 Current arrangements for devolved governments to influence the UK Government's position in relation to the EU**

The UK's withdrawal from the EU has had a fundamental impact on devolved government's ability to influence the UK Government's position in relation to the EU. The EU Withdrawal Agreement and the Trade and Cooperation Agreement (TCA), the two main agreements establishing UK-EU relations, and the Common Frameworks are inevitably associated with devolved matters in a whole host of policy areas and in practice have implications for every Welsh Government department. For instance, the Welsh Government and Senedd are responsible for implementation and compliance with significant parts of TCA in devolved areas and they clearly influence policy-making and regulatory frameworks in Wales.<sup>5</sup>

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<sup>2</sup> UK Government, *Devolution: Memorandum of Understanding and Supplementary Agreements* (2013) p. 25.

<sup>3</sup> Tatham, M. 'Paradiplomats against the state: Explaining conflict in state and sub-state interest representation in Brussels', *Comparative Political Studies* 46,1 (2013) p.66.

<sup>4</sup> Interview cited in Minto, Rowe and Royles (2023).

<sup>5</sup> see Moran, S., Wilkes, J. 'UK-EU relations: the responsibilities of new Welsh Ministers' Senedd Research, Welsh Parliament (2021).

### 3.1 EU Withdrawal Agreement arrangements

There is no Welsh Government representation on the 8 UK-EU forums established with respect to the Withdrawal Agreement nor are the Welsh or Scottish Governments invited to attend the Withdrawal Agreement Joint Committee (WAJC).

3.1.2 With regards to Welsh Government input into Trade Agreements, the UK Government provides some opportunities to input by sharing parts of texts that the UK Government considers to be relevant to devolved areas with the Welsh Government. In practice, they have not been willing to share the texts in their entirety, for instance on issues that have direct implications to devolved areas.<sup>6</sup> This contrasts with practices highlighted above in relation to the EU in the post-1999 that recognised that devolved interests encompassed non-devolved matters which impact on devolved areas.

### 3.2 Trade and Cooperation Agreement arrangements

The main document guiding decisions on devolved governments' input into the TCA arrangements, seems to be a letter by Lord Frost in May 2021. It stated 'where items of devolved competence are on the agenda for the Partnership Council or the Specialised Committees, we expect to facilitate attendance by Devolved Administrations at the appropriate level... However, final discretion in any specific instance as regards attendance would be held by the UK co-chair of the body concerned, depending on the nature of the discussion.'<sup>7</sup>

3.2.1 In practice, therefore, the Welsh Government's role on the UK-EU Partnership Council (PC), the main TCA oversight body, is limited. Welsh Government officials and Welsh ministers have attended some of these meetings, but this has been inconsistent. In contrast to the post-1999 arrangements, devolved Ministers have observer status, have no formal role in decision-making, and no role in any decision-making that occurs between meetings.<sup>8</sup> The Welsh Government have advocated for being full / active participants where issues related to devolved competences are discussed.<sup>9</sup> A Minister called for developing joint positions across the four governments of the UK in areas of devolved competence or in areas affecting devolved competence and advocating these joint UK positions to the EU.<sup>10</sup> They also directly referred to the EU Council of Ministers input as a proven model of how to more actively engage the devolved governments and as a 'valuable exercise of ministerial time'.<sup>11</sup>

3.2.2 As regards the Trade Partnership Committees and Specialised Committees, the Welsh Government's role is again limited and ad hoc. Regarding composition, 'UK and EU co-chairs of each TCA Committee and Working Group determine their respective delegations to each meeting. Numbers in each delegation will vary between meetings, depending on what agenda items are scheduled for

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<sup>6</sup> For instance, in relation to the UK-Australia Free Trade Agreement, the Minister for Economy stated ' Although we have engaged with the UK Government throughout the negotiations and have had the opportunity to feed in our views on the potential opportunities and risk for Wales, we have yet to see the exact details of what will be included in the agreement.' Welsh Government, 'Written Statement UK-Australia Free Trade Agreement' (2021).

<sup>7</sup> Lord Frost, 'Letter from Lord Frost on engagement regarding EU matters' (UK Government, Cabinet Office, 2021).

<sup>8</sup> UK Parliament, 'Welsh Parliament Legislation, Justice and Constitution Committee: Submission to the House of Lords, European Affairs Committee' (2022).

<sup>9</sup> This is expressed most strongly in Vaughan Gething's letter to Lord Frost, Gething, V, Letter to Lord Frost following Partnership Council (Welsh Government, 2021).

<sup>10</sup> Gething, V, Letter to Lord Frost following Partnership Council (Welsh Government, 2021).

<sup>11</sup> Welsh Parliament, 'The Record, Plenary 1 February 2022, 6. Statement by the Minister for Economy: Wales and Europe - managing a new relationship' (2022a).

discussion'.<sup>12</sup> Therefore, the expectation is that when devolved matters are considered, their attendance should be facilitated at an appropriate level.

3.2.3 In practice, there is evidence that the Welsh Government is 'not routinely invited to all meetings and its request to join others has been rejected'.<sup>13</sup> Evidence suggests that there are examples of 'good' official level engagement in working groups and specialised committees with Welsh Government officials included in delegations where there is a devolved interest. They have been involved in preparations for particular committees, working level pre-meetings, and attended as observers. However, if there is no agreement on a UK position, the UK Government reserves the right to decide on the UK's approach.<sup>14</sup>

3.2.4 At the same time, it is difficult to fully appreciate the Welsh Government's level of engagement with these committees. Whilst this is partly as a result of the ad hoc nature of the degree to which they are invited to attend, it can also be attributed to a lack of communication by the Welsh Government, including articulation of their priorities in relation to the trade and specialised committees.

3.2.5 Overall, whilst Lord Frost suggested that the Cabinet Office's EU Secretariat would have a role in supporting the coordination of preparation,<sup>15</sup> the TCA arrangements for devolved government input seem unstructured. They seem to operate in a segmented way led by individual UK government departments with no clear overall coordination, in contrast to the post-1999 arrangements.

### 3.3 Common Frameworks

Twenty-six of the UK Common Frameworks impact on areas devolved to Wales. Whereas the function of the UK Common Frameworks is to 'ensure a common approach is taken where powers have returned from the EU which intersect with policy areas of devolved competence',<sup>16</sup> there are clear issues in how they facilitate coordination between central and devolved governments. For instance, the House of Lords Common Frameworks Scrutiny and Welsh Senedd committee investigation into Common Frameworks called for clear terms of reference for working groups and a means of understanding relationships between them.<sup>17</sup>

### 3.4 Intergovernmental arrangements introduced after the UK Government's review of intergovernmental relations

The review of intergovernmental relations establishes five principles to guide relations between the UK and devolved governments:

- a. Maintaining positive, constructive, and respectful relationships.
- b. Building and maintaining trust.
- c. Allowing information sharing, including confidential information.
- d. Increasing understanding of intergovernmental activities.

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<sup>12</sup> UK Parliament, 'Procurement: UK-EU Trade and Cooperation Agreement: Questions for Cabinet Office, UIN 25876, tabled on 1 July 2021' (2021).

<sup>13</sup> Moran, S., Wilkes, J., Lugonia, B., 'The room where it happens: Wales in UK-EU relations, Senedd Research, Welsh Parliament (2022).

<sup>14</sup> Drakeford, M. 'Letter from the First Minister to the Legislation, Justice and Constitution Committee 18 January 2022' (Cardiff, Welsh Government, 2022).

<sup>15</sup> Lord Frost, 'Letter from Lord Frost on engagement regarding EU matters' (UK Government, Cabinet Office, 2021).

<sup>16</sup> UK Government, 'UK Common Frameworks' (2023).

<sup>17</sup> Welsh Parliament, 'Economy, Trade and Rural Affairs Committee, Common Frameworks, December 2022' (2022b).

e. Implementing a mutually agreed process for dispute resolution.<sup>18</sup>

3.4.1 Despite the potential of these structures, based on the early stage of their implementation, it is difficult to be wholly positive regarding these arrangements.

3.4.2 First, in addition to problems in terms of slow progress in implementing these structures, there were initial questions as to the extent to which the UK Government took these structures seriously. The first scheduled meeting of the IMG on UK-EU Relations was postponed. The Welsh Government Minister for Economy, Vaughan Gething, then missed the rescheduled first meeting because it was called with two hours' notice, which he described as 'not an acceptable way to conduct intergovernmental relations.'<sup>19</sup> It is understandable that under such circumstances it was only possible to arrange for a senior Welsh Government official to attend as an observer. The Welsh Government has also called for the IMG to meet regularly, for instance before Partnership Council and the Withdrawal Agreement's Joint Committee.

3.4.3 Second, whereas the UK Government publishes documents and communiques regarding the operation of a number of IMGs in line with the commitment to greater transparency regarding intergovernmental relations, the IMG on UK-EU Relations is not included on the list and no information is currently issued from the UK Government.<sup>20</sup>

3.4.4 Third, the Welsh Government anticipated that the IMG on UK-EU Relations would be a forum to raise concerns and call for strengthening devolved government engagement, for instance calling for 'full and active opportunity to participate' in the TCA Partnership Council.<sup>21</sup> They have also raised issues such as lack of engagement with devolved Governments before introducing the Northern Ireland Protocol Bill (July 2022).<sup>22</sup> It is not clear that the UK Government has responded to these points and there has been no change in the extent of devolved government representation.

### **3.5 Reflections and recommendations**

Despite their potential, the new intergovernmental structures established in the UK since 2022 raise the following concerns.

3.5.1 In contrast to the clarity and relative consistency of UK-EU intergovernmental relations arrangements between the UK and devolved governments post-1999, as illustrated, current intergovernmental arrangements in this area vary widely in the extent to which devolved governments are represented and can influence decision-making. Their decreased influence in many of these decision-making structures contributes to the lack of trust in intergovernmental relations.

3.5.2 Relatedly, there is little coherence to the influence of devolved governments across the intergovernmental structures in relation to the EU, the TCA, Common Frameworks and revised intergovernmental relations arrangements. Your committee was very clear on this 'inconsistent

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<sup>18</sup> UK Government, 'Policy Paper, Review of Intergovernmental Relations' (2022).

<sup>19</sup> Welsh Government, 'Cabinet Statement: Written Statement: Meeting of the UK-EU Relations Interministerial Group, 17 February 2022' (2022).

<sup>20</sup> UK Government, 'Collection: Intergovernmental relations. Documents relating to engagement between the UK Government and the devolved administrations' (2023).

<sup>21</sup> Drakeford, M. 'Letter from the First Minister to the Legislation, Justice and Constitution Committee, 10 March 2022' (Cardiff, Welsh Government, 2022).

<sup>22</sup> Welsh Government, 'Cabinet Statement: Written Statement: Meeting of the UK-EU Relations Interministerial Group, 14 July 2022' (2022).

approach to how the structures and processes established within them will engage with other governance structures on UK-EU relations such as the IMG and UK-EU governance structures'.<sup>23</sup>

3.5.3 Alongside this, a shift has taken place in the foundational basis of devolved government representation, including what is considered to be a devolved interest in relation to the EU. As previously outlined, under the post-1999 arrangements, the Concordat on Co-ordination of European Union Policy Issues established a relatively all-encompassing interpretation of an interest in devolved matters and in 'non-devolved matters which impact on devolved areas and non-devolved matters which will have a distinctive impact of importance to Wales'. Currently, the arrangements seem to have departed significantly from this position to one where individual UK Government departments on a case by case basis develop their own narrower interpretation of what is relevant to devolved matters. In this particularly ad hoc set up there seems to be no clear attempt to take into account the way in which non-devolved policy areas can have a significant impact on devolved matters.

3.5.4 Ways of strengthening devolved government input into UK-EU governance arrangements include:

- Greater clarity regarding the guiding principles driving intergovernmental relations and the status of devolved governments within the arrangements. It is important to clarify the status of the Memorandum of Understanding which includes the Concordat on Co-ordination of European Union Policy Issues as this is currently unclear. Relatedly, there is a lack of clarity regarding the concordat's relationship to the latest principles for intergovernmental relations established by the Review of Intergovernmental Relations and the status of those principles in the context of EU related issues vis a vis the direction provided by Lord Frost's 2021 letter.
- Increased consistency and formalisation of devolved government representation across the intergovernmental arrangements in line with their status within the post-1999 arrangements.
- Greater involvement of devolved legislatures in scrutinising intergovernmental relations would also be beneficial. This is a general point also important to more specific repercussions in the context of devolved input into the UK's relations with the EU. The treaty text only refers to the UK Parliament as regards the UK-EU Parliamentary Partnership Assembly (PPA). The role of UK devolved legislatures could be formalised and strengthened beyond the current provision of attending meetings as observers who lack speaking and voting rights during the plenary sessions. It is positive that Senedd elected members have been invited to attend PPA meetings and there is potential to evolve these arrangements to formalise enabling devolved legislature representatives to more actively participate in the meetings, e.g. contribution to work in groups and specific items on devolved legislature engagement on the agenda.

### **3.6 Wales' external relations with the EU**

Post-1999, the EU Concordat enabled devolved governments to able set up Brussels offices and were considered as part of the UKRep organisational structure. The arrangements enabled the Welsh Government to develop its own relationships with EU institutions, membership and activity in EU inter-regional networks and other European network alongside the access and engagement via UK structures.

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<sup>23</sup> UK Parliament, 'Welsh Parliament Legislation, Justice and Constitution Committee: Submission to the House of Lords, European Affairs Committee' (2022), p. 4.

3.6.1 Post-Brexit, the Welsh Government has set out an agenda of seeking to maintain its engagement with these structures in Brussels, including expanding its network of offices in Europe.<sup>24</sup> It faces an additional requirement that devolved governments keep the UK Government informed of ministerial or senior official level contact with EU institutions or member states to ensure a coordinated response as stipulated in Lord Frost's letter.<sup>25</sup>

3.6.2 The UK Government can potentially constrain the external activities of UK devolved governments. A recent development is that the UK Government is keeping the overseas activity of the SNP Scottish Government 'under close review'<sup>26</sup> and issued guidance to Heads of UK Missions on 'Working with the Scottish Government internationally'. A particular focus is devolved ministerial visits overseas. Revised requirements are indicated to include the need for greater information gathering and sharing within the UK Government on Scottish ministerial visits, requiring host governments to coordinate requests for devolved ministerial visits via FCDO, and UK diplomats to explain the reserved and devolved powers distinction to host governments.<sup>27</sup>

3.6.3 The steps taken reflect the extent of UK Government concerns that Scottish Government international engagement is being used to pursue its independence agenda. Accusations include Scottish Government activities internationally overstepping the boundary into reserved matters, particularly the constitution, and undermining UK Government policy positions. It is viewed by the Scottish Government as damaging and limit its international activity.<sup>28</sup>

3.6.4 This example is somewhat exceptional, reflecting the extent of strained relations between the UK Conservative Government and Scottish SNP Government. However, whilst the degree to which the latest guidance impacts upon Welsh Government ministerial activity internationally and in relation to the EU and European governments is unclear, it is instructive of the UK Government's potential to constrain the external relations of the UK's sub-state governments.

3.6.4 Overall, this recent development reminds us that the flexibility of the arrangements provides the potential for central government to take steps place additional requirements on devolved governments and to constrain sub-state external relations activity under particular circumstances. This underlines the vulnerability of current sub-state external relations arrangements and the repercussions of their non-binding status. It points to the value of considering a firmer basis for these arrangements.

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<sup>24</sup> See Minto, R., Rowe, C., Royles E. 'Sub-states in transition: changing patterns of EU paradiplomacy in Scotland and Wales, 1992–2021' *Territory, Politics, Governance* (2023).

<sup>25</sup> Lord Frost, 'Letter from Lord Frost on engagement regarding EU matters' (UK Government, Cabinet Office, 27 May 2021).

<sup>26</sup> UK Parliament, 'Hansard: Scottish Government Ultra Vires Expenditure, Volume 828: debated on Thursday 9 March 2023' (2023), Lord Offord of Garvel.

<sup>28</sup> Scottish Government, 'Correspondence: Protecting Scotland's interests: letter to the UK Foreign Secretary, 1 May 2023' (2023).