



Ein cyf/Our ref: MA/FM/2168/23

Llywodraeth Cymru
Welsh Government

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

Delyth Jewell MS
Chair of the Culture, Communications, Welsh Language, Sport, and International Relations Committee

5 September 2023

Dear Huw and Delyth

I would like to thank you both, as well as the members of the Culture, Communications, Welsh Language, Sport, and International Relations Committee (CCWLSIRC) and the Legislation, Justice and Constitution Committee (LJCC) for considering the two Legislative Consent Memoranda laid in respect of the Data Protection and Digital Information (No. 2) Bill ('the Bill').

I appreciate the Committees detailed consideration of the issues relating to what is a very broad and complex piece of UK Government legislation. I have considered the conclusions in the two reports and have responded to the recommendations below (to note I have used clause references from the Bill as amended in Public Bill Committee, dated 9 June).

Legislative consent

I am pleased that both Committees are of the view that the following provisions fall within a purpose within the legislative competence of the Senedd, under Standing Order 29, and therefore require the consent of the Senedd:

- clauses 65-81 Customer and Business Data (clauses 61 to 77 as introduced);
- clause 98 Disclosure of information to improve public service delivery to undertakings (clause 92 as introduced);
- clause 99 Implementation of law enforcement information-sharing agreements (clause 93 as introduced);
- amendment 46 change to clause 65 customer data and business data (clause 61 as introduced); and,
- amendments 8-16, along with Amendment NC5, in relation to clause 99 (clause 93 as introduced), clause 115 Regulations (clause 108 as introduced), and the meaning of "appropriate national authority".

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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.

I note that both Committees believe that consent is not required for clauses 56 and 60 (clauses 54 and 56 as introduced) and Amendment NC3 (now clause 58) on the basis that the provisions are not within the legislative competence of the Senedd. However, I remain of the view that these provisions are within legislative competence. The purpose of the power conferred on public authorities under clauses 56 and 60 is to facilitate the provision of Digital Verification Services (DVS) in order to improve the service offered to the user. I do not consider that the telecommunications reservation applies to material that is transmitted but rather relates to the means by which communications are transmitted. As such, I am of the view that clauses 56 and 60 relate to devolved matters of public services, economy and business and therefore fall within the legislative competence of the Senedd.

EU-UK relations & Data adequacy

In terms of the UK retaining EU data adequacy, we share the same concerns that provisions within the Bill may pose a risk to this. I also note that both Committees have highlighted compliance with the Trade and Co-operation Agreement (TCA), which places duties on matters covered by the Bill, as a further matter of concern.

In line with both Committees, we do not consider the risk around data adequacy to be an issue for trade only. Being granted adequacy by the EU means that the UK is recognised as having an equivalent level of protection for personal data as the EU, enabling personal data to flow freely between the EU and the UK, supporting both public services as well as private businesses.

We have of course considered the impact of the Bill on the TCA and our view is that the Bill's provisions on the transfer of personal data to third countries comply with the TCA's provisions, which are very brief and high-level.

Use of powers

I note that the LJC Committee would have found it helpful if the reference to the use of the pre-existing Henry VIII power contained within clause 98 of the Bill (clause 92 as introduced) had been included in the original memorandum.

I also note the LJC Committee's views on both the use of concurrent plus powers and the implementation of international healthcare agreements and how this could be reapplied to international agreements whose implementation falls within devolved competence.

Recommendations

In addition to setting out the conclusions reached by the Committees, the reports also set out a series of recommendations and my response to each of these is set out in the table below:

CCWLSIRC Recommendation

In light of the potential risks outlined by the Welsh Government to the UK's EU data adequacy decision, we call on the Welsh Government to provide regular updates to the Committee on the Bill's impact on UK-EU relations, including intergovernmental discussions on the Bill as it progresses through the UK Parliament and on an ongoing basis should it be enacted.

Response: I will continue to provide updates on the potential impact of the Bill on EU-UK relations through the LCM process, in particular regarding concerns around the EU's data adequacy decision, until such time that I am content that the Bill will not impact on EU data adequacy.

LJCC Recommendation 1. The First Minister should provide an update to this Committee and to the Senedd by 6 September 2023 or in the laying of

any next supplementary legislative consent memorandum, whichever is the earlier, on the Welsh Government's consideration of the devolved implications of a UK-wide Code of Practice about the disclosure of information and the powers provided to the Secretary of State in relation to clause 56 of the Bill (as introduced; now clause 60 in the Bill as amended in Public Bill Committee).

Response: My officials are continuing to consider the impacts and suitability of this clause for Wales and Welsh public bodies and are in ongoing discussions with UK Government counterparts. I will provide an update of the outcome of those discussions through the LCM process.

LJCC Recommendation 2. The First Minister should provide an update to this Committee and to the Senedd by 6 September 2023 or in the laying of any next supplementary legislative consent memorandum, whichever is the earlier, on the Welsh Government's consideration of the devolved implications of the regulation making powers in clauses 61 to 77 of the Bill (as introduced; now clauses 65 to 81 in the Bill as amended in Public Bill Committee).

Response: My officials are continuing to consider the suitability of regulation making powers and are in ongoing discussions with UK Government counterparts. I will provide an update of the outcome of those discussions through the LCM process.

LJCC Recommendation 3. Where the Welsh Ministers do not make regulations to implement international agreements, and powers to do so are instead exercised by the Secretary of State, the Welsh Ministers must provide full detail and an explanation to the Senedd in advance of such regulations being made by the Secretary of State.

Response: Should this occur, the Senedd will be updated through the usual process.

LJCC Recommendation 4. The First Minister should provide an update to this Committee and to the Senedd by 6 September 2023 or in the laying of any next supplementary legislative consent memorandum, whichever is the earlier, on the Welsh Government's consideration of clause 36 of the Bill (as introduced; now clause 38 in the Bill as amended in Public Bill Committee).

Response: My officials are exploring the background and rationale behind clause 36 with UK Government to inform our position, and this is a matter of ongoing discussions. I will provide an update of the outcome of those discussions through the LCM process.

LJCC Recommendation 5. We support the Welsh Government's request to the UK Government that it should share a copy of its risk assessment on the Bill and the loss of the adequacy decision as a matter of urgency.

Response: We will continue to raise the issue of the potential impact of the Bill on EU data adequacy (as set out in my response to recommendation 6).

LJCC Recommendation 6. Given the concerns regarding the potential risk of loss of adequacy, the First Minister should escalate this issue to Ministerial level discussions as opposed to discussion at official level.

Response: Welsh Ministers have already raised our concerns with UKG Ministers around the impact of the Bill on the retention of EU data. We will continue to raise the issue at both official and Ministerial level.

LJCC Recommendation 7. The First Minister should provide to this Committee by 6 September 2023 or in the laying of any next supplementary legislative consent memorandum, whichever is the earlier, the Welsh Government's view on the Bill as it relates to compliance under the Trade and Cooperation Agreement.

Response: The digital trade provisions in the TCA are very brief and high level. Article 202 covers the protection of personal data and privacy in relation to digital trade. Our view is that the Bill's provisions on the transfer of personal data to third countries comply with the TCA.

Part Three of the TCA forms the basis of cooperation between the UK and the EU on law enforcement and judicial cooperation in criminal matters. This allows the UK continued access to EU databases covering fingerprints, DNA and criminal records. This cooperation between the UK and EU on law enforcement matters is crucial for the safety and security of people in Wales.

It is welcome that the maintenance of high standards of personal data protection form a basis for current and future UK-EU cooperation, as this should motivate the UK Government to maintain the standards of data protection citizens in Wales should expect to see. High standards of personal data protection should reduce the potential risk of the EU not being satisfied with UK standards of personal data protection and potentially terminating the TCA agreement on these grounds.

I agree with the Committee's view that there should be high standards of data protection as this underpins international law enforcement cooperation. People in Wales have the right to be confident and secure about how their personal data is used, including for law enforcement purposes. We will continue to emphasise this in our liaison with the UK Government on the Bill.

I am copying this letter to the Minister for Economy, Minister for Finance and Local Government, Minister for Social Justice, and the Counsel General. A copy of this letter will also be sent to all Members, and the Economy, Trade and Rural Affairs Committee.

Yours sincerely



MARK DRAKEFORD