



Eich cyf/Your ref:  
Ein cyf/Our ref:

Huw Irranca-Davies  
Cadeirydd y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

14 Tachwedd 2022

Annwyl Huw,

Diolch am eich adroddiad ar Femorandwm Cydsyniad Deddfwriaethol Llywodraeth Cymru yn y Bil Caffael a osodwyd gerbron y Senedd ar 26 Hydref.

Rwyf wedi ystyried yr wyth argymhelliad yn yr adroddiad ac yn falch o roi fy ymateb i bob un ohonynt isod.

### **Argymhelliad 1.**

Dylid gofyn am gydsyniad y Senedd hefyd ar gyfer cymalau 114 a 116, a dylid sicrhau bod unrhyw femoranda yn y dyfodol mewn perthynas â'r Bil yn cyd-fynd â hynny.

[Nid wy'n derbyn yr argymhelliad hwn.](#)

[Nid wy'n cytuno â'r casgliad y byddai cymalau 114 a 116 cyfystyr â darpariaeth berthnasol at ddibenion Rheol Sefydlog 29.](#)

[Fel yr eglurais mewn ymateb i gwestiynau'r Pwyllgor ynglŷn â'r Memorandwm Cydsyniad Deddfwriaethol, mae'r cymalau hyn yn ddarpariaethau technegol sy'n ymwneud â sut mae'r Bil yn gweithio yn hytrach na darpariaethau yn eu rhinwedd eu hunain ac, yn ymarferol ac yn gyffredinol, nid ydym yn cynnwys cymalau nad ydynt yn weithredol mewn Memoranda Cydsyniad Deddfwriaethol.](#)

### **Argymhelliad 2.**

Dylai'r Gweinidog roi diweddariad ar ymgysylltu rhwng Llywodraeth Cymru a Llywodraeth y DU o ran y pryderon sy'n weddill a ganlyn a godwyd ym mharagraff 119 o'r Memorandwm:

- y ffordd y mae'r pŵer sy'n ychwanegu cytundebau rhyngwladol at y rhestr yn Atodlen 9 i'r Bil wedi ei ddrafftio fel pŵer cyfredol, heb fod unrhyw ofyniad i geisio cydsyniad Gweinidogion Cymru pan fydd Gweinidogion Llywodraeth y DU yn arfer y pŵer hwn mewn perthynas â meysydd datganoledig;

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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.

Mae trafodaethau manwl yn mynd rhagddynt ar lefel swyddogol ynghylch darpariaethau tebyg sydd wedi eu cynnwys yn y Bil Masnach (Awstralia a Seland Newydd). Ar ôl sicrhau unrhyw gytundeb, disgwylir y bydd canlyniadau'r trafodaethau hynny'n cael eu hadlewyrchu ar gyfer y pŵer hwn yn y Bil Caffael.

- b. y diffiniad o Awdurdodau Contractio Cymru;

Mae fy swyddogion yn cwrdd â swyddogion Swyddfa Cabinet Llywodraeth y DU i ddatrys y mater hwn. Mae'r trafodaethau wedi bod yn gadarnhaol, ac rydym yn gobeithio cael canlyniad llwyddiannus.

- c. y ffordd y mae pwerau cychwyn wedi eu drafftio fel pwerau Gweinidog y Goron yn unig;

Ymrwymodd Llywodraeth y DU ar y dechrau i sicrhau bod Gweinidogion Cymru'n cael pwerau cychwyn yn y Bil. Mae trafodaethau ynglŷn â'r pwerau yn parhau rhwng swyddogion, a disgwylir cael cytundeb ar y ffordd ymlaen yn fuan.

- d. y pwerau cydredol sydd wedi eu cynnwys i wneud y ddarpariaeth ganlyniadol ac ati, heb fod unrhyw ofyniad i geisio cydsyniad Gweinidogion Cymru pan fydd Gweinidogion Llywodraeth y DU yn arfer y pwerau hyn mewn perthynas â meysydd datganoledig.

Mae fy swyddogion wedi gofyn i'r pŵer gael ei ddiwygio i bwerau cydredol plws ac mae'r trafodaethau'n parhau.

Ynglŷn â'r holl faterion hyn sy'n weddill, nid yw'r drws wedi cau ac mae ymgysylltu'n parhau â Llywodraeth y DU, a hynny ar lefel Weinidogol a swyddogol.

**Argymhelliad 3.** Am resymau tryloywder, dylai'r Gweinidog gyhoeddi ei llythyrau ar 18 Mai a 23 Mai 2022 at y Gweinidog dros Gyfleoedd Brexit ac Effeithlonrwydd y Llywodraeth, a'r ymatebion a gafwyd (os o gwbl).

Mae'r llythyrau wedi'u hamgáu yn Atodiad 1.

**Argymhelliad 4.** Dylai'r Gweinidog nodi'r pwynt yn ystod hynt y Bil pan fyddai'n ystyried defnyddio'r mecanweithiau cysylltiadau rhynglywodraethol i ddatrys meysydd o bryder sy'n weddill yn y Bil.

Rydym wedi cynnal perthynas weithio dda â Llywodraeth y DU ynglŷn â'r Bil Caffael a, hyd yn hyn, rydym wedi gallu cytuno ar ddatrysiadau heb orfod ystyried unrhyw fecanweithiau datrys anghydfod megis y cytundeb rhynglywodraethol. Gan fod trafodaethau â Llywodraeth y DU yn mynd rhagddynt, ni fyddai'n briodol, ar hyn o bryd, ddefnyddio'r mecanweithiau cysylltiadau rhynglywodraethol i ddatrys meysydd o bryder sy'n weddill yn y Bil.

Mae hyn yn unol â chytundeb yr Adolygiad o Gysylltiadau Rhynglywodraethol sy'n nodi: *Nid ystyrir uwchgyfeirio anghytundeb rhwng llywodraethau i anghydfod ond ar ôl rhoi ystyriaeth briodol a llawn ar lefel portffolio (gan gynnwys ymgysylltu'n rheolaidd â'r Pwyllgor Sefydlog Rhyngweinidogol ar Gyllid - F:ISC), a hynny pan na ellir datrys anghytundeb ar lefel portffolio ac mae goblygiadau sylweddol ar y berthynas rhwng dwy neu ragor o lywodraethau.*

O ystyried y berthynas â Llywodraeth y DU ar hyn o bryd, a'r canllawiau ar ddefnyddio mecanweithiau cysylltiadau rhynglywodraethol, nid yw'n bosibl (nac yn briodol) darogan pryd y byddai perthnasau'n methu i'r pwynt lle dylid ystyried defnyddio'r mecanweithiau hyn.

**Argymhelliad 5.** Dylai'r Gweinidog nodi unrhyw senarios lle y byddai'n ystyried defnyddio cytundeb rhynglywodraethol i ddatrys meysydd o bryder sy'n weddill yn y Bil.

Ni ragwelir y bydd angen defnyddio'r mecanwaith cysylltiadau rhynglywodraethol i ddatrys unrhyw faterion sy'n weddill. Fodd bynnag, pe bai perthnasau'n methu yn y dyfodol, byddem yn bwriadu uwchgyfeirio drwy'r Pwyllgor Sefydlog Rhyngweinidogol yn y lle cyntaf.

Byddwn, wrth gwrs, yn adolygu'r sefyllfa yn barhaus ac rydym yn cydnabod bod y mecanwaith datrys anghydfodau ar gael – os bydd ei angen arnom – ar gyfer datrys unrhyw faterion na ellir mo'u datrys drwy ymgysylltu ar lefel portffolio.

**Argymhelliad 6.** Dylai'r Gweinidog nodi ei safbwyntiau ar y gweithdrefnau sy'n gymwys i holl bwerau Gweinidogion Cymru i wneud is-ddeddfwriaeth o dan y Bil.

**Argymhelliad 7.** Dylai'r Gweinidog roi diweddariad ar drafodaethau rhwng Llywodraeth Cymru a Llywodraeth y DU ynglŷn â phryderon a godwyd gan y Pwyllgor Pwerau Dirprwyedig a Diwygio Rheoleiddio mewn perthynas â'r Bil.

O ystyried y cysylltiadau rhwng Argymhellion 6 a 7, mae'r ymateb hwn yn cwmpasu'r ddau argymhelliad.

Mae fy swyddogion wedi trafod â'u swyddogion cyfatebol yn Swyddfa Cabinet Llywodraeth y DU y pryderon a godwyd yn adroddiad y Pwyllgor Pwerau Dirprwyedig a Diwygio Rheoleiddio. Mae fy swyddogion wedi cyfrannu at yr ymateb lle ceir ystyriaethau polisi sy'n ymwneud â Chymru.

Roeddwn yn fodlon ar y gweithdrefnau sy'n gymwys i holl bwerau Gweinidogion Cymru i wneud is-ddeddfwriaeth o dan y Bil fel y'i cyflwynwyd. Fodd bynnag, bydd rhai gweithdrefnau'n newid o ganlyniad i nifer o bwyntiau a godwyd yn adroddiad y Pwyllgor Pwerau Dirprwyedig a Diwygio Rheoleiddio. Rydym wedi cael ar ddeall y caiff yr ymateb i'r adroddiad ei gyhoeddi yn fuan.

Rwy'n fodlon o hyd ar y gweithdrefnau sy'n gymwys i holl bwerau Gweinidogion Cymru i wneud is-ddeddfwriaeth o dan y Bil yn dilyn y diwygiadau y cytunwyd arnynt ar lefel swyddogol.

**Argymhelliad 8.** Dylai'r Gweinidog roi ymateb i'r holl argymhellion a geir yn yr adroddiad hwn o fewn tair wythnos i'r dyddiad y cafodd ei osod, neu cyn i unrhyw femoranda yn y dyfodol gael eu gosod gan Lywodraeth Cymru mewn perthynas â'r Bil, pa un bynnag a ddaw yn gyntaf.

Rwy'n derbyn hyn.

Hyderaf fod yr ymatebion a roddwyd yn ddefnyddiol. Mae croeso mawr ichi gysylltu â mi os oes angen rhywbeth arall arnoch.

Yn gywir,



**Rebecca Evans AS/MS**  
Y Gweinidog Cyllid a Llywodraeth Leol  
Minister for Finance and Local Government



Rt. Hon. Jacob Rees-Mogg M.P.  
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By email to:

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Dear Minister,

Thank you for your letters dated 18 May and 23 May in response to the UK Government's request that the Welsh Government commence the legislative consent process for the Procurement Bill in the Senedd Cymru.

The Procurement Bill provides HM Government and the Devolved Administrations with an excellent opportunity to overhaul the public procurement regime and drive flexibility in our procurement processes. I have been pleased to see our officials working together on this important legislation.

I note from your correspondence, and the subsequent Legislative Consent Motion which was lodged with the Senedd on 9 June, that you have some concerns about the Bill as drafted. Regarding your concern about the Definition of Welsh Contracting Authorities within the Bill, it has always been the intention of HM Government to find a workable, practical solution which will be easy for affected Contracting Authorities to implement and follow.

Additionally, I have noted your concern regarding powers in respect of implementing future trade agreements. I understand the position and recognise that there are some cross-cutting Trade implications which need to be taken into account in this regard.

Since May our officials have continued to work closely together on identifying potential technical and legal solutions and I was pleased to see that some of these issues, for example, with regard to the disapplication power for healthcare services and the removal of the Wales Procurement Policy Statement from any civil proceedings remedies regime, have been resolved. I have asked my officials to continue working collaboratively with your officials throughout the summer and September in order to resolve the remaining issues whilst the Bill is going through the parliamentary process.

I want to thank you for your continued engagement and support of the Procurement Bill and assure you that I will respond in more depth in due course.

Yours sincerely,

Jan 2000

Rebecca Evans AS/MS  
Y Gweinidog Cyllid a Llywodraeth Leol  
Minister for Finance and Local Government



Llywodraeth Cymru  
Welsh Government

Eich cyf/Your ref  
Ein cyf/Our ref: RE/700/2022

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cc The Rt Hon Penny Mordaunt MP, Minister of State for Trade Policy  
Email: [Mordaunt.Correspondence@trade.gov.uk](mailto:Mordaunt.Correspondence@trade.gov.uk)

cc The Rt Hon Simon Hart MP, the Secretary of State for Wales  
Email: [secretary.state@ukgovwales.gov.uk](mailto:secretary.state@ukgovwales.gov.uk)

23 May 2022

Dear Jacob,

Thank you for your letter regarding the introduction of the Procurement Bill (the Bill) to Parliament on 11 May 2022.

I agree in principle that the Bill engages the legislative consent motion process in legislating for procurements undertaken by devolved Welsh authorities and certain private utilities as defined in the Bill. I am therefore content, in principle, to begin the legislative consent process in the Senedd Cymru.

I have written to you separately however regarding some issues with the definition of devolved Welsh authorities within the Bill and I look forward to receiving your response.

Due to the size of the Bill, my officials are continuing with the devolution analysis for the legislative consent memorandum. My officials are also working with yours to agree a list of government amendments required.

In relation to the section in your letter entitled "Power to implement procurement aspects of trade agreements", this is an area of significant concern with the Bill. Thank you for the assurance provided in your letter. However, the Welsh Government has been clear that the use of concurrent powers undermines the devolution settlement and that we cannot recommend consent to the Senedd where concurrent powers are proposed.

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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.

When the Welsh Ministers were considering their position regarding the Bill, the following assurances were made by Minister Lopez, the then Parliamentary Secretary for the Cabinet Office, in her letter of 16 July 2021:

- that the legislation will not fetter either the legislative competence of the Senedd or the executive competence of Welsh Ministers, e.g., no concurrent powers so as to engage Schedule 7B Government of Wales Act 2006, full autonomy in taking forward any secondary legislation for Welsh contracting authorities (i.e., those bodies with wholly or mainly devolved functions)
- that Welsh Ministers will be granted equivalent powers to UK Ministers in relation to those contracting authorities carrying out wholly or mainly devolved activities (Welsh contracting authorities).

In light of the assurances provided by Minister Lopez above, I ask that you reconsider your position and that the power to implement procurement aspects of trade agreements in the Bill are amended to give Welsh Ministers an equivalent power. This is a matter of grave importance to the Welsh Ministers, I have therefore copied this letter to the Minister of State for Trade Policy and the Secretary of State for Wales.

I look forward to hearing from you soon.

Yours sincerely,

A handwritten signature in black ink that reads "Rebecca Evans". The signature is written in a cursive, flowing style.

**Rebecca Evans AS/MS**

Y Gweinidog Cyllid a Llywodraeth Leol  
Minister for Finance and Local Government



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18 May 2022

Dear Jacob,

### **Procurement Bill: Cross Border Procurement**

Thank you for your letter of 11 May. I confirm that I will be providing a formal response to your letter in relation to those matters outlined under the heading of “Next steps.”

Meanwhile, I would like to draw your attention to a particular area of concern to Welsh Ministers in relation to cross border procurement.

An assurance was made by Minister Lopez, the then Parliamentary Secretary for the Cabinet Office, in her letter of 16 July 2021, that we agree the list of contracting authorities to which the “Welsh” elements of the Bill will apply (i.e., those bodies with wholly or mainly devolved functions) and to which the UK Government elements will not.

Since then, discussions have been ongoing between Welsh Government and UK Government Officials on the definition for Welsh Contracting Authorities (WCAs) in the Bill - with the draft wording being amended a number of times.

The Bill as introduced contains provision which restricts the exercise of Welsh Ministers’ powers under the Bill to the purpose of regulating (a) contracting authorities that are devolved Welsh authorities (within the meaning given in section 157A of the Government of Wales Act 2006) (b) contracting authorities that are not devolved Welsh authorities but are to be treated as devolved Welsh authorities or (c) the award of contracts under a devolved Welsh procurement arrangement, or the management of such contracts (see clause 99(1)). Any reference in the Bill to a “devolved Welsh authority” is to include a reference to an authority that is to be treated as a devolved Welsh authority (see clause 99(4)).

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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.



We are mostly content with the definition as it stands for most Welsh Contracting Authorities. This goes some way towards addressing our concern that the “Welsh” rules (as a consequence of the exercise of the Welsh Ministers powers and the separate provision for Wales) should apply to a wider range of contracting authorities than would fall within the Government of Wales Act definition of “devolved Welsh authority”. Our main concern is about the implications for contracting authorities, other than utilities, which fall within category (b) (i.e. contracting authorities that are not devolved Welsh authorities but are to be treated as devolved Welsh authorities) when they carry out a cross border procurement i.e. a single procurement which relates to both Wales and England.

Our interpretation of clause 99(3) is that it would mean that in these circumstances, the authority will be bound by the ‘Welsh’ rules for procurements which are wholly in respect of Wales but not for any other procurements, including cross border procurements. Ultimately this means that for any cross border procurements which are for the supply of goods, services or works of which, say, 90% is for use in Wales and 10% is for use in England, then the ‘English’ elements of the rules would apply. Examples of what this might mean currently for Contracting Authorities falling within the wider definition of “devolved Welsh authority” (“category (b) authorities”) when carrying out cross-border procurements are currently as follows:

- Category (b) authorities carrying out a cross border procurement in Wales and England would have to have regard to the NPPS and not the WPPS, as the duty to have regard to the WPPS only applies to devolved Welsh authorities (clause 13). An example of this is registered social landlords (RSLs) procuring work in relation to their housing stock which they have in both Wales and England in one contract. The English NPPS would apply, even though the main element of their housing stock is based in Wales.
- Prohibition of a separate pre-qualification stage for procurements below GPA thresholds (clause 78) applies to contracting authorities other than devolved Welsh authorities. Category (b) authorities when carrying out a cross border procurement would be subject to this prohibition and would not be able to utilise the flexibility of using a pre-qualification stage.
- For any contracts valued above £2m let in Wales, category (b) authorities carrying out a cross border procurement will need to comply with the requirement to publish the contracts (clause 51(3)). But this requirement does not apply to devolved Welsh authorities so will not be a requirement for category (a) authorities when carrying out any procurement (including a cross border procurement) nor is it a requirement for a category (b) authority when carrying out a procurement only in relation to Wales.
- Category (b) authorities carrying out cross border procurement would also need to comply with the requirement to update published contracts valued over £2m when they have been modified, or to publish contracts if a modification has taken the value over £2m (clause 70(6)). This is not a requirement for category (a) authorities when carrying out any procurement (including a cross border procurement) nor is it a requirement for a category (b) authority when carrying out a procurement only in relation to Wales.

Both UKG Ministers and Welsh Ministers have regulation making powers within this Bill, and the Bill makes separate provision for Wales in some areas. As both Governments develop policies within their competence in the future there may be further divergence and the impact on category (b) authorities carrying out cross border procurements could therefore be much greater moving forward and could therefore have a real impact on the implementation of Welsh policies for the authorities affected. This would not be acceptable for Welsh Ministers.

The drafting of the definition of “devolved Welsh authority” in the Bill means that when category (b) authorities are carrying out a cross border procurement the English regulations take precedence, which is not what Welsh Ministers require for bodies undertaking wholly or mainly devolved functions.

The Explanatory Note (587) to this section in the Bill refers to this point, It explains that subsection (3) defines another category of contracting authority to be treated as a devolved Welsh authority and states:

”These are contracting authorities that operate to some extent outside Wales, but whose functions are both exercisable wholly or mainly in relation to Wales and are not wholly or mainly reserved. These authorities are only to be treated as devolved Welsh authorities when awarding or managing a contract in relation only to their functions in Wales. In respect of a contract that relates to more than just functions in Wales, the authority would not be a devolved Welsh authority.”

It is this last section that is not acceptable to Welsh Ministers if the procurement being undertaken relates mainly to Wales then we believe that they should be treated as a devolved Welsh authority for the purposes of this Bill.

You may be aware that my officials have already requested an approach, which would require contracts for services/goods/works for use in both Wales and England to be procured in accordance with the provisions applicable to the main geographical location and function of the contract in question. This is a similar approach to mixed procurements in the current PCR. However, we understand that you are not minded to accept this approach. It is important to ensure that we reach agreement on the scope of the Welsh Ministers powers to regulate in relation to Welsh Contracting Authorities (WCAs) and the application of separate provisions in relation to WCAs.

Given the above and the assurance provided by Minister Lopez, I would ask you to consider an amendment to the Bill so that the drafting of the definition of category (b) authorities would reflect where procurement undertaken by an authority is wholly or mainly in relation to Wales that they are treated as a devolved Welsh authority.

Yours sincerely,



**Rebecca Evans AS/MS**

Y Gweinidog Cyllid a Llywodraeth Leol  
Minister for Finance and Local Government