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14 Awst 2020

Annwyl Gadeiryddion,

Rwyf yn ysgrifennu atoch i dynnu eich sylw at ddadansoddiad Llywodraeth Cymru i Bapur Gwyn Lywodraeth y DU ar Farchnad Fewnol y DU. Rwyf wedi anfon y llythyr yma heddiw at yr Ysgrifennydd Gwladol dros Fusnes, Ynni a Strategaeth Ddiwydiannol ac atodaf ef er eich gwybodaeth.

Edrychaf ymlaen at ymgysylltu gyda'ch Pwyllgorau chi ymhellach ar y materion a drafodwyd yn y dadansoddiad.

Yn gywir,

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Llywodraeth Cymru
Welsh Government

The Rt. Hon Alok Sharma MP
Secretary of State for Business, Energy & Industrial Strategy
secretary.state@beis.gov.uk

14 August 2020

Dear Alok,

I am writing further to the UK Government's White Paper on the UK Internal Market, published just four weeks ago.

Prior to the Paper's publication, I wrote to you and the Chancellor of the Duchy of Lancaster (7 July) to set out our position on the UK Internal Market and the steps we believe we should take to ensure future regulatory and economic cooperation across the UK, as a result of the UK leaving the EU Single Market. Our position and thoughts on a potential approach to this issue, as set out in my letter, have not changed.

The Welsh Government is concerned that the long-term survival of the United Kingdom is under great strain and that the approach taken in the White Paper will exacerbate those tensions in a way which, if not addressed, will accelerate the break-up of the Union. Our initial view was that the White Paper was fundamentally flawed and misleading – further analysis of the substance of your proposals has confirmed this view.

We have already made clear that we are not opposed to an internal market for the United Kingdom, neither are we opposed to legislation being brought forward to support the functioning of a UK Internal Market. Wales' interests, and those of the UK as a whole, are best served by ensuring smooth trading arrangements for businesses across all four nations. However, your proposals do not deliver this and in any case, this should be a collaborative piece of work in which all the governments within the UK have the opportunity to participate fully and on an equal basis.

Legislation of the kind proposed in your White Paper is simply not necessary, and we do not recognise the need for this type of solution as the UK Internal Market is already highly integrated.

The proposals also undermine three years of collaboration via Common Frameworks. Our commitment to the Frameworks programme remains and we continue to focus on the effective delivery of the programme.

Our reading of the proposals is that the proposed legislation would prevent the Senedd or Welsh Ministers from imposing mandatory requirements relating to lawful sale of goods and services in Wales – even where there were justified by public health objectives, environmental concerns or any other public policy reason. This would represent a direct attack on the current model of devolution. The power – even if untouched – to regulate for goods and services produced in Wales would moreover be severely undermined, if not made completely impractical as in almost any sector, only a minority of good and services consumed in Wales are produced here.

The White Paper would thus remove or emasculate the current rights of the devolved institutions to implement changes to the regulatory environment in devolved policy areas governed to date by EU law, such as labelling, or environmental standards.

Attached to this letter is the Welsh Government's analysis to the substance of the UK Government's White Paper. I cannot emphasise strongly enough that, in our view, the model of primary legislation envisaged in the White Paper is unnecessary, unworkable, heavy-handed, and will not secure legislative consent from the Senedd.

I ask that you resume multilateral discussions on the future UK Internal Market, underpinned by our continuing and joint efforts to put in place Common Frameworks, to design and agree appropriate arrangements which serve the interests of the whole of the United Kingdom.

I am copying this letter to the Chancellor of the Duchy of Lancaster, the Secretary of State for Wales, the Scottish Government's Cabinet Secretary for the Constitution, Europe and External Affairs, and the First Minister and deputy First Minister of Northern Ireland.

Yours sincerely,

Jeremy Miles AS/MS
Cwnsler Cyffredinol a'r Gweinidog Pontio Ewropeaidd
Counsel General and Minister for European Transition

The UK Government's White Paper on a UK Internal Market
Welsh Government Analysis

Claims of risk / harm without legislative underpinning

The assertion that the UK Government, through the proposals in the White Paper, will 'give' the DAs new powers is misleading – the powers in question are not reserved and, in the absence of UK legislation to reverse the devolution settlement, would automatically and properly come back to the devolved institutions in any case.

The risks of harm to the UK economy if an Internal Market Bill is not introduced are overstated and are based on speculation on the extent of regulatory differences which *may* emerge, rather than the current situation within the UK which includes, and has included for some time, managed regulatory divergence. We have been clear from the outset that policy and regulatory divergence already exists within the UK, and this ability to diverge has led to innovative solutions being developed in one nation and subsequently introduced across the UK.

We note that the White Paper refers to construction and building regulations as examples where differences in regulations could create complexities over time. With the transfer of functions in 2012, England and Wales have diverged on their approach to building regulations as a reflection of each administration's policies and priorities. The construction sector has become accustomed to dealing with differing processes and performance standards set through regulations and associated statutory advice, in particular with regard to energy performance of buildings and fire safety. Liaison amongst the four administrations ensures that, where practical and of mutual benefit, policy work is shared – divergence is not considered a barrier to development.

Generally, the White Paper's analysis is very focussed on hypothetical examples of policy and/or regulatory divergence and there is no study of the impact of current divergence, such as building regulations, on businesses and how they manage current regulatory practices within the UK. There is no evidence of any engagement with stakeholders already operating in areas of current divergence in regulations.

We would question the economic modelling and analysis used to support the Paper's assertions of risk and the basis for a legislative underpinning of the kind proposed. For example, the use of Germany as a model to determine the economic cost to the UK if trade costs increased (pages 36 & 90), however with the clear caveat on page 89 that this data should not be used as a prediction for the UK market. This is deeply concerning.

It is clear that the evidence to support the White Paper's proposals is flawed in many ways. Stakeholder views and evidence should be analysed from across the UK and across a variety of sectors with differing levels of current divergence – this evidence should reflect the needs of the *whole* of the UK, not solely one nation.

Mutual Recognition & Non-discrimination

The Welsh Government has already clearly stated that the mutual recognition model proposed in the White Paper would undermine the Welsh and wider UK economy, our work on Common Frameworks, inter-governmental relations and the devolution settlements.

Whilst we recognise that the UK Government's proposals are careful not to suggest that there will be a constraint on devolved legislative competence to make regulations for goods

and services produced in Wales, it seems inevitable that the legislation will limit the Senedd's competence to legislate on goods which are placed on the market in Wales. Moreover, the effects of an overarching Internal Market Bill would also hollow out our competence in these areas. The economic dominance of England within the UK would undermine any policy innovation that could only apply to Welsh goods in Wales, as Welsh laws will not apply to goods and services being sold in Wales.

In addition, whilst the principles of mutual recognition and non-discrimination are well-established elements of the architecture of the EU Single Market, they are balanced by a commitment to subsidiarity and proportionality, a baseline of minimum standards and by the recognition that certain public policy concerns, for example in terms of environmental protection or public health, can in certain circumstances over-ride these principles. This is not reflected in the UK Government's proposals within the White Paper. It is also widely recognised by academics that there is a big difference between what is being suggested by the UK Government and how the EU Single Market works, and the context of the UK is key. By legislating in this way, the UK Government would be imposing a model of mutual recognition and non-discrimination on the three other nations of the UK, whereas the EU Single Market is a result of Member States voluntary coming together to negotiate and agree a set of rules to which they are all bound.

We also note that the principles of mutual recognition and non-discrimination will apply in an unqualified way to goods and services from Northern Ireland being put on the market in Great Britain. This will not be the case in the reverse direction, since the Northern Ireland Protocol requires a large proportion of goods which are placed on the market there to conform to EU standards. We are concerned that there is a distinct lack of detail within the UK Government's proposals of how an Internal Market Bill will work alongside the Northern Ireland Protocol.

We have also made clear in past discussions with BEIS officials that comparing the UK's Internal Market to mutual recognition systems in other countries such as Australia is flawed as these comparisons do not reflect our structures, levels of devolution and way of working within the UK. Indeed, the closest comparison to be made would be with Spain, which also has a system of asymmetric devolution – where, in 2017, the law establishing the principle of mutual recognition was cancelled following a ruling by the Spanish Constitutional Court.

In addition, the non-discrimination provisions, while mentioned by UK Government during our discussions, were not interrogated in detail as part of our collaborative work on the Internal Market and continue to lack substance within the White Paper.

The economic weight of England and its impact on the rest of the UK's nations must be fully recognised and considered, and any adverse impact mitigated or minimised. What actions is the UK Government putting in place to ensure this?

Why is it proposed that mutual recognition will apply to all goods and services placed on the market in the UK rather than only to those originating in the UK?

How will the UK Government ensure that arrangements for the UK Internal Market reflect the unique multinational character of the UK and that learning from other systems is properly analysed in both home and UK contexts?

Services and Qualifications

The White Paper makes explicit that services and professional qualifications will be covered by the mutual recognition principle. This is an area of divergence which already exists and

each nation of the UK already has its own regulators overseeing areas such as social care and education.

The current Provision of Services Regulations 2009 implement the EU's 'Services Directive'. The UK 2009 Regulations facilitate both the cross-border provision of services within the EU *and* intra-UK access, therefore allowing people to live and work freely within the UK. Importantly, the 2009 Regulations also allow for divergence and exceptions, if justified – therefore allowing each nation of the UK to amend its rules if they believe it is within the public interest.

It is not clear whether this exception will be preserved if the system under the 2009 Regulations is brought within the Internal Market system, as proposed by the White Paper.

Case study: teachers' qualifications

This is illustrated by teachers' qualifications. Presently, in order to teach in maintained settings in Wales teachers must hold Qualified Teacher Status (QTS) and be registered with the Education Workforce Council. Teachers trained and awarded QTS in England are currently automatically recognised as being able to teach in Wales. For a number of years the route to being awarded QTS and the standards underpinning QTS have diverged significantly between England and Wales. Student teachers studying in Wales must hold GCSE (or equivalent) qualifications at a certain level, complete a degree level academic qualification as well as be assessed against the Welsh QTS Standards. In addition the Scottish regulatory model for teachers is also continuing to be altered in a policy direction slightly different from that in Wales in order to support their own education system effectively.

In England, the entry requirements to the teaching profession are lower and the English version of QTS can be awarded without undertaking an academic qualification. The policy direction in England continues to move towards an unregulated professional space or at least with minimal statutory requirements or academic qualifications in order to teach in schools. This is an example of an existing regulatory difference – while we would need to seek confirmation that this position can be maintained and will be outside the scope of the legislation, the worst case scenario of the proposed system of mutual recognition could be the significant reduction of the standards of the teaching workforce in Wales. Also, should the requirements to gain QTS continue to fall in England, potential student teachers could be attracted by lower cost and lower standard routes into teaching in England and seek to undertake their training there before returning to teach in Wales, undermining the requirements set to gain QTS in Wales.

Can the UK Government clarify how their proposals will affect (and indeed protect) the system of divergence for services and qualifications, already in place within the UK?

Common Frameworks

We have previously set out our proposals for future economic and regulatory cooperation across the UK. These proposals were, and continue to be, based on the Common Frameworks programme – and the development of other tools such as regulatory impact assessments – which would ensure any detrimental effect to the Internal Market of any policies are identified and could be weighed against any identified benefits such as public policy reasons.

Common Frameworks are expressly designed to allow for managed divergence in areas where all four Governments agree there is a need for this. In setting up the Common Frameworks programme, the UK Government identified the areas they considered may need a Framework to ensure the functioning of the UK Internal Market – these areas are supposed to cover all areas of returning powers. This would suggest, on the UK Government's own analysis, that there are no other areas outside the Frameworks areas which require agreement on divergence. Since that exercise, and in good faith, policy areas have been considering to what extent any Frameworks are needed in specific areas based on the fact-specific circumstances of each Framework area. This work has been developed on the basis of collaboration and cooperation across the UK's nations, in line with the Inter-governmental Agreement already agreed.

The UK Government, through the proposals set out in the White Paper, now suggests that the Common Frameworks programme does not go far enough in protecting the integrity of the UK's Internal Market. We have been clear that, while we agree that every aspect of the Internal Market is not covered by current Frameworks, this is not a justification for a heavy-handed piece of legislation which goes much further than areas covered by retained EU law.

The UK Government has stated on numerous occasions that Common Frameworks do not go far enough to protect the UK Internal Market.

Which areas fall outside the scope of Common Frameworks and are in need of an overarching legislative underpinning?

How has the UK Government reached the conclusion that legislation of this type is justified to govern those areas?

As Common Frameworks provide the mechanism for agreeing in specific detail what divergence is possible in all areas identified as part of that programme – why do these areas require a blunt, catch-all Bill that fails to reflect or recognise the years of work undertaken on Common Frameworks?

Exemptions & Exclusions

The list of exclusions from mutual recognition and non-discrimination within the White Paper is very limited, with no provision made for future exceptions. This does not allow for a sustainable, future-proofed way of working, neither does it allow for future changes to be made based on agreement by consensus.

The proposed exclusions do not reflect the current position in EU law which allow derogations for public policy reasons, neither are they consistent with similar arrangements in other countries such as Canada.

We will also need to consider the scope of any exceptions under the principle of non-discrimination and how this would apply in practice – the White Paper is very lacking in detail in this area. For example, it is not clear how the proposals may impact Welsh language requirements.

The Paper also makes reference to existing regulatory differences being excluded. However, it is not clear how this would impact changes to existing regulation – where there is existing divergence – and where the underlying policy remains. It raises the question what level of changes to existing policies would render a policy 'changed' and therefore within scope of the Internal Market system.

Why has the UK Government limited the exceptions and exclusions in such a way which is inconsistent with systems already in operation in other parts of the world?

Maintaining high standards

While the UK Government has stressed in discussions and publicly that their intention is to continue to apply high standards, for example in environmental and animal welfare areas, there is no suggestion within the White Paper that the legislation would set these standards in law, nor set a mechanism for agreeing them, and create a baseline for minimum, maximum or unitary standards, as exists within the EU mutual recognition model. At an EU level, Member States voluntarily agree to these standards and agreement is made by collaboration – the Welsh Government has also been involved in this process via the Committee of the Regions and also in discussion with the UK Government to shape the negotiating position. It is therefore deeply concerning that this is not set within the UK Government's proposals.

Welsh business groups have also made clear that this setting of a baseline for standards is absolutely crucial to ensure certainty for business. Without such a baseline, the risk of deregulation by one of the nations of the UK is great and in itself would lead to uncertainty for business, as the risk would be vastly differing standards across the UK which would ultimately lead to radical deregulation and a 'race to the bottom'.

Case study: single use plastic items

This is illustrated by the ban on single use plastic items. While the Welsh Government's proposals to introduce a ban on the sale of nine single use plastic items in Wales aligns with the nine items included in Article 5 of the EU's Single Use Plastics (SUP) Directive[1], the UK Government's proposal for a similar ban for England will only apply to three of the nine items. Therefore, the sale of three of the items banned in Wales would also be banned in England, the sale of the other six items would be lawful in England. The mutual recognition principle could mean that Wales would not be able to introduce legislation or, if legislation is introduced, enforce the ban on the sale of these six items in Wales, irrespective of their origin. A ban that could only apply to Welsh produced plastics would undermine the policy and render it ineffective. Furthermore, even if the UK Government were to bring its ban in line with the SUP Directive in the future, it would not be possible for Wales to go further and ban other single use plastic products without the policy being undermined by such plastics from other parts of the UK being sold in Wales.

Case study: food standards

A second example concerns food standards. Under the current EU regime, common standards are agreed at EU level on the basis of negotiation and compromise. Moreover, it is open to the Welsh Government to specify higher standards for food put on the market in Wales provided this can be justified in terms of public policy and is not discriminatory.

However, should the UK Parliament legislate, for example, to permit the use of hormones in beef cattle, the mutual recognition principle as envisaged by the White Paper would mean that meat from such cattle could be placed on the market in Wales, even if our current regulations – which forbid such techniques – remained in place in respect of cattle reared in Wales. Moreover, it would most likely be impossible for the Welsh Government to insist on labelling to identify beef produced from hormone-injected cattle, since beef products which originated elsewhere in the UK would only have to respect the labelling regulations of the

[1] Article 5 of Directive (EU) 2019/904 (the Single Use Plastic Directive) – see Annex C for further detail.

part of the UK in which they were produced. And since the legislation would apply to all goods, whether produced in the UK or imported, provided the UK Parliament had legislated to reduce standards in this way in England, the Welsh Government would have no possibility of excluding English produced or imported beef from sale in Wales or even making consumers aware of what they were buying.

While the UK Government, at this time, may publicly commit to maintaining high standards, these proposals would mean that any *future* reduction in standards would result in lower standard products entering the Welsh market.

How will the UK Government ensure that high standards will be agreed and preserved?

Governance

The section within the White Paper focussed on governance and independent monitoring is relatively light on detail, including on mechanisms for dispute resolution.

The reference to the oversight role of the UK Parliament (para. 154) suggests no role for the devolved legislatures in any new system which could be created to manage the UK Internal Market. As any new system would impact the whole of the UK, this is wholly unacceptable.

On independent advice and monitoring, the Paper states that there is a "range of potential vehicles" to explore. There is no real detail included, specifically in terms of the functions, constitution and accountability of an independent body.

In a country such as the UK, close collaboration and cooperation via a clear system of governance, based on strong inter-governmental relations and parity of participation, and agreed at the outset by each of the UK nations, is vital.

How does the UK Government envisage an independent body would be scrutinised and held accountable?

What governance and oversight role is envisaged for the devolved legislatures?

Subsidies regime / State aid

Currently, the Government of Wales Act 2006 (GoWA) does not include State aid in its list of reservations, and therefore State aid is not a reserved matter. The White Paper implicitly accepts this view by stating that the UK Government intends to "legislate to expressly provide that subsidy control is a reserved matter", rolling back the process of devolution and constraining the Senedd's ability to legislate on this matter.

We have made clear, through discussion with the UK Government, that we cannot foresee any way in which the Senedd would give legislative consent to changes to GoWA which would introduce a reservation on State aid policy.

Whilst the Paper commits to "work[ing] closely with all the devolved administrations to seek to agree the shape of a UK-wide domestic subsidy control regime" (para. 174) the inference is that the future UK subsidy regime will be developed to reflect the interests of the UK Government, rather than be the results of a collaborative development process, as is currently the case for the EU State aid rules.

The White Paper also gives little detail on the UK's future subsidy regime and makes no reference to an independent regulator for a future regime.

What are the UK Government's plans for a future subsidy regime and why do these require changes to the devolution settlements if the intention is to proceed by agreement?

Procurement

Despite the fact that procurement is a devolved competence, the White Paper confirms that the UK Government is considering extending the non-discrimination duty to the procurement of goods.

In raising the issue of the non-discrimination principle in relation to procurement, the UK Government is seeking to resolve an anomaly caused by the UK's exit from the EU, in relation to the WTO's Government Procurement Agreement (GPA). This issue has been raised as part of the discussions in relation to the Common Framework for procurement, the current draft of which states "The parties will… maintain principles of non-discrimination, equal treatment and transparency in respect of economic operators from the UK''. No Party to the draft Concordat has objected to the inclusion of this intra-UK non-discrimination commitment.

This begs the question of why this provision should be included in an overarching Internal Market Bill. By unnecessarily extending the proposed UK non-discrimination provision to the procurement of goods there may be unintended adverse consequences for policy making in Wales and/or our devolved competence in this area.

What justification can the UK Government give to including this area within their proposals?

What impact will these proposals have on work already underway to agree a Common Framework for procurement?

Spending powers

It is not clear from the White Paper what is meant by 'spending powers', which at paras 47, 126 and 128 are characterised as new or "clarified" powers for the UK Government but at para 182 are described as for "all levels of Government". Reference is also made at para 182 to powers "for the UK Government to construct replacements of EU programmes". There is no further detail or substance about the rationale or impact of this, or about how this relates to ongoing intergovernmental discussions about the Shared Prosperity Fund and continued participation on programmes such as Erasmus+.

Could the UK Government clarify the meaning of 'spending powers' in this context and how they will ensure that any plans respect the current devolution settlements?