

**Is a bad deal better than no deal? An examination of intergovernmental agreements between the Welsh and UK Governments**

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## Structure

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### I. Introduction

This report examines the use of non-legislative agreements between the Welsh and UK Governments. Specifically, it considers their role in resolving disputes over devolved legislative consent for UK bills, particularly those related to the UK's withdrawal from the European Union ('Brexit').

The agreements have taken various forms: memoranda of understanding, concordats, despatch box commitments and exchanges of letters. These devices are not new; they have been central to UK intergovernmental relationships since devolved elected institutions were established in 1998-9. The devolution statutes were silent on how the new bodies would interact with the UK Government. Various codes and agreements – what Rawlings has called the 'concordats of the constitution'<sup>1</sup> – filled the gap.

In the wake of the UK's exit from the EU, however, recourse to these non-legislative tools has proliferated. The Fifth Senedd's Legislation, Justice and Constitution Committee (LJCC) observed that they are a key feature of Wales' changing constitution.<sup>2</sup> The complex process of re-regulation required by departure from the various fields of EU governance led to considerable political contestation between the UK's four central governments over their respective powers and responsibilities. In the Welsh context, non-legislative commitments have had an important role in the resolution of these disputes. Repeatedly, the Welsh Government has been prepared to accept the UK Government acquiring broad law-making powers, whose scope extends over devolved matters, in exchange for non-statutory assurances from the UK Government as to how the powers will be used.

Recourse to these agreements has been controversial. While they offer a light-touch means of regulating intergovernmental relationships, they are not legally enforceable, prompting consternation over the protection of devolved powers and the integrity of decision-making at the devolved level. The current Welsh Government appears to have accepted this concern. Following the 2021 Senedd election, it stated that it would seek to avoid non-legislative agreements on UK bills in future, which suggests that they will be used less frequently going

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<sup>1</sup> R. Rawlings, 'Concordats of the constitution' (2000) 116 LQR 257.

<sup>2</sup> Legislation, Justice and Constitution Committee, *Fifth Senedd Legacy Report* (Senedd Cymru, 2021). <<https://senedd.wales/media/eccmngfv/cr-ld14319-e.pdf>> accessed 27 May 2022

forward.<sup>3</sup> The extended use of such agreements during the Brexit process therefore presents an instance of constitutional experimentation from which important lessons can be drawn for devolution in the UK.

This report takes stock of these non-legislative agreements and considers their implications. Part 2 provides ten examples where non-legislative commitments were used to resolve disputes on legislative consent. Parts 3 and 4 examine the purposes of the agreements and their effects, evaluating the justifications offered by the Welsh Government for their use and the criticisms which have been made against them. Part 5 offers some conclusions and recommendations concerning the use of such agreements in future.

## **2. Ten intergovernmental agreements**

To date, non-legislative agreements between the Welsh and UK governments have featured alongside at least nine UK statutes and one set of regulations. These have spanned both the Fifth (2016-2021) and Sixth (2021-present) Senedd terms and concerned several major UK Government bills related to Brexit, albeit not exclusively. From the Welsh Government's point of view, the aim of these agreements has been consistent: the protection of devolved competences and the fostering of closer intergovernmental cooperation in the design and implementation of post-Brexit governance. As will become clear in what follows, however, the agreements have had – at best – mixed results in achieving these aims.

### **2.1. European Union (Withdrawal) Act 2018**

The European Union (Withdrawal) Act 2018 makes provision for the continuing effect of 'retained' EU law after the UK's secession. Under the terms of the original bill, the devolved institutions would be prevented from modifying that body of law, even in areas intersecting with devolved competences, such as agriculture, fisheries and the environment. The devolved governments opposed this arrangement: they demanded the removal of the restrictions on devolved competences and sought a requirement on UK ministers to obtain their consent before exercising any new powers in devolved areas.

This dispute was partly resolved on the basis of two intergovernmental agreements. First, in October 2017, the governments agreed a set of principles for the development of common frameworks to replace EU regulation.<sup>4</sup> According to this agreement, the frameworks would 'enable the functioning of the UK internal market, while acknowledging policy divergence'. They would 'respect the devolution settlements and the democratic accountability of the devolved legislatures'. The development of frameworks would be 'based on established

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<sup>3</sup> Letter from the Counsel General to the Chair of the Legislation, Justice and Constitution Committee (22 October 2021). <<https://business.senedd.wales/documents/s118991/LJC6-11-21-%20Paper%2010%20Letter%20from%20the%20Counsel%20General%20and%20Minister%20for%20the%20Constitution%2022%20Octob.pdf>> accessed 25 May 2022

<sup>4</sup> Cabinet Office, 'Joint Ministerial Committee (EU Negotiations) Communique' (UK Government, 16 October 2017). <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/652285/Joint\\_Ministerial\\_Committee\\_communique.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf)> accessed 27 May 2022

conventions', in particular the convention that devolved competences are not normally altered without the consent of the devolved institutions (the 'Sewel Convention'). The flexibility permitted to devolved institutions by EU law would be maintained; there would also be a 'significant increase' in devolved powers.

Later, in April 2018, the Welsh and UK governments came to an agreement on the terms of the legislation. The 'Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks'<sup>5</sup> consisted of legislative and non-legislative commitments. The clauses which would have restricted the ability of devolved institutions to amend retained EU law within devolved areas were removed. In their place, UK ministers were granted time-limited powers to suspend devolved competences, subject to UK parliamentary approval, if agreement could not be reached on common frameworks and only after seeking the consent of the devolved institutions and providing their views to the UK Parliament if consent was refused.

The non-legislative parts of the agreement contained renewed commitments to work by consensus, respect established constitutional conventions (particularly the Sewel Convention) and develop common frameworks through collaboration and consensus. The UK Government undertook not to use its new powers under the legislation to create new policy within devolved areas, and to refrain from enacting policy in areas in which devolved powers were suspended, while the Welsh Government committed to not withhold consent 'unreasonably'. A memorandum of understanding set out further details regarding the development of common frameworks. The Senedd was able to scrutinise the terms of the agreement alongside the revised bill and legislative consent was granted on 15 May 2018.

To some extent, these arrangements were successful. Devolved competences were maintained; the powers to introduce restrictions on those competences were never used;<sup>6</sup> joint work on common frameworks has steadily progressed to completion. However, both the Welsh Government and the Senedd's committees accused the UK Government of breaching the agreement on several occasions. For example, the Welsh Government argued that UK ministers made the Animal Health and Genetically Modified Organisms (Amendment) (EU Exit) Regulations 2019 without seeking the consent of devolved ministers, despite it having reaffirmed its commitment to seeking consent under the IGA 2018.<sup>7</sup> The Fifth Senedd's Constitutional and Legislative Affairs Committee in 2019 also observed that the UK

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<sup>5</sup> Cabinet Office, 'Intergovernmental Agreement on the European Union (Withdrawal) Bill' (UK Government, 25 April 2018) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/702623/2018-04-24\\_UKG-DA\\_IGA\\_and\\_Memorandum.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IGA_and_Memorandum.pdf)> accessed 27 May 2022

<sup>6</sup> The powers have since been repealed by the European Union (Withdrawal) Act 2018 (Repeal of EU Restrictions in Devolution Legislation, etc.) Regulations 2022.

<sup>7</sup> Counsel General for Wales, 'Written submissions of the Counsel General for Wales' (Welsh Government, 2019). <<https://gov.wales/sites/default/files/inline-documents/2019-09/WRITTEN%20SUBMISSIONS%20OF%20THE%20COUNSEL%20GENERAL%20FOR%20WALES.pdf>> accessed 27 May 2022

Government appeared to make two sets of regulations in breach of its commitment not to enact new policy within devolved areas.<sup>8</sup>

The 2017 and 2018 agreements were undermined further by the Internal Market Act 2020. Despite both agreements having emphasised cooperation, consent and the autonomy and empowerment of devolved institutions, this legislation introduced significant limitations on devolved competences and was enacted without their consent. The Act establishes ‘market access’ principles, according to which goods, services and professional qualifications recognised in one part of the UK cannot be subject to additional restrictions or competitive disadvantages in another part of the UK. Further, while there are some exceptions to the application of these rules, the range of exceptions is not as broad as those permitted under EU law. The result is that a ‘collaborative model of economic unionism’<sup>9</sup> reflected in the common frameworks programme will potentially be undermined by a deregulatory system in which ‘market integration is ... an almost absolute rule’.<sup>10</sup>

The 2020 Act provides some scope for flexibility, however: UK ministers have powers to alter the application of the market access principles, including to give effect to a common framework agreement, subject to a request for the consent of the devolved institutions.<sup>11</sup> Additionally, the governments have since agreed a process by which those powers will be exercised.<sup>12</sup> However, the discretion to create exceptions is ‘a power, not a duty; in principle, therefore, agreed common frameworks remain vulnerable to being undermined by the application of the market access principles’.<sup>13</sup>

Despite the governments having since agreed upon the process for those powers, the 2020 Act arguably represents an inversion of the previous agreements: a presumption against restrictions on devolved competences has been supplanted by a presumption that restrictions, albeit of a different variety, will apply unless and until agreed otherwise. The United Kingdom

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<sup>8</sup> The Animal Welfare (Amendment) (EU Exit) Regulations 2018; The Floods and Water (Amendment etc.) (EU Exit) Regulations 2019. Constitutional and Legislative Affairs Committee, ‘Scrutiny of regulations under the European Union (Withdrawal) Act 2018: progress report’ (National Assembly for Wales, 2019). <<https://senedd.wales/laid%20documents/cr-ld12128/cr-ld12128-e.pdf>> accessed 27 May 22.

The Welsh Government, however, did not accept that these regulations amounted to ‘new’ policy. Letter from the First Minister to the Chair of the Constitutional and Legislative Affairs Committee (7 February 2019). <<https://business.senedd.wales/documents/s84405/Letter%20from%20the%20First%20Minister%20-%207%20February%202019.pdf>> accessed 1 June 2022

<sup>9</sup> K.A. Armstrong, ‘The governance of economic unionism after the United Kingdom Internal Market Act’ (2022) 85(3) MLR 635, 636.

<sup>10</sup> N. McEwen, A. McHarg, J. Hunt and M. Dougan, ‘Sleeping with an elephant: devolution and the United Kingdom Internal Market Act 2020’ (2022) Law Quarterly Review (forthcoming). <<https://ssrn.com/abstract=4018581>> accessed 27 May 2022

<sup>11</sup> Internal Market Act 2020, ss. 10 and 18

<sup>12</sup> Cabinet Office, ‘Process for considering UK Internal Market Act exclusions in Common Framework areas’ (UK Government, 10 December 2021). <<https://www.gov.uk/government/publications/process-for-considering-ukim-act-exclusions-in-common-framework-areas/process-for-considering-uk-internal-market-act-exclusions-in-common-framework-areas>> accessed 27 May 2022. This is a post-legislative agreement, reached after the enactment of the 2020 Act. For this reason, it has not been listed in this report among the non-legislative agreements which preceded a Welsh Government recommendation of legislative consent.

<sup>13</sup> McEwen et al (n 10).

Constitution Monitoring Group observes that the Act is ‘a clear challenge to the principle that there is a need for cooperation and meaningful co-decision-making between devolved and UK government’.<sup>14</sup> In September 2020, asked about the status of the 2018 agreement, the Welsh Government responded that it ‘remains in place and must be respected’,<sup>15</sup> but there has been little mention of it since.

## **2.2. Healthcare (European Economic Area and Switzerland Arrangements) Act 2019**

This Act provides UK ministers with powers related to the implementation of reciprocal healthcare agreements between the UK, the EEA states and Switzerland. The UK Government claimed that the negotiation of international agreements was a reserved matter; the Welsh Government argued that the powers cut across devolved competences over health and the implementation of international agreements.

The governments subsequently reached an agreement which mirrored the 2018 agreement on the EU (Withdrawal) Bill. The UK Government agreed to amend the bill to require UK ministers to consult with their devolved counterparts before exercising the powers to implement healthcare agreements. This was accompanied by a draft memorandum of understanding designed to reinforce intergovernmental collaboration.<sup>16</sup> The memorandum stated that the Welsh Government would be consulted in the negotiation and development of international healthcare agreements and in the drafting of regulations which implement such agreements. Further, regulations would not normally be enacted without the consent of devolved ministers. In the event of disagreement, the views of devolved ministers would be presented to the UK Parliament before a vote was taken on the regulations.

On the basis of these commitments, the Welsh Government recommended legislative consent to the legislation, which was given on 12 March 2019. Notably, however, although the draft memorandum was published prior to the consent vote, it was after committee scrutiny had already concluded. The ‘final’ memorandum was not shared with the Senedd’s committees until 2 February 2022 – almost three years later – and (at the time of writing) will need to be revised again following negotiations on the Health and Care Act 2022, discussed below.

## **2.3. Agriculture Act 2020**

This Act was designed to establish a legal framework in England to replace agricultural support schemes under the Common Agricultural Policy. It also establishes an equivalent regime for Wales, at the Welsh Government’s request, and includes various UK-wide provisions. The

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<sup>14</sup> United Kingdom Constitution Monitoring Group, *The constitution in review: first report from the United Kingdom Constitution Monitoring Group* (The Constitution Society, 2022) 7. <<https://consoc.org.uk/wp-content/uploads/2021/09/UKCMG-CONSTITUTION-IN-REVIEW-1.pdf>> accessed 27 May 2022

<sup>15</sup> Senedd Cymru, ‘Answers to questions not reached in Plenary’ (22 September 2020, Record of Proceedings). <<https://record.assembly.wales/QNR/6565>> accessed 27 May 2022

<sup>16</sup> Welsh Government, ‘Supplementary legislative consent memorandum (memorandum no 2): Health (International Arrangements) Bill’ (March 2019). <<https://senedd.wales/laid%20documents/lcm-ld12232/lcm-ld12232-e.pdf>> accessed 27 May 2022

governments initially disagreed over powers which would enable UK ministers to make regulations to ensure the UK's compliance with the World Trade Organisation's Agreement on Agriculture. The UK Government's position was that this concerned the reserved matter of international trade; the Welsh Government argued that it cut across devolved competences in agriculture and the implementation of international obligations.

The disagreement as to whether this matter was reserved or devolved was not resolved. However, following 'extensive and highly collaborative working',<sup>17</sup> the two agreed to a collaborative process based on the principles of the 2018 IGA. This process would not be written into the bill itself. Instead, it was set out in a bilateral agreement: the 'UK and Welsh Government Bilateral Agreement on WTO provisions within the Agriculture Bill', published on 12 March 2019.<sup>18</sup>

According to this agreement, draft regulations would be shared with devolved officials and agriculture ministers, followed by an exchange of letters with their respective views. Disagreements would be addressed 'in line with the existing MoU governing Intergovernmental relations and any future agreements in place between Defra and the DAs on dispute resolution'.<sup>19</sup> If the disagreement persisted, the views of devolved and UK ministers would be presented to the UK Parliament before a decision was taken on the regulations.

Additionally, Welsh ministers would be able to propose the WTO classification for Welsh agricultural support schemes, and in the event of disagreement, UK ministers would be able to take independent advice on classifications. They would be expected to take that advice into consideration, before relaying all relevant information regarding their decision to devolved ministers. The Welsh Government was satisfied with the 'clear onus ... on seeking agreement', along with 'strong mechanisms for the Welsh Ministers to exert their views'.<sup>20</sup>

A new Agriculture Bill was introduced in January 2020. The Welsh Government remained satisfied with the bilateral agreement, which the UK Government confirmed would be 'enshrined'<sup>21</sup> in a concordat, developed by the UK's four governments. However, the bilateral agreement was not presented alongside the legislative consent memorandum. According to the Minister for Environment, Energy and Rural Affairs, the UK Government's commitments were repeated by the Parliamentary Under Secretary of State in a letter on 6 July 2020.<sup>22</sup> The

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<sup>17</sup> Welsh Government, 'Supplementary legislative consent memorandum (memorandum no 2): Agriculture Bill' (March 2019). <<https://senedd.wales/laid%20documents/lcm-ld12461/lcm-ld12461-e.pdf>> accessed 27 May 2022

<sup>18</sup> Department for Environment, Food and Rural Affairs, 'UK and Welsh Government Bilateral Agreement on WTO provisions within the Agriculture Bill' (UK Government, 21 March 2019). <<https://www.gov.uk/government/publications/agriculture-bill-progress-with-devolved-administrations/uk-and-welsh-government-bilateral-agreement-on-wto-provisions-within-the-agriculture-bill>> accessed 27 May 2022

<sup>19</sup> *ibid.*

<sup>20</sup> Welsh Government, 'Supplementary legislative consent memorandum (memorandum no 2) on the Agriculture Bill (n 19).

<sup>21</sup> Letter from the Minister for Environment, Energy and Rural Affairs to the Chair of the Legislation, Justice and Constitution Committee (11 September 2020). <<https://business.senedd.wales/documents/s105187/Letter%20from%20the%20Minister%20for%20Environment%20Energy%20and%20Rural%20Affairs%20to%20the%20Chair%20of%20the%20Legislation%20.pdf>> accessed 27 May 2022

<sup>22</sup> *ibid.*

Senedd consented to the legislation on 29 September 2020, before the concordat was finalised or published.<sup>23</sup>

## 2.4. Fisheries Act 2020

The Fisheries Act 2020 makes provision for the management of UK fisheries outside of the European Union and the Common Fisheries Policy. The Welsh Government objected to a provision which would give UK ministers the power to set UK fishing quotas in accordance with international obligations, contending that this would encroach upon the regulation of stocks falling within the exclusive jurisdiction of the devolved governments.

The governments later agreed to develop a memorandum of understanding on a consultation process to be followed for the exercise of the disputed powers. However, the memorandum was not finalised or published before the Act came into force. On 18 September 2020, Victoria Prentis MP, Parliamentary Under Secretary of State at DEFRA, confirmed the agreement in principle in an exchange of letters, offering assurance that a future memorandum would ‘set out principles for consultation’ and ‘a fisheries dispute resolution process between the Fisheries Administrations, incorporating and building on existing processes where appropriate’.<sup>24</sup> However, disagreement over the terms of consultation remained. For instance, the UK Government refused to commit to a 21-day consultation period on draft regulations. It also declined to make a despatch box commitment regarding the memorandum of understanding, as requested by the Welsh Minister for Environment, Energy and Rural Affairs, because the bill was close to completing the legislative process. The Senedd voted to give its consent on 6 October 2020, without the memorandum having been finalised or published.

The UK Government published the framework and memorandum of understanding in February 2022.<sup>25</sup> However, this contains no detail on the consultation process. As the Welsh Minister for Environment, Energy and Rural Affairs observed, it sets out ‘high principles by which the fisheries policy authorities will work together’.<sup>26</sup> According to the framework document, further details would be provided in ‘operational agreements’. At the time of writing, however, these are yet to be published.

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<sup>23</sup> A draft common framework on agricultural support, published in February 2022, makes reference to an additional concordat related to WTO regulations, but this has not been published at the time of writing. Department for Environment, Food and Rural Affairs, *Agricultural support common framework: provisional framework outline agreement and concordat* (Cm 613, 2022).  
<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1052061/agricultural-support-provisional-common-framework.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1052061/agricultural-support-provisional-common-framework.pdf)> accessed 27 May 2022

<sup>24</sup> Letter from the Parliamentary Under Secretary of State, Department for Environment, Food and Rural Affairs to the Minister for Environment, Energy and Rural Affairs (18 September 2020).  
<<https://business.senedd.wales/documents/s105684/Letter%20from%20the%20Minister%20for%20Environment%20Energy%20and%20Rural%20Affairs%20to%20the%20Chair%20of%20the%20Legislation%20.pdf>> accessed 27 May 2022

<sup>25</sup> Department for Environment, Food and Rural Affairs, *Fisheries Management and Support Common Framework: Provisional Framework Outline Agreement and Memorandum of Understanding* (Cm 616, 2022).  
<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1054476/fisheries-management-provisional-common-framework.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054476/fisheries-management-provisional-common-framework.pdf)> accessed 27 May 2022

<sup>26</sup> Economy, Trade, and Rural Affairs Committee (3 March 2022, Record of Proceedings).  
<<https://record.assembly.wales/Committee/12605#C406713>> accessed 27 March 2022



## 2.5. Trade Act 2021

The Trade Act 2020 makes provision for the implementation of international trade agreements. The Welsh Government raised concerns over the inclusion of Henry VIII law-making powers which could be used by UK ministers to amend devolved Acts and the devolution statutes without the consent of devolved ministers. The Welsh Government had initially considered it 'vital' that these powers 'must only be used with the prior consent of Welsh Ministers' and that a requirement should be 'on the face of the Bill'.<sup>27</sup>

Later, however, the Welsh Government indicated that it was prepared to recommend consent on the basis of various 'non-legislative commitments'<sup>28</sup> expressed by the UK Government at the despatch box in the House of Commons. UK ministers pledged that they would not normally use the powers in devolved areas without obtaining the consent of devolved ministers, nor would the powers be used to implement new policies. Additionally, UK ministers would engage with devolved counterparts before extending the period in which these powers could be used, and the devolved governments would be involved in the activities of the new Trade Remedies Authority.

Following the prorogation of the UK Parliament in October 2019, the Trade Bill was reintroduced in the House of Commons in March 2020. The Welsh Government recommended consent on the basis that the UK Government had 'agreed to restate [its] commitments'<sup>29</sup> in respect of the previous bill. These despatch box commitments were delivered in the House of Commons on 23 June 2020; the Senedd subsequently consented to the Trade Bill on 12 January 2021.<sup>30</sup>

## 2.6. Trade (Disclosure of Information) Act 2021

This Act establishes UK-wide data-sharing mechanisms, authorising HMRC and other bodies to share data with public and private authorities to support the delivery of trade-related functions. It also empowers UK ministers to amend the list of authorities permitted to share data. The Welsh Government sought commitments from the UK Government that relevant data would be shared with the devolved governments to support the delivery of devolved functions, and that devolved ministers would be consulted before Welsh public authorities are added or removed from the list of authorities permitted to share data.

The UK Government provided these assurances in the form of despatch box commitments on 15 October 2020, when the relevant provisions featured in the Trade Bill.<sup>31</sup> The Welsh Government was prepared to grant consent because it had received further assurances that

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<sup>27</sup> Welsh Government, 'Legislative consent memorandum: Trade Bill' (December 2017). <<https://senedd.wales/laid%20documents/lcm-ld1314/lcm-ld1314-e.pdf>> accessed 27 May 2022

<sup>28</sup> Welsh Government, 'Supplementary legislative consent memorandum (memorandum no 2): Trade Bill' (February 2019). <<https://senedd.wales/laid%20documents/lcm-ld12169/lcm-ld12169-e.pdf>> accessed 27 May 2022

<sup>29</sup> Welsh Government, 'Legislative consent memorandum: Trade Bill' (April 2020). <<https://senedd.wales/laid%20documents/lcm-ld13122/lcm-ld13122%20-e.pdf>> accessed 27 May 2022

<sup>30</sup> HC Deb 23 June 2020 vol 677 col 240.

<sup>31</sup> HL Deb 15 October 2020 vol 806 col 1247.

these commitments would be ‘restated, either in the Houses of Parliament or within a Ministerial letter’.<sup>32</sup> The Minister for Trade Policy, Greg Hands MP, restated the commitments in the House of Commons on 16 December 2020.<sup>33</sup> On the same day, the Senedd gave its consent to the legislation. While there was no reference to the assurances made a few hours earlier, the Counsel General, Jeremy Miles MS, stated that ‘we have been able to assure ourselves that the pledges made are meaningful in this context’.<sup>34</sup>

## 2.7. Medicines and Medical Devices Act 2021

This Act grants UK ministers the powers to regulate human and veterinary medicines and medical devices, along with powers to establish information-sharing systems related to medical devices. The Welsh Government expressed concern with powers which enable UK ministers to establish a database related to medical devices. While this was aimed at product safety, it observed that the power was ‘very broad’<sup>35</sup> and could be used in relation to devolved responsibilities in health, with no requirement to consult with devolved ministers.

The bill was subsequently amended to require UK ministers to consult with devolved ministers. Further, the UK Government gave non-legislative assurances that devolved governments would be included in the design and implementation of medical device information systems. A memorandum of understanding was agreed providing terms for the shared development and governance of the medical device information system. The Department of Health and Social Care sent a draft of the memorandum to the Welsh Government on 11 December 2020, which was then shared with the Senedd committees on 5 January 2021.<sup>36</sup> As summarised by the Minister for Health and Social Services, the memorandum provides for ‘four nation consultation and reporting on the operation of the MDIS, the establishment of joint officials’ working groups to discuss and draft the regulations, escalation arrangements in the event of disagreement and technical operational matters’.<sup>37</sup> By the time the draft memorandum was shared with committees, however, they had concluded their scrutiny of the legislation. The Senedd gave consent to the bill on 12 January 2021.

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<sup>32</sup> Welsh Government, ‘Legislative consent memorandum: Trade (Disclosure of Information) Bill’ (December 2020). <<https://business.senedd.wales/documents/s110069/Legislative%20Consent%20Memorandum%20-%20Trade%20Disclosure%20of%20Information%20Bill%20-%20December%202020.pdf>> accessed 27 May 2022

<sup>33</sup> HC Deb 16 December 2020 vol 686 col 330.

<sup>34</sup> Senedd Cymru, ‘Legislative consent motion on the Trade (Disclosure of Information) Bill’ (16 December 2020, Record of Proceedings). <<https://record.assembly.wales/Plenary/11127>> accessed 27 May 2022

<sup>35</sup> Welsh Government, ‘Legislative consent memorandum: Medicines and Medical Devices Bill’ (July 2020). <<https://senedd.wales/laid%20documents/lcm-ld13306/lcm-ld13306%20-e.pdf>> accessed 27 May 2022

<sup>36</sup> Letter from the Minister for Health and Social Services to the Chair of the Health, Social Care and Sports Committee (5 January 2021). <<https://business.senedd.wales/documents/s500006313/Letter%20from%20the%20Minister%20for%20Health%20and%20Social%20Services%20to%20the%20Chair%20of%20the%20Health%20Social%20Care%20and%20.pdf>> accessed 27 May 2022.

<sup>37</sup> *ibid.*

## 2.8. Health and Care Act 2022

This Act is a notable example of informal intergovernmental agreements being used on legislation unrelated to EU withdrawal. It makes provision primarily for reforms to NHS England but also includes a number of clauses which intersect with devolved competences.

The Welsh Government objected to several provisions. Among these were powers which would enable UK ministers to establish UK-wide medicine information systems held by Health and Social Care Information Centre (NHS Digital), including powers to require the disclosure of information to NHS Digital by devolved services. It also took issue with powers which would enable UK ministers to give effect to international healthcare agreements (thereby expanding those powers contained under the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019), subject to a requirement to consult devolved ministers. Additionally, it objected to provisions which would allow UK ministers to make ‘consequential’ amendments to Senedd legislation.

These objections were addressed through a combination of legislative and non-legislative concessions. The powers related to information systems are now subject to a statutory requirement to consult with Welsh ministers, along with a memorandum of understanding providing the terms of consultation. As of 18 February 2022, however, this memorandum had not been published. According to the Minister for Health and Social Services, UK ministers had indicated that they would aim to have the memorandum finalised ‘before the provisions come into effect, but at the very latest in advance of drafting of regulations’.<sup>38</sup>

Meanwhile, the exercise of powers relating to the implementation of international healthcare agreements would be guided by a further memorandum of understanding providing a role for devolved ministers and officials in the development of those agreements.<sup>39</sup> This memorandum was shared with Senedd committees on 2 February 2022, by which point it needed to be updated in light of the Intergovernmental Relations Review.<sup>40</sup>

Finally, the UK Government agreed to make despatch box commitments regarding the powers to make consequential provision. However, it refused to do so in respect of some of these powers because, in its view, they did not fall within devolved competence. In light of the assurances obtained, however, the Welsh Government concluded that the powers posed

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<sup>38</sup> Letter from the Minister for Health and Social Services to the Chair of the Health and Social Care Committee (18 February 2022).

<<https://business.senedd.wales/documents/sI22826/Response%20from%20the%20Minister%20for%20Health%20and%20Social%20Services%20to%20the%20Health%20and%20Social%20Care%20Committees%20.pdf>> accessed 27 May 2022.

<sup>39</sup> Letter from the Minister for Health and Social Services to the Chair of the Health and Social Care Committee (2 February 2022).

<<https://business.senedd.wales/documents/sI22712/Response%20from%20the%20Minister%20for%20Health%20and%20Social%20Services%20to%20the%20reports%20of%20the%20Health%20and%20Social%20Ca.pdf>> accessed 27 May 2022.

<sup>40</sup> *ibid.* Cabinet Office, ‘The review of intergovernmental relations’ (UK Government, January 2022).

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1046083/The\\_Review\\_of\\_Intergovernmental\\_Relations.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1046083/The_Review_of_Intergovernmental_Relations.pdf)> accessed 27 May 2022

‘an acceptable and minor constitutional risk’.<sup>41</sup> The Senedd gave its consent to the legislation on 15 February 2022, with the memorandum relating to medical information systems still having not been published.

## **2.9. Advanced Research and Invention Agency Act 2022**

This Act makes provision for the creation of a new UK-wide body (the Advanced Research and Invention Agency (ARIA)) responsible for long-term funding of emerging fields of research and technology.

The original version of the bill provided that ARIA would be added to the list of ‘particular authorities’ under the Government of Wales Act 2006 Sch 7A, with the effect that devolved powers relating to research and development would be reserved to the UK level. However, negotiations resulted in this provision being removed and replaced with a memorandum of understanding. The ‘Agreement on the Independence of the Advanced Research and Invention Agency (ARIA)’ emphasises that the governments should not interfere with the running of ARIA and, further, that devolved scientific advisors would be involved in the oversight of the new body.<sup>42</sup>

The Welsh Government considered this sufficient. Having prevented the reservation of devolved powers, it noted that the memorandum of understanding represented a ‘better use’ of intergovernmental agreements.<sup>43</sup> The Senedd gave its consent to the legislation on 7 December 2021. Once again, however, the memorandum of understanding had not been signed or published by the time the Senedd was asked to give its consent to the legislation.

## **2.10. Secondary legislation**

Occasionally, non-legislative commitments have also formed the basis of Welsh Government consent to secondary legislation made by the UK Government under the EU (Withdrawal) Act 2018.

For example, the Welsh Government initially disputed draft regulations pertaining to food naming and geographical indications, matters which it claimed were devolved. Although it was unable to secure joint decision-making functions, it was prepared to consent to the relevant regulations after UK ministers gave ‘written assurances that all Devolved Administrations will have a clear role in the development and operation of the new scheme’.<sup>44</sup> The Welsh

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<sup>41</sup> Welsh Government, ‘Supplementary legislative consent memorandum (memorandum no 3): Health and Social Care Bill’ (January 2022). <<https://senedd.wales/media/45cguwqo/slcm-ld14900-e.pdf>> accessed 27 May 2022

<sup>42</sup> Welsh Government, ‘Supplementary legislative consent memorandum (memorandum no 2): Advanced Research and Invention Agency Bill’ (November 2021). <<https://senedd.wales/media/c3kota2p/slcm-ld14692-e.pdf>> accessed 27 May 2022

<sup>43</sup> *ibid.*

<sup>44</sup> Welsh Government, ‘Written statement by the Welsh Government: Agricultural Products, Food and Drink (Amendment etc.)(EU Exit) Regulations 2019’ (October 2019).

Government later claimed that it would 'have satisfactory input regarding the appraisal of [GI] applications in a transparent and objective manner. A comprehensive operational process has been codesigned and ... it should create a successful scheme'.<sup>45</sup> The agreement, it argued, also included 'a clear process for dispute resolution should conflict arise'.<sup>46</sup> The Welsh Government committed to keep the agreed process under review, but since then few details have been made available.<sup>47</sup>

Another area of disagreement was state aid. Since state aid was not the subject of an explicit reservation under the Government of Wales Act 2006, the Welsh Government claimed that it was a devolved matter, invoking the logic of the reserved powers 'model' established under the Wales Act 2017. Having initially called for shared governance of the UK's state aid regime, it subsequently sought to negotiate a memorandum of understanding with the UK Government in order to secure for itself a 'meaningful role' in the provision of state aid, but without success.<sup>48</sup> State aid was subsequently reserved explicitly to the UK level following the enactment of the Internal Market Act 2020.

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<<https://business.senedd.wales/documents/s94833/WS-30C5156%20-%20The%20Agricultural%20Products%20Food%20and%20Drink%20Amendment%20etc.EU%20Exit%20Regulations%202019.pdf>> accessed 27 May 2022

Welsh Government, 'Written statement by the Welsh Government: Agricultural Products, Food and Drink (Amendment Etc.) (EU Exit) Regulations 2020' (October 2020). <<https://senedd.wales/laid%20documents/ws-ld13640/ws-ld13640-e.pdf>> accessed 27 May 2022.

<sup>45</sup> Letter from the Minister for the Environment, Energy and Rural Affairs to the Chair of the Legislation, Justice and Constitution Committee (2 December 2020). <<https://business.senedd.wales/documents/s113560/Letter%20from%20the%20Minister%20for%20Environment%20Energy%20and%20Rural%20Affairs%20to%20the%20Chair%20of%20the%20External%20Affa.pdf>> accessed 27 May 2022

<sup>46</sup> *ibid.*

<sup>47</sup> On 18 January 2022, the Minister for Rural Affairs and North Wales indicated that 'Wales ... had the first geographical indications designated under the new UK scheme'. Senedd Cymru, 'Statement by the Minister for Rural Affairs and North Wales, and Trefnydd: Blas Cymru/Taste Wales—Promoting Welsh food and drink to the world' (18 January 2022, Record of Proceedings). <<https://record.assembly.wales/Plenary/12590#C400020>> accessed 27 May 2022

<sup>48</sup> Welsh Government, 'Written statement: State Aid (Agriculture and Fisheries) (Amendment) (EU Exit) Regulations 2019' (February 2019). <<https://business.senedd.wales/documents/s84794/WS-30C5109%20-%20The%20State%20Aid%20Agriculture%20and%20Fisheries%20Amendment%20EU%20Exit%20Regulations%202019.pdf>> accessed 27 May 2022.

### 3. The aims of non-legislative agreements

#### 3.1. Intergovernmental agreements in multi-level systems

At this stage, it is useful to consider the different functions which intergovernmental agreements can perform within multi-level systems. Poirier observes five: substantive policy coordination; procedural cooperation; soft law; para-constitutional engineering, and regulation by contract.<sup>49</sup>

Substantive policy coordination refers to the use of intergovernmental agreements to demarcate the responsibilities and tasks of different tiers of government in particular policy fields. Procedural cooperation, meanwhile, concerns the mechanisms and processes by which the different levels of government agree to engage with one another. As a form of ‘soft law’, agreements can also produce similar effects to legal rules: while they are not legally binding, they can nonetheless guide official behaviour while keeping disputes out of the courts and allowing the participants the flexibility to change course.

The ‘para-constitutional’ function of agreements concerns their role in providing an alternative to legal-constitutional reform. By focusing on the exercise of powers rather than their formal distribution, political agreements can allow the parties to ‘avoid direct and difficult constitutional questions and confrontation’.<sup>50</sup> Finally, a more critical view of intergovernmental agreements – ‘regulation by contract’ – is that they serve as ‘tools of centralisation, under the guise of compromise and consensus’.<sup>51</sup> From this perspective, political agreements offer the more powerful tier of government a means of ‘indirect regulation’<sup>52</sup> in place of unilateral legislative action and the potentially graver political costs associated with it.

The Welsh Government has offered two principal justifications for using non-binding agreements. The first is the protection of devolved competences and policy spaces, an aim which now features in a set of Welsh Government principles designed to guide its consideration of UK bills.<sup>53</sup> The second is enhanced intergovernmental collaboration, one of its overarching constitutional aims since 2017.<sup>54</sup> Applying Poirier’s terminology, it seems that the various agreements discussed above were designed to perform procedural, para-constitutional and soft law functions which would further these overarching aims. Whether they have succeeded, however, is open to question.

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<sup>49</sup> J. Poirier, ‘The functions of intergovernmental agreements: post-devolution concordats in a comparative perspective’ (Constitution Unit, 2001). <<https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/75.pdf>> accessed 27 May 2022

<sup>50</sup> *ibid*, 12.

<sup>51</sup> *ibid*, 14.

<sup>52</sup> *ibid*.

<sup>53</sup> ‘UK Parliament Bills should either protect or enhance the existing devolution settlement, rather than introducing new reservations’. Letter from the Counsel General to the Chair of the Legislation, Justice and Constitution Committee (n 3).

<sup>54</sup> Welsh Government, *Brexit and devolution* (2017). <[https://gov.wales/sites/default/files/2017-06/170615-brexit%20and%20devolution%20\(en\).pdf](https://gov.wales/sites/default/files/2017-06/170615-brexit%20and%20devolution%20(en).pdf)> accessed 28 May 2022

### 3.2. Protecting devolved competences

While the form of intergovernmental agreements has varied, they are intended to safeguard devolution in several ways. Some have involved the removal of proposed restrictions on devolved competences in exchange for political commitments from devolved ministers as to how those competences would be used. In this regard, the agreements on the European Union (Withdrawal) and Advanced Research and Invention Agency bills are notable examples. The Welsh Government argued that the former ‘entrenched’<sup>55</sup> devolution and would prevent the UK Government from imposing post-Brexit rules unilaterally. Likewise, it was prepared to recommend consent to the Advanced Research and Invention Agency Bill on the ground that a memorandum of understanding would replace proposed restrictions on devolved competence.<sup>56</sup>

In this way, the agreements have performed a clear para-constitutional function: specific conflicts over the formal distribution of competences have been addressed through political, rather than legal, means. Further, it is clear that the agreements – and in particular the memoranda of understanding – are intended to protect devolution by functioning as a form of soft law, guiding and constraining intergovernmental interactions as de facto administrative rules. In addition to these para-constitutional and soft law functions, the agreements have also established terms for procedural cooperation between the governments in the development of cross-cutting post-Brexit policy. Most have contained assurances that UK ministers will not exercise new powers within devolved areas without consulting, or seeking the consent of, the devolved ministers, and not without providing them the opportunity to influence the content of the relevant regulations. Clearly, this input is intended to ensure devolved competences and policy aims are respected.

The Welsh Government’s determination to obtain at least some assurance from the UK Government about how the latter would exercise new powers within devolved areas also helps to explain the various forms which the intergovernmental agreements have taken. For much of the Brexit process, its position has been that devolution is better protected by striving for agreement with the UK Government than refusing to recommend legislative consent. As First Minister, Mark Drakeford justified this position in the following terms:

...where the UK Government is not prepared to agree the inclusion of such provisions on the face of its Bills, the Welsh Government faces a difficult choice. On the one hand, we could recommend that the Senedd does not consent to a UK Bill, with the clear risk that the UK Government will invite Parliament to ignore the withholding of consent, thus further undermining the inadequate Sewel convention. On the other, we could look to non legislative solutions, such as an intergovernmental agreement to enable a recommendation that the Senedd consents to the Bill. In the current constitutional and political circumstances, with a Government with a large majority in the House of Commons and facing significant policy and legislative

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<sup>55</sup> Senedd Cymru, ‘Debate: the Law Derived from the European Union (Wales) Act 2018 (Repeal) Regulations 2018’ (20 November 2018, Record of Proceedings). <<https://record.assembly.wales/Plenary/5365#C140170>> accessed 28 May 2022

<sup>56</sup> Welsh Government, ‘Supplementary legislative consent memorandum (memorandum no 2): Advanced Research and Invention Agency Bill’ (n 47).

challenges arising from the UK's departure from the EU, there are likely to be some occasions when we favour the latter option.<sup>57</sup>

This rationale was echoed by other Welsh ministers. As Minister for International Relations and the Welsh Language, Eluned Morgan MS argued that the UK Government was in a 'strengthened position'<sup>58</sup> following the 2019 general election. It was therefore 'extremely unlikely' that requests from Welsh ministers for stronger protections for devolved competences 'would receive serious consideration'.<sup>59</sup> Similarly, as Counsel General, Jeremy Miles MS sought to justify the Welsh Government's reliance on informal assurances from UK ministers 'in light of the difficulty overall in achieving changes to the face of the Bill'.<sup>60</sup>

The Welsh Government has therefore accepted non-binding agreements primarily on the basis that legislative safeguards were unobtainable. On this reading, the agreements offer the devolved institutions a form of damage control when confronted with unilateral reforms to devolution. Faced with the certainty that UK ministers will acquire regulatory powers which extend into devolved policy areas, the Welsh Government considered that some form of agreement as to how those powers would be exercised was still desirable. Inverting Theresa May's Brexit mantra, a bad deal was better than no deal.

### **3.3. Enhancing intergovernmental collaboration**

The second principal aim of the agreements is enhanced collaboration in the design and implementation of post-Brexit governance. As discussed above, the agreements facilitate this by setting the terms of procedural cooperation and functioning as a form of soft law, guiding and constraining intergovernmental interactions.

As Brexit minister, Mark Drakeford argued that the intergovernmental agreement on the EU (Withdrawal) Act 2018 represented 'a first significant step towards an equitable approach to inter-governmental working of the sort that we argue should be characteristic of the post European Union United Kingdom'.<sup>61</sup> In an attempt to embed a cooperative approach, the Welsh Government subsequently used the 2018 agreement as a template for subsequent

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<sup>57</sup> Letter from the First Minister to the Chair of the Legislation, Justice and Constitution Committee (11 June 2020) <<https://business.senedd.wales/documents/s102035/CLA5-18-20%20Paper%2021.pdf>> accessed 28 May 2022

<sup>58</sup> Letter from the Minister for International Relations and the Welsh Language to the Chair of the Legislation, Justice and Constitution Committee (11 September 2020). <<https://business.senedd.wales/documents/s105188/Welsh%20Government%20response%20to%20the%20Legislation%20Justice%20and%20Constitution%20Committee%20report%20on%20the%20Legis.pdf>> accessed 28 May 2022

<sup>59</sup> *ibid.*

<sup>60</sup> Senedd Cymru, 'Legislative consent motion on the Trade Bill' (12 January 2021, Record of Proceedings). <<https://record.assembly.wales/Plenary/11146#C344273>> accessed 28 May 2022

<sup>61</sup> Senedd Cymru, 'Statement by the Cabinet Secretary for Finance: the European Union (Withdrawal) Bill' (25 April 2018, Record of Proceedings). <<https://record.assembly.wales/Plenary/4978#A43203>> accessed 28 May 2022



agreements on UK bills.<sup>62</sup> During the May premiership, one legislative consent motion after another revealed the same motive:

This is a good outcome providing a strong role and flexibility for the Welsh Ministers following extensive and highly collaborative working between Governments. It provides a valuable model which could be used in other areas where intergovernmental cooperation is needed and demonstrates both governments' commitment to collaboration.<sup>63</sup>

From the Welsh Government's perspective, the agreements have also enabled devolved input into non-devolved policy areas – another one of its objectives for the Brexit process.<sup>64</sup> Here it has had some success, most notably regarding the role it secured for devolved governments in the negotiation of international healthcare agreements.

Finally, the Welsh Government has also argued that the agreements provide a form of intergovernmental accountability. They provide 'a legitimate, although not ideal device that devolved governments can use to hold the UK Government to account in relation to UK Bills'.<sup>65</sup> When UK ministers refused to countenance a legal obligation to engage with devolved institutions, these publicly stated commitments provide a basis for holding the UK Government to its word: 'it's been said on the floor of the house, and you've got something to appeal against, effectively'.<sup>66</sup>

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<sup>62</sup> Jeremy Miles, 'Brexit and devolution' (17 June 2019, Wales Governance Centre). <<https://gov.wales/brexit-and-devolution-speech-17-june-2019>> accessed 28 May 2022

<sup>63</sup> Welsh Government, 'Supplementary legislative consent memorandum (memorandum no 2): Agriculture Bill' (n 19).

<sup>64</sup> Welsh Government, *Brexit and devolution* (n 59).

<sup>65</sup> Letter from the Minister for International Relations and the Welsh Language to the Chair of the Legislation, Justice and Constitution Committee (n 66).

<sup>66</sup> Senedd Cymru, 'Legislative consent motion on the Health and Care Bill' (15 February 2022, Record of Proceedings). <<https://record.assembly.wales/Plenary/12618#C409866>> accessed 28 May 2022

## 4. The limitations of non-legislative agreements

Despite its efforts to justify reliance on non-legislative agreements, the Welsh Government's approach has been criticised by a number of Senedd committees, in particular the Fifth Senedd's Legislation, Justice and Constitution Committee (formerly Constitutional and Legislative Affairs Committee). Drawing on their criticisms, this section examines the limitations of the agreements.

### 4.1. The disputed efficacy of non-binding safeguards

A key criticism is that the agreements are non-binding: in place of legal enforcement, their efficacy and longevity depends upon the mutual commitment and trust of those who negotiated them and their political successors. While this provides flexibility, it means that the agreements can be displaced by circumstances or simply ignored by ministers with different priorities.

This risk is perhaps most acute with the agreements which are not codified in memoranda of understanding. Whereas memoranda of understanding are detailed and codified, and can thereby function as de facto administrative rules which permeate institutional processes, despatch box commitments and other agreements arguably represent government by 'good chaps' *par excellence*, dependent entirely on individuals 'knowing what the unwritten rules are and wanting to adhere to them'.<sup>67</sup> Such agreements offer, at best, a light-touch and potentially temporary discouragement to UK ministers from interfering with devolved competences. By contrast, the statutory powers which the agreements purport to constrain will often last much longer; indeed, they may not be subject to any time limits at all.

Further, the risk of agreements being either breached or ignored is not borne equally: UK ministers always have recourse to their own law-making powers or the legislative supremacy of the UK Parliament to achieve their aims should the devolved governments choose not to abide by the terms of agreements. As Rawlings notes, the agreements are therefore 'vulnerable to side-stepping or trumping by the dominant legal and political player'.<sup>68</sup> This was particularly evident in the case of the agreement on the EU (Withdrawal) Act, arguably the most significant of the intergovernmental agreements negotiated during the Brexit process. As discussed in Part 2, despite incorporating both legislative and non-legislative commitments, the edifice of the agreement was undermined considerably by the Internal Market Act 2020. The extent to which the common frameworks, developed by consensus, will escape the

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<sup>67</sup> A. Blick and P. Hennessy, *Good chaps no more? Safeguarding the constitution in stressful times* (Constitution Society, 2019). <<https://consoc.org.uk/wp-content/uploads/2019/11/FINAL-Blick-Hennessy-Good-Chaps-No-More.pdf>> accessed 28 May 2022

<sup>68</sup> R. Rawlings, 'Wales and the United Kingdom: a territorial constitutional policy drive' (2022) *Territory, Politics, Governance*. <<https://www.tandfonline.com/doi/pdf/10.1080/21622671.2022.2036630>> accessed 28 May 2022

automatic application of the market access principles, unilaterally imposed by the UK Government, remains to be seen.<sup>69</sup>

Another problem is that the agreements can give rise to conflicting interpretations. Without recourse to independent arbitration, however, the determination as to whether a breach of terms has taken place was, until recently, left to the UK Government, acting as judge in its own cause. This issue of enforceability also brings into focus the Welsh Government's claims about the agreements providing a mechanism of intergovernmental accountability. As discussed earlier, even before the Internal Market Act 2020 threatened to undermine the common frameworks falling within its scope, both the Welsh Government and the Constitutional and Legislative Affairs Committee had alleged during the Fifth Senedd that the UK Government had breached the agreement, yet to no avail.

In this respect, non-legislative agreements of this kind appear to share the now well-established flaws in the Sewel Convention: not only are UK ministers the final arbiters of what constitutes a violation, they are unlikely to suffer any electoral consequences for their behaviour towards devolved institutions. Technical and obscure, breaches of despatch box commitments and memoranda of understanding are unlikely to give rise to the sort of major political controversy which could deter a UK Government. Beyond the objections of devolved ministers and the sure attrition of trust, from the UK Government's perspective there is little to lose.<sup>70</sup>

The extent to which the agreements have performed a para-constitutional function in defence of devolution can also be questioned. While the European Union (Withdrawal) and Advanced Research and Invention Agency bills are notable examples of agreements being used to replace proposed restrictions on devolved competences, the majority of examples discussed above centred on the UK Government acquiring *new* powers in devolved areas. As the Fifth Senedd's Constitutional and Legislative Affairs Committee argued, the use of non-binding agreements instead of statutory consent requirements to constrain those powers is inconsistent with the view that the relevant matters are devolved.<sup>71</sup> In the final analysis, the Welsh Government has recommended that the Senedd consent to various UK Government powers in devolved areas, subject to no legal requirements to obtain devolved consent or consult with devolved institutions. The agreements thus reflect not the avoidance of constitutional conflict but its resolution, with the Welsh Government relinquishing its claim to the various competences which were in dispute.

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<sup>69</sup> The governments have agreed a first exception to the market access principles, concerning single use plastics. Department for Levelling Up, Housing and Communities, 'Intergovernmental relations quarterly report quarter 1 2022' (UK Government, May 2022).  
<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1078721/CPM0522992596-001\\_Intergovernmental\\_Relations\\_-\\_Quarterly\\_Report\\_25M\\_\\_1\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1078721/CPM0522992596-001_Intergovernmental_Relations_-_Quarterly_Report_25M__1_.pdf)> accessed 28 May 2022

<sup>70</sup> The question of whether the changes introduced following the Intergovernmental Relations Review will address the problem of enforcement is considered in the concluding section of this report.

<sup>71</sup> Constitutional and Legislative Affairs Committee, *The Welsh Government's supplementary legislative consent memorandum (memorandum no 2) on the Agriculture Bill* (National Assembly for Wales, 2019).  
<<https://senedd.wales/laid%20documents/cr-ld12547/cr-ld12547-e.pdf>> accessed 28 May 2022

The Fifth Senedd's LJCC also argued that frequent recourse to non-binding commitments created a 'perverse incentive'<sup>72</sup> for the UK Government to refrain from including requirements for devolved consent or consultation in legislation. With the Welsh Government having demonstrated its amenability to non-legislative assurances, it argued, legal requirements would appear increasingly unnecessary. The Committee warned of the cumulative effects of this trend for the future of Welsh devolution: 'Welsh Ministers' continued acceptance of such agreements might have the effect of normalising their use, reducing the likelihood of legislative safeguards being agreed and, consequently, weakening the devolution settlement'.<sup>73</sup>

#### 4.2. Marginalising the Senedd

The proliferation of non-binding agreements has had significant ramifications for the Senedd. The Fifth Senedd's LJCC argued that, although the agreements are between governments, they have arisen from disputes around *legislative* consent and ultimately concern the Senedd's powers. To the extent that they are used as an alternative to statutory provisions, therefore, they displace the normal legislative consent process. Their effect is 'to take power away from the Senedd as the legislature and place it the hands of the Welsh Government'.<sup>74</sup> Further, several of the agreements – most notably on the Agriculture Act 2020 – have left to the UK Parliament the task of scrutinising UK Government regulations in devolved areas, 'despite it not having done so ... for 20 years'.<sup>75</sup> To this extent, the LJCC said, the Senedd's role has been 'bypassed'.<sup>76</sup>

It could also be argued that the agreements have prioritised intergovernmental relations over the integrity of the Senedd's powers. As discussed above, for much of the Fifth Senedd the Welsh Government deemed non-binding agreements preferable to the Senedd withholding its consent. This may have reflected its commitment in the 2018 Agreement not to withhold a recommendation of consent 'unreasonably', or perhaps a desire to play the 'good unionist' and influence the UK Government through cooperation rather than contestation.<sup>77</sup>

Whatever its intentions, the agreements have often involved the governments making significant decisions between themselves about the allocation of law-making responsibilities in devolved areas, with little input from the Senedd. Given that the Welsh Government has repeatedly argued that the Senedd's law-making powers are grounded in popular sovereignty, as expressed in the two referendums on Welsh devolution, this approach is particularly

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<sup>72</sup> Legislation, Justice and Constitution Committee, *Fifth Senedd legacy report* (n 2) 15.

<sup>73</sup> Legislation, Justice and Constitution Committee, *The Welsh Government's legislative consent memorandum on the Trade Bill* (Senedd Cymru, 2020) 18. <<https://senedd.wales/laid%20documents/cr-ldl3375/cr-ldl3375-e.pdf>> accessed 28 May 2022

<sup>74</sup> Legislation, Justice and Constitution Committee, *Fifth Senedd legacy report* (n 2) 15.

<sup>75</sup> Constitutional and Legislative Affairs Committee, *The Welsh Government's supplementary legislative consent memorandum (memorandum no 2) on the Agriculture Bill* (n 81) 9.

<sup>76</sup> *ibid.*

<sup>77</sup> J. Hunt and R. Minto, 'Between intergovernmental relations and paradiplomacy: Wales and the Brexit of the regions' (2017) 19(4) *British Journal of Politics and International Relations* 647.

questionable.<sup>78</sup> To the extent that the agreements reflect an attempt to play the ‘good unionist’, they may have come at the expense of constitutional principle.

The Senedd’s role has also been undermined by a lack of transparency regarding the terms of the agreements. It has frequently been asked to consent to the relevant UK legislation without the agreements having been finalised, published or subject to committee scrutiny. Indeed, the publication of the terms of the agreements ahead of legislative consent votes has been the exception rather than the norm. For four of the nine bills discussed above, the Senedd was asked to give consent without the relevant memoranda of understanding having been scrutinised.<sup>79</sup> On other occasions, the agreements, once published, have been out of date.<sup>80</sup> Further, the Welsh Government in some instances has accepted agreements on the basis of intergovernmental dispute mechanisms which had not yet been negotiated or finalised – most notably in relation to the Agriculture Bill.

The Senedd has also been asked to consent to agreements amid confusion as to which specific commitments given by the May administration had been reaffirmed by the Johnson administration.<sup>81</sup> Despatch box commitments have been particularly problematic in this regard: it has often been unclear whether, when, and by whom, the relevant commitments have been given in the UK Parliament. Thus the Senedd has been confronted with circumstances which not only reduce its role in the legislative consent process but also hinder its ability to scrutinise fully the implications of UK legislation for its competences.

A final issue is post-legislative scrutiny. The Fifth Senedd’s LJCC expressed concern that the agreements, once given consent, ‘could be subject to change without scrutiny by, or notification to, the Senedd’.<sup>82</sup> This proved to be prescient: with the exception of the agreement on the EU (Withdrawal) Bill, it is difficult to ascertain how most of the agreements discussed in Part 2 have operated in practice. Generally, once the Senedd consented to the relevant legislation and accompanying agreement, there has been little reporting. This makes it difficult to determine whether the UK Government is doing what it said it would do.

Following the 2021 Senedd election, a revised ‘Inter-Institutional Relations Agreement’ was established between the Welsh Government and the Senedd. This provides that the Welsh Government will give regular updates to the Senedd on its ‘participation in formal, ministerial-level inter-governmental meetings, agreements, concordats, and memorandums of

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<sup>78</sup> Welsh Government, *Reforming our Union: shared governance in the UK* (2021). <<https://gov.wales/reforming-our-union-shared-governance-in-the-uk-2nd-edition>> accessed 28 May 2022

<sup>79</sup> The Fisheries, Medicines and Medical Devices, Advanced Research and Invention Agency and Health and Social Care Bills.

<sup>80</sup> For example, the draft Memorandum of Understanding on reciprocal healthcare agreements under the Health and Care Bill.

<sup>81</sup> Letter from the Minister for International Relations and the Welsh Language to the Minister of State for Trade Policy (11 September 2020). <<https://business.senedd.wales/documents/s104885/CLA5-25-20%20Paper%2041.pdf>> accessed 28 May 2022

<sup>82</sup> Legislation, Justice and Constitution Committee, *Fifth Senedd legacy report* (n 2) 15.

understanding’.<sup>83</sup> However, the emphasis here is on ‘formal, Intergovernmental Structures’.<sup>84</sup> This wording could be interpreted by the Welsh Government in a way which excludes the various agreements discussed in Part 2, with the consequence that a lack of transparency around the operation of those agreements might continue to be an issue in future.

### 4.3. A lack of principled justification

Finally, the Welsh Government has been criticised for lacking a compelling rationale for its repeated reliance on non-binding agreements. As discussed in Part 3, its position has been that non-binding agreements have offered the best and only protection for devolved competences achievable under the political circumstances, placing particular emphasis on its perception of the UK Government’s mandate following the 2019 general election. For the Fifth Senedd’s LJCC, ‘this response, and the principle on which it is based, is unacceptable’.<sup>85</sup>

The approach could be criticised on several grounds. First, it suggests that the UK Government was entitled to unilaterally determine the appropriate safeguards for devolution on the basis of a majority in the House of Commons. At the same time, it seemed to ignore the Welsh Government’s own electoral mandate and authority to demand effective safeguards for the Welsh devolved system. In the UK’s contested constitutional setup, the devolved institutions are not passive actors; they have a central role in articulating what is constitutionally and democratically legitimate for a UK Government to do. Particularly during the Fifth Senedd, the Welsh Government at times appeared to lose sight of this responsibility in its attempts to instil better working relationships with the UK Government.

The Welsh Government’s position also appeared to be based on highly selective realpolitik. While it was not unreasonable to conclude that the UK Government would not be prepared to offer stronger safeguards for devolution in the aftermath of the 2019 election, equally it could have concluded that the same government would fail to fulfil its commitments, particularly in light of its willingness to dispense with constitutional conventions and practices, and that this posed an unacceptable risk to Welsh devolution which should not be endorsed with legislative consent.<sup>86</sup> The experience of devolution to date would also militate against reliance on non-binding agreements. For instance, devolution guidance notes state explicitly that the devolved institutions should be consulted in the drafting of UK parliamentary

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<sup>83</sup> Legislation, Justice and Constitution Committee, *Inter-Institutional Relations Agreement between Senedd Cymru and the Welsh Government* (Senedd Cymru, 2021). <<https://senedd.wales/media/ifdavfn2/cr-ld14674-e.pdf>> accessed 28 May 2022

<sup>84</sup> *ibid.*

<sup>85</sup> Legislation, Justice and Constitution Committee, *The Welsh Government’s supplementary legislative consent memorandum (memorandum no. 2) on the Trade Bill* (Senedd Cymru, 2020) 7. <<https://senedd.wales/media/nttbvh23/cr-ld13896-e.pdf>> accessed 28 May 2022

<sup>86</sup> ‘...[T]he UK government has in recent years shown an increasing willingness to push the limits of the norms and conventions that are central to the relationship between the four political institutions of the UK and override the devolved institutions in areas of their own responsibility’. M.T. Jack, J. Sargeant and J. Pannell, *A framework for reviewing the UK constitution* (Bennett Institute for Public Policy Cambridge and Institute for Government, 2022) 31. <<https://www.instituteforgovernment.org.uk/sites/default/files/publications/framework-reviewing-uk-constitution.pdf>> accessed 28 May 2022

legislation which impinges on devolved competences. Even in respect of legislation with major ramifications for devolution, however, often this has either not occurred or has not been done to the satisfaction of the devolved governments.<sup>87</sup>

To some extent, the use of non-binding agreements has also followed a self-perpetuating logic: occasionally Welsh ministers cited previous agreements as precedent and justification for new agreements. As the Minister for International Relations and the Welsh Language said in relation to the Trade Bill, '[i]t would ... be consistent with the approach taken to other legislation to rely on a despatch box commitment in this instance'.<sup>88</sup> Such remarks suggest that the use of such commitments in place of legislative safeguards were becoming normalised, despite their limitations.

Contrary to the Welsh Government's claims, it could also be argued that the agreements offered limited gains in intergovernmental collaboration. Some agreements, for example, centred not on new but rather pre-existing dispute resolution mechanisms.<sup>89</sup> Meanwhile, it has been suggested that the process constructed through the agreement on the EU (Withdrawal) Act 2018 – the benchmark of intergovernmental collaboration – merely reflected 'traditional UK territorial management: informal negotiations, with central sovereignty as a backstop', one which 'openly clashes with a version of permissive autonomy based on consent from the devolved bodies'.<sup>90</sup> Additionally, while the co-development of common frameworks progressed steadily in line with that agreement, this did not dissuade the UK Government from enacting profound changes to the devolution settlement, without devolved consent, through the Internal Market Act 2020, despite the emphasis which the 2018 agreement had placed on cooperation and consensus.

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<sup>87</sup> Rawlings notes that the Welsh Government had a 'bystander status' during the discussions which preceded the initial draft of the Wales Bill in 2015. R. Rawlings, 'The strange reconstitution of Wales' [2018] Public Law 62, 68. More recently, the UK Government did not consult with the devolved governments prior to the publication of its proposals for the Internal Market Bill, or its plans to replace the Human Rights Act 1998.

<sup>88</sup> Letter from the Minister for International Relations and the Welsh Language to the Chair of the Legislation, Justice and Constitution Committee (n 66).

<sup>89</sup> E.g. the UK and Welsh Government Bilateral Agreement on WTO provisions within the Agriculture Bill, which stated that disputes would be resolved 'in line with the existing MoU governing Intergovernmental relations'.

<sup>90</sup> M. Sandford and C. Gormley-Heenan, 'Taking back control', the UK's constitutional narrative and Schrodinger's devolution' (2020) 73(1) Parliamentary Affairs 108, 118.

## 5. Conclusions and recommendations

Non-binding intergovernmental agreements have played a prominent role in the Welsh context since the 2016 referendum on EU membership, emerging from the legislative consent negotiations on a wide range of UK Government bills. Where disagreements have arisen as to the boundary between devolved and non-devolved responsibilities, or the appropriate limits and conditions to be attached to new regulatory powers for UK ministers, memoranda of understanding, despatch box commitments and written assurances have provided one of the principal means of unlocking the disputes.

Despite their different forms, the aims of the agreements have been consistent: discouraging UK Government interference with devolved competences and the enhancement of intergovernmental collaboration in the design and implementation of UK governance outside of the EU. To date, however, they have had mixed results in achieving these aims. Further, the agreements have repeatedly undermined the Senedd's law-making and scrutiny functions and have often lacked a principled justification. Despite the Inter-Institutional Relations Agreement between the Welsh Government and Senedd, there remains a lack of transparency around how many of the agreements are working in practice.

The Welsh Government has now stated that the agreements 'should be avoided' because 'they only bind the current UK Government to an extent, and they do not bind future UK Governments'.<sup>91</sup> This stance is reflected in its recent approach to legislative consent. For instance, the Professional Qualifications Act 2022 provides concurrent powers for UK and devolved ministers to regulate the recognition of qualifications and experience obtained outside of the UK, thereby enabling both to make laws in devolved areas. The Welsh Government argued that this approach 'undermine[s] the long-established powers of the Senedd and the Welsh Ministers'.<sup>92</sup> It rejected an assurance from the UK Government that it 'does not intend to use the concurrent powers in the areas of devolved competence without the agreement of the relevant DAs'.<sup>93</sup> It sought the removal of the concurrent powers or, alternatively, the inclusion of a requirement on UK ministers to obtain the consent of devolved ministers when making regulations in devolved areas. It also requested a 'carve out' from paragraph 11 of Schedule 7B to the Government of Wales Act 2006 which would allow the Senedd to remove the relevant powers held by UK ministers without requiring their consent. Although the UK Government conceded the carve out, it refused to remove the concurrent powers and was only prepared to introduce a requirement to consult with

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<sup>91</sup> Letter from the Counsel General to the Chair of the Legislation, Justice and Constitution Committee (n 3).

<sup>92</sup> Welsh Government, 'Supplementary legislative consent memorandum (memorandum no 2): Professional Qualifications Bill' (December 2021). <<https://senedd.wales/media/uawh2jvp/slcm-ldl4720-e.pdf>> accessed 28 May 2022

<sup>93</sup> Letter from the Minister for Education and Welsh Language to the Chair of the Legislation, Justice and Constitution Committee (10 September 2021). <<https://business.senedd.wales/documents/sl17457/Letter%20from%20the%20Minister%20for%20Education%20and%20the%20Welsh%20Language%20to%20the%20Chair%20of%20the%20Legislation%20Justi.pdf>> accessed 28 May 2022



devolved ministers; the Welsh Government therefore refused to recommend legislative consent.<sup>94</sup>

In light of the limitations of non-binding agreements discussed in Part 4, the Welsh Government's change of approach should be welcomed. Nevertheless, it is important to note that the Welsh Government has continued to rely on intergovernmental agreements to resolve legislative disputes: for instance, in relation to the Health and Care Act 2022. Clearly, therefore, such agreements on UK legislation will remain an important feature of the Welsh devolved system. It should also be noted from the negotiations on the Professional Qualifications Act 2022 that the Welsh Government sought a requirement to obtain the consent of devolved *ministers*, not the Senedd. While such a mechanism offers legal protection for devolved competences, thereby avoiding one of the key risks associated within non-binding agreements, it limits the scrutiny of regulations in devolved areas by the Senedd.<sup>95</sup>

To a certain extent, the political context of non-binding agreements has changed following the conclusion of the Intergovernmental Relations Review in January 2021, negotiated and agreed by the UK's four governments.<sup>96</sup> Three features of the review are particularly noteworthy. First, it sets out an enhanced dispute resolution mechanism, intended to cover disagreements over the interpretation and fulfilment of intergovernmental agreements, which will be overseen by an Intergovernmental Relations (IGR) Secretariat made up of officials from each government. The new process enables the governments to obtain third party advice on the dispute, provided each agrees. Second, there is a commitment to increased transparency in intergovernmental relations through enhanced reporting to the UK's legislatures, for which the individual governments and IGR Secretariat have responsibility. Third, and crucially, the review is not legally binding: it is 'a statement of political intent, ... not intended to create new, or override existing, legal relations or obligations'.<sup>97</sup>

These changes should be welcomed cautiously. Recourse to an enhanced dispute process may help to address the imbalance of power between the UK and devolved governments which has characterised previous non-binding agreements, whereby the latter had no means of redress for alleged breaches of such agreements.<sup>98</sup> Likewise, if the commitment to increased transparency extends to the operation of the agreements discussed in this report, that would also represent significant progress, given the issues of transparency discussed in Part 4. However, it is unclear whether that is the case; indeed, it has been noted that the review

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<sup>94</sup> Welsh Government, 'Supplementary legislative consent memorandum (memorandum no 3): Professional Qualifications Bill' (March 2022). <<https://senedd.wales/media/oidjlnic/slcm-ld15023-e.pdf>> accessed 28 May 2022

<sup>95</sup> As noted by the Sixth Senedd's LJCC. Legislation, Justice and Constitution Committee, *The Welsh Government's legislative consent memorandum on the Professional Qualifications Bill* (Senedd Cymru, 2021) <<https://senedd.wales/media/r0yn5fhu/cr-ld14574-e.pdf>>

<sup>96</sup> Cabinet Office, 'The review of intergovernmental relations' (n 45).

<sup>97</sup> *ibid.*

<sup>98</sup> 'Whereas previously the UK government could deny the existence of a dispute, now any administration can escalate a disagreement to a formal dispute. The secretariat can seek third-party advice or mediation, and the process must be chaired by a body not party to the dispute. The days when the UK government could act as the accused, the judge and the jury appear to be over.' N. McEwen, 'Intergovernmental relations review: worth the wait?' (*UK in a Changing Europe*, 17 January 2022).

‘offers very little’<sup>99</sup> in gains for transparency. Finally, since the review ‘doesn’t have any legal constitutional status’,<sup>100</sup> as the Counsel General has noted, it cannot be enforced in the courts. Thus if the dispute process concludes with the UK Government refusing to concede that it has breached an intergovernmental agreement, the devolved governments have no further recourse.

Notwithstanding the modest alterations to the UK’s system of intergovernmental relations, therefore, non-binding agreements on UK legislation will remain a weaker, high-risk substitute for statutory requirements for devolved legislative consent, and their repeated use will continue to undermine the Senedd’s law-making and scrutiny functions.

## Recommendations

- The Welsh Government should maintain its policy of avoiding the use of non-binding agreements as a solution to disputes on legislative consent, unless they are used as a substitute for new reservations on devolved competences.
- The Welsh Government’s criteria for using such agreements should be clarified in light of its continued (albeit more reluctant) reliance on them during the Sixth Senedd. One option would be to revise its principles for considering UK bills to specify when it will consider accepting non-binding agreements, particularly when the agreements are not being used as alternatives to new restrictions on devolved competences.
- The Legislation, Justice and Constitution Committee should consider requesting an update from the Welsh Government on the status and progress of the various non-binding agreements which were used to overcome disputes on legislative consent. This will facilitate post-legislative scrutiny of the various laws to which those agreements related and align with the Welsh Government’s commitment to increased transparency in the Intergovernmental Relations Review.
- If necessary, the Welsh Government should request the support of the new IGR Secretariat to assist it in preparing updates for the Senedd on the status of the various non-binding agreements which have been negotiated.
- The Legislation, Justice and Constitution Committee should consider seeking clarification from the Welsh Government as to whether the Inter-Institutional Relations Agreement includes the various non-binding agreements which have been used to resolve disputes on legislative consent. If the Welsh Government’s view is that it does not, the Agreement should be amended in future to include them.

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<sup>99</sup> *ibid.*

<sup>100</sup> Legislation, Justice and Constitution Committee (14 March 2022, Record of Proceedings) <<https://record.senedd.wales/Committee/12646>> accessed 28 May 2022