Legislative Consent Memorandum

UK Infrastructure Bank Bill

Background

1. This memorandum has been lodged by John Swinney, Deputy First Minister and Cabinet Secretary for Covid Recovery, under Rule 9B.3.1(a) of the Parliament's standing orders, and is supported by the Minister for Business, Trade, Tourism and Enterprise. The UK Infrastructure Bill was introduced in the House of Lords 11 May 2022. The Bill can be found at [UK Infrastructure Bank Bill [HL] - Parliamentary Bills - UK Parliament].

2. The creation of a UK infrastructure bank ("the Bank") was first announced by the Chancellor at the Spending Review 2020. The Bank was launched on a non-statutory basis on 17 June 2021, and has already begun making investments.

3. This LCM considers only the Bill as introduced. Scottish Government officials have sought amendments/assurances relating to the remit of the bank in areas of devolved competence to ensure devolution is respected, but to date the UK Government has not made any such changes or provided the requested assurances.

Content of the UK Infrastructure Bank Bill

4. The UK Government's stated objectives for the Bank are to help tackle climate change and to support regional and local economic growth by providing access to financial instruments, including loans to local authorities to enable investment in infrastructure. It will operate on a UK-wide basis.

5. The UK Infrastructure Bank was established following HM Treasury's publication of a new National Infrastructure Strategy alongside the UK Spending Review in 2021. Underpinning the strategy was the intention to create the UK Infrastructure Bank to "play a leadership role in supporting private infrastructure projects to help meet the Government's objectives on economic growth, levelling up, and transitioning to net zero".

6. In March 2021, HM Treasury published a policy design document , which confirmed that in total, the UK Infrastructure Bank would have £22 billion of financial capacity to deliver on its objectives. The Bank's financial capacity consists of £12 billion of equity and debt capital, and the ability to issue £10 billion of guarantees. The bank's investments are expected to help unlock over £40 billion of overall investment.

7. The purpose of this Bill is to place the Bank on a statutory footing and seeks to:

- Place the Bank's objectives into legislation;
- Create statutory forms of transparency, accountability and governance;
- Remove legal obstacles to the Bank's capacity to lend directly to local authorities and the Northern Ireland executive for infrastructure purposes;
- Grant specific powers to the Treasury to provide financial assistance to the Bank; and
- Ensure the Bank is a long-lasting institution.

Provisions which relate to Scotland

8. The UK Infrastructure Bill is relatively short comprising eleven clauses. HM Treasury believe that six of these require legislative consent as they could fall within the legislative competence of the Scottish Parliament. These are, clause 2 (Objectives and functions), clause 3 (Strategic priorities and plans), clause 4 (Directions), clause 5 (Financial assistance), clause 8 (Duties of the bank) and clause 11 (Extent, commencement and short life). These clauses relate to infrastructure investment and may involve investment in areas such as rail, ports or bridges located solely within Scotland and therefore fall within devolved competence.

Clause 2: Objectives and activities

9. This clause sets out the Bank's objectives and activities, as well as the definition of infrastructure which is central to the scope of those activities. This clause also creates delegated powers to enable the Treasury to change the Bank's activities or the definition of infrastructure using secondary legislation under the affirmative procedure.

Clause 3: Strategic priorities and plans

10. This clause requires the Treasury to prepare and lay before Parliament (at the latest six months after the Bill takes effect) a statement of strategic priorities for the Bank. Such a statement may be revised or replaced by the Treasury. The policy intention is that the statement will provide the Bank with a steer on where, in the Government's view, the Bank should prioritise and focus its activities. It is also the policy intention that the Government will not normally issue the steer more than once a Parliament.

11. The clause also requires the Bank to secure that its articles of association provide for the Bank to publish and act in accordance with strategic plans, which must reflect the Treasury's strategic statement; and for the Bank to update those plans whenever the Treasury's strategic statement is revised or replaced. The policy intention is that the Bank will be expected to respond within a reasonable timeframe, taking into consideration the scale of the changes required in the response to any updates.

12. The Treasury's first (non-statutory) strategic statement for the Bank was published on 18 March 2022. It provides further detail on how the Bank should interpret its strategic objectives and encourages the Bank to prioritise opportunities that align with the Government's recent focus on energy security. The Bank responded to this in their first strategic plan, published in June 2022.

13. When the Bill takes effect the preparation and presentation to UK Parliament of the Treasury's strategic statements for the Bank will become the subject of mandatory statutory obligations, and the Bank's alignment with these will take place through the relevant provisions in its articles of association. The Treasury does not plan to prepare a new strategic statement for the Bank within six months of the Bill taking effect, but intends to reissue the strategic statement published on 18 March 2022.

Clause 4: Directions

14. This clause gives the Treasury the power to give directions to the Bank of a specific or general nature about how it is to deliver its objectives.

15. The Bank is required by subsection (2) to comply with such a direction.

16. The Treasury is not able to give a direction until it has consulted the Bank's board of directors.

17. The Treasury is the only shareholder of the Bank and could therefore influence the Bank's activities by means of its ownership stake under normal principles of company law.

18. The UK Government's policy is that such influence should be used sparingly in practice, and that the default position should be that the Bank is independent as regards its operations and investment decisions. This position is supported by the UK Government's public statements to date in this regard, and by the fact that the UK Government will be constrained by public law and public policy considerations to act rationally and proportionately in any use of its influence over the Bank.

19. As in the case of influence through ownership, any use of the direction-giving power by the Treasury would be subject to appropriate public law and public policy constraints, supported by the Government's public statements regarding the Bank's operational independence as the default position. The requirement to consult the Bank's board of directors in advance of any use of the direction power would also need to be observed in each case in order for a legally valid direction to be given.

20. This power is consistent with the power that the UK Government has to direct comparable institutions, for example the Treasury has a statutory power to direct the Bank of England (with the exception of monetary policy), although in practice this has never been used.

Clause 5: Financial assistance

21. This clause gives the Treasury the power to provide financial assistance to the Bank for the purpose of helping the Bank to deliver its objectives. A capacity of this nature exists already, deriving from the Infrastructure (Financial Assistance) Act 2012 and sections 50 and 51 of the United Kingdom Internal Market Act 2020. However, it is the UK Government's view that a specific form of statutory authority is appropriate to include in the Bill, given the specific nature of the Bank's remit and the policy intention that the Bank be an enduring institution. "Financial assistance" is defined in broad terms in clause 10 of the Bill, to include loans, guarantees, indemnities, participation in equity finance and any other form of financial assistance of an actual or contingent nature.

Clause 8: Duties of the Bank

22. This clause is intended to ensure that the duties imposed upon the Bank by the Bill are technically enforceable as a matter of law.

23. The Treasury will be enabled to apply to the court for an injunction (or equivalent remedies in Scotland) to enforce the Bank's duties under the Bill, such as its duty to secure that its articles of association properly reflect the Bank's objectives and activities in accordance with clause 2 or the appointment and tenure provisions in clause 7.

24. It is not envisaged that these provisions will be needed in practice. They are included in the Bill to ensure that the Bank's legal duties under the Bill have an appropriate legal status.

Clause 11: Extent, commencement and short title

25. The Bill extends to England and Wales, Scotland and Northern Ireland.

26. The Bill will come into force at the end of the period of two months beginning with the day on which it is passed, that is, two months after the day on which the Bill receives Royal Assent.

27. The short title of the Act resulting from the Bill will be the UK Infrastructure Bank Act 2022.

Reasons for seeking a legislative consent motion

28. HM Treasury have provided their analysis of the Bill and believe that six of the eleven clauses require legislative consent from the Scottish Parliament. It is the UK Government's view that only these clauses engage the legislative consent process. Accordingly on 10 May 2022 the Economic Secretary to the Treasury asked for legislative consent for the clauses identified (paragraph 8).

29. Since the statutory objectives of the Bank have the potential to encroach on devolved areas of competence, the Scottish Government agree that the Sewel Convention is engaged.

30. In view of the above, we believe that a legislative consent motion is required for the UK Infrastructure Bank Bill to have full effect in Scotland and to optimise deal flow.

31. The Cabinet Secretary for Economy and Finance provided in-principle support to a legislative consent motion in her letter to the Economic Secretary to the Treasury on 9 June 2022 but considered that Scotland's position could be better reflected in UKIB activity and was clear that the following assurances were required before recommending consent to the Scottish Parliament:

- The Bill allows HM Treasury, by regulations made by statutory instrument, to amend UKIB's functions or the meaning of infrastructure. This provides a risk of divergence in future with Scottish Government priorities. We have sought to mitigate this risk by suggesting that UKIB and SNIB seek to develop a Memorandum of Understanding with the intention that this should maintain high level alignment with SG priorities through SNIB's missions;

- In order to ensure investments deliver maximum impact we believe it is imperative that we are able to work together to identify and support appropriate infrastructure projects in Scotland. We expect this could be achieved by either placing individuals who have the relevant knowledge of the policy/project landscape in Scotland at board room level or ensuring that such individuals are included on relevant investment panels; and

- We are also seeking assurances that there will be no impact on Barnett consequentials should the Scottish Parliament provide legislative consent.

32. These assurances have been the subject of ongoing discussion with the UK Government but a formal response has still to be received. Therefore, we are unable to recommend legislative consent at this time.

Consultation

33. We have raised the operation of the UK Infrastructure Bank in Scotland with the Scottish National Investment Bank and with relevant government agencies. Although there is potential for competition over the deals and projects that both Bank's will pursue and a risk of divergence with SG policy priorities (under clause 2) we believe this can be mitigated through a Memorandum of Understanding (MOU), or similar administrative mechanism. We have asked both banks to work together to consider the terms for an MOU and discussions will continue. There is mutual benefit to ongoing communication between UKIB and SNIB and coordination relating to projects, particularly as the pipeline continues to develop. The relationship between both Banks continues to develop and could be further strengthened with a Memorandum of Understanding.

Financial Implications

34. There are no direct financial implications arising from this memorandum.

35. The impact that UKIB activity may already be having or will have on Barnett consequentials and the Scottish budget are not clear. We have asked for assurances from HM Treasury that there will be no impact on financial implications for the Scottish Government in relation to an adjustment of Barnett consequentials.

Conclusion

36. As set out above, the legislative consent of the Scottish Parliament is required for a number of clauses in the Bill. Some of these clauses are of constitutional concern to the Scottish Government. Thus, despite the merits of the Bill, the Scottish Ministers' cannot recommend legislative consent at this time. Our final position on whether to recommend consent will be subject to the outcome of ongoing discussions with the UK Government and the provision of assurances that Scotland's interests will be properly reflected in the design and delivery of UKIB activity. Should such assurances be received we will provide a supplementary Legislative Consent Memorandum.

Scottish Government
September 2022

This Legislative Consent Memorandum relates to the UK Infrastructure Bank Bill (UK legislation) and was lodged with the Scottish Parliament on 2 September 2022

UK Infrastructure Bank Bill – Legislative Consent Memorandum

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at: www.parliament.scot/documents