

LEGISLATIVE CONSENT MEMORANDUM

TRADE BILL

Introduction

1. The Trade Bill (the Bill) was introduced in the House of Commons on 19 March 2020. As the Bill is a relevant Bill under Rule 9B.1 of the Parliament's Standing Orders, this memorandum has been lodged by Fiona Hyslop MSP, Cabinet Secretary for Economy, Fair Work and Culture, and supported by Ivan McKee MSP, Minister for Trade, Investment and Innovation in accordance with Rule 9B.3.1(a). The Bill and its supporting documents can be found at <https://services.parliament.uk/Bills/2019-21/trade.html>. This memorandum relates to the Bill as amended at Report Stage in the House of Commons.

2. The Bill is necessary as a result of the UK's withdrawal from the EU. The Scottish Government deeply regrets the withdrawal of Scotland, as part of the UK, from the EU on 31 January 2020. This action was taken with no democratic mandate for withdrawal in Scotland.

3. However, the Scottish Government accepts the need to make preparations for the exceptional circumstances which arise as a result of that withdrawal and to ensure that continuity in trading relationships can be maintained.

Content of the Bill

4. The UK Government has set out the aims and purpose of the proposed legislation in the Explanatory Notes which accompany the Bill. The UK Government describes the principal purpose of the Bill as providing the key measures that are required as the UK Government develops its trade policy for the UK, now that it has left the European Union (paragraph 1 of the Explanatory Notes).

The main provisions of the Bill are as follows:

Part 1

- Creating a power to allow implementation in UK domestic law of obligations created when the UK accedes to the Agreement on Government Procurement (GPA) in its own right, and not as a member state of the EU. The Bill will also allow the UK to reflect in legislation where parties join or leave the GPA;
- Creating a power to allow, so far as necessary, implementation in UK domestic law of trade agreements that the UK has concluded with countries with which the EU has existing trade agreements as at 31 January 2020, and which the UK was a signatory to through its EU membership.

Part 2

- Establishing an independent body, the Trade Remedies Authority (TRA), to deliver a new UK trade remedies framework and to enable the TRA to provide advice, support and assistance to the Secretary of State in connection with the conduct of international disputes and other trade related functions.

Part 3

- Creating powers for Her Majesty's Revenue and Customs (HMRC) to collect information to confirm the number of exporters of goods and services there are in the UK, and allowing it to share data with public or private bodies in order that it can fulfil its public functions as they relate to trade.
- Creating powers for specified public authorities to disclose information for the purpose of facilitating the exercise by a Minister of the Crown of the Minister's functions related to trade.

5. Further detail on the structure and provisions of the Bill is set out at Annex A; and a summary of the provisions which trigger the need for legislative consent is set out at Annex B.

Background

6. The Bill corresponds in terms of scope and policy objectives to the Trade Bill which was introduced at Westminster in November 2017 (Trade Bill 2017¹). The Scottish Government lodged a Legislative Consent Memorandum (LCM) in respect of that Bill in December 2017², which stated that the Scottish Government could not accept the restrictions (in the Bill as introduced) on the exercise of its competence in devolved areas. The previous Trade Bill took broadly the same approach as the EU (Withdrawal) Act 2018 in that, in relation to the powers in clauses 1 and 2 of the Bill, it prevented the Scottish Ministers from amending retained direct EU legislation, or from making regulations that would create inconsistencies with any modifications to retained direct EU law that the UK Government made, even in devolved areas. That would have allowed UK Ministers to impose constraints on devolved competence by secondary legislation without the consent of the Scottish Government or the Scottish Parliament. The Scottish Government could not accept such a constitutionally inappropriate mechanism, which would undermine the devolution settlement. The LCM also expressed concern at the lack of any meaningful involvement for the Scottish Ministers in the Trade Remedies Authority.

7. The Finance and Constitution Committee published a report on the previous Trade Bill on 31 October 2018³, agreeing with the Scottish Government's recommendation that the Scottish Parliament should not consent to the Bill. The previous Trade Bill subsequently failed to complete its parliamentary passage, falling in consequence of dissolution of the UK Parliament in Autumn 2019.

Requirement for legislative consent

8. The Bill is a relevant Bill under Rule 9B.1.1 of the Standing Orders, as it makes provision applying to Scotland for purposes within the legislative competence of the Parliament, and alters the executive competence of the Scottish Ministers.

¹ [Trade Bill 2017 \(as introduced\)](#)

² [Legislative Consent Memorandum](#) for the Trade Bill, 2 October 2018

³ [Report](#) on Trade Bill LCM, 31 October 2018

9. The parts of the Bill which trigger the need for legislative consent are: Part 1, aspects of Part 3 and schedules 1, 2 and 3. The remaining parts of the Bill do not themselves trigger the need for legislative consent. Annex A sets out the full range of powers provided for in the Bill but of particular relevance to devolved powers are:

- Clause 1 – which provides a power for both UK and the Scottish Ministers (within devolved competence) to make regulations to implement the Agreement on Government Procurement;
- Clause 2 – which provides a power for both UK and the Scottish Ministers (within devolved competence) to make regulations to implement qualifying international trade agreements;
- Clause 9 – which provides that certain public authorities may disclose information for the purpose of facilitating the exercise by a Minister of the Crown of the Minister’s functions relating to trade;
- Part 1 of the Bill also introduces schedules 1-3, which establish and constrain ‘devolved competence’ for the purpose of the exercise of those powers.

10. The main provisions for which consent is required are:

i. Purposes within the legislative competence of the Scottish Parliament

The Trade Bill seeks to maintain continuity in the UK’s trade relationships through two implementation powers: implementation of the Agreement on Government Procurement (GPA) as an independent member; and assisting the transition of current trade arrangements by enabling, so far as may be required, the implementation in UK domestic law of trade agreements the UK intends to conclude after the end of the transition period with countries with which the EU has existing trade agreements as at 31 January 2020. These implementation powers may be exercisable within devolved areas (e.g. procurement, in the GPA context), and can be exercised both by the UK Government, and by the devolved administrations (subject to constraints).

ii. Provisions altering and constraining the executive competence of the Scottish Ministers

The Bill alters the executive competence of the Scottish Ministers by conferring implementation powers on them. The Trade Bill 2017 contained a provision which prohibited the devolved authorities from using the powers in clauses 1 and 2 (i) to modify retained direct EU legislation or anything which is retained EU law by virtue of section 4 of the European Union (Withdrawal) Act 2018 or (ii) in ways that would be inconsistent with any modifications to retained EU legislation and retained EU law which the UK Government has made.

This provision does not appear in the Trade Bill introduced on 19 March 2020. Constraints on the Scottish Ministers’ powers are now set out in paragraph 1(1) of schedule 1 which provides that a devolved authority may not make provision under clauses 1 or 2 unless the provision is within ‘devolved competence’. The same schedule sets out a bespoke definition of devolved competence for the purpose of the Trade Bill and disapplies the normal restrictions on devolved competence which prevents the Scottish Ministers from legislating in a way

which is incompatible with EU law or in breach of potential restrictions relating to retained EU law (introduced under the European Union (Withdrawal) Act 2018).

Clause 9 (newly added at Commons Report Stage to provide for disclosure of information) also alters the executive competence of Scottish Ministers.

Recommendation

11. As set out above, the Scottish Government accepts that, having left the EU, it is necessary to maintain continuity in trading relationships, and ensure continued access to government procurement markets as far as possible. The Scottish Government therefore agrees the need for provisions which seek to achieve that, not least to provide much needed continuity for businesses, employees and consumers.

12. The Scottish Government's primary objection to recommending legislative consent to the previous Trade Bill concerned the restrictions it placed on the Scottish Ministers' ability to amend retained EU legislation when exercising the powers of implementation. This constraint has been removed from the current Trade Bill.

13. There remain concerns about the content and coverage of the Trade Bill. A number of amendments were made to the Trade Bill 2017 during its partial passage including: amendments relating to future parliamentary scrutiny of agreements; and amendments relating to requirements for consultation with devolved administrations before draft negotiating mandates and texts of agreements are laid before the UK Parliament for final approval. These have not been included in the Trade Bill 2020 as introduced, and the Scottish Government believes that the UK Government should bring forward amendments to the Bill on these issues. In line with the Scottish Government's consistent approach to engagement in these areas, those amendments should go beyond the amendments made to the previous Bill to ensure a substantial and meaningful role for the devolved administrations in future trade arrangements.

14. The UK Government has stated that the powers of implementation in this Bill are intended to facilitate the "rolling over" of existing international trade agreements. However, as drafted, they are broad powers and could allow the implementation of substantial changes to those agreements: a point that the Scottish Government raised in relation to the Trade Bill 2017. The powers could also potentially be used in the implementation of entirely new trade agreements in circumstances where those agreements are with trading partners who have an existing agreement with the EU, (e.g. Japan or, potentially, Canada). In those circumstances, enhanced procedures for parliamentary scrutiny and engagement with the devolved administrations will be particularly important. The Scottish Government will continue to press the UK Government for clarification on how it intends to use these powers.

15. The Scottish Government notes that the UK Government has retained an amendment brought forward to the Trade Bill 2017, which altered a consent requirement in Schedule 1, paragraph 2 of the Bill to a consult requirement. This means that the Scottish Ministers would be required to consult with UK Ministers (rather than seek consent) when making particular regulations relating to the

implementation of international trade agreements in devolved areas or changes to or affecting the operation of the GPA.

16. A number of non-legislative commitments were also made by the UK Government to the devolved administrations during the passage of the Trade Bill 2017. The Scottish Government notes the confirmation given by the then Minister of State at the Department of Trade in his letter of 19 March 2020 to the Scottish Government's Minister for Trade, Investment and Innovation that the UK Government will restate those commitments⁴. The commitments were as follows:

- i. The UK Government will consult the Scottish Government and other devolved administrations before extending the sunset for the power in clause 2 (i.e. before extending the period during which clause 2 powers can be used under the Bill). Clause 2 relates to the implementation of international agreements;
- ii. In relation to the Trade Remedies Authority (TRA) the Secretary of State will notify the devolved administrations on decisions to initiate a trade investigation when there is a particular impact on the devolved nation;
- iii. The Secretary of State will notify the devolved administrations of the TRA's recommendations to the Secretary of State at the same time as consulting other government departments so that they can feed in their views;
- iv. The devolved administrations can proactively submit any information to the TRA that they consider relevant to an investigation; and
- v. The Secretary of State will seek the devolved administrations' suggestions on the optimal way of recruiting TRA non-executive members with regional knowledge skills and experience.

17. The Minister for Trade, Investment and Innovation also confirmed his commitment that UK Government Ministers will not normally use the powers conferred by the Bill in devolved areas without Scottish and other devolved Ministers' consent, and never without consulting them. This position has subsequently been restated by the current Minister for Trade Policy, Greg Hands MP, both in conversations with the Scottish Ministers and on the floor of the House of Commons⁵. The Scottish Government is currently discussing with the Parliament a revised protocol on scrutiny of decisions by the Scottish Ministers to consent to UK secondary legislation relating to or arising from EU exit and affecting devolved matters: the Scottish Government's intention is that the Bill will fall within the scope of that revised protocol once it has been agreed.

18. In addition to the points above, the Scottish Government's ongoing concerns with the Bill are (1) the constraint on the ability of the Scottish Ministers to exercise the powers set out in clauses 1 and 2 of the Bill in devolved areas in certain circumstances by virtue of the need to consult the UK Government; and (2) the UK Government's refusal to commit, via statute, not to exercise the concurrent regulation making powers which clauses 1 and 2 of the Bill provide for in devolved areas without first consulting, and ideally obtaining the consent of the Scottish Ministers. The Scottish Ministers are

⁴ [Letter from the Rt Hon Conor Burns MP, Minister of State, Department for International Trade to Ivan McKee MSP, Minister for Trade, Investment and Innovation, dated 18 March 2020](#)

⁵ [Third Reading, House of Commons, 20 July 2020, column 1937](#)

also pressing the UK Government to amend new clause 9 to provide devolved administrations with direct access to the relevant trade related information.

19. However, whilst the Scottish Government would wish to ensure that these points are addressed, these concerns need to be weighed against the prospect of finding Scotland unable to maintain, at least to some degree, continuity in its trading relationships and access to procurement markets following the end of the implementation period and thereby, in the absence of equivalent Scottish powers in Scottish legislation, reliant on the UK Government to exercise these powers on Scotland's behalf. It is the potential significant risk to businesses in Scotland of disruption to existing trading relationships and access to current and future procurement markets if the Scottish Government were to recommend not consenting to the Bill that draws the Scottish Government to lodge a Legislative Consent Motion in the Scottish Parliament and to recommend that the Scottish Parliament agree to such a motion.

Draft Legislative Consent Motion

20. The draft motion intended to be lodged by Fiona Hyslop MSP, Cabinet Secretary for Economy, Fair Work and Culture is:

“That the Parliament agrees that the relevant provisions of the Trade Bill, introduced in the House of Commons on 19 March 2020, which relate to the implementation of international obligations arising from the exercise of an independent UK trade policy, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive functions of the Scottish Ministers, should be considered by the UK Parliament.”

TRADE BILL – STRUCTURE AND PROVISIONS

The Scottish Government has additional comments on various provisions of the Bill, which are included below.

Part 1

Implementation of International Trade Agreements

Legislative consent is required for Part 1 of the Trade Bill.

Clause 1 Implementation of the Agreement on Government Procurement

The Agreement on Government Procurement (GPA) is a plurilateral agreement within the World Trade Organisation framework, between 19 WTO Members. It opens up government procurement markets and seeks to address trade barriers. The UK was a member by virtue of its EU membership and will have to re-join as an independent member. Clause 1 provides a power, to be held concurrently by the UK Government and devolved authorities, to ensure that any required changes can be implemented into UK domestic legislation in order for the UK to meet obligations arising from its independent membership of the GPA. The power also enables regulations to reflect future changes, for example to reflect new countries joining, or existing parties withdrawing from, the GPA.

Schedule 1 sets out the restrictions on devolved authorities in the exercise of their powers under clause 1.

The UK Government has reiterated a non-legislative commitment made during the partial passage of the Trade Bill 2017 stating that they will not normally use the powers in devolved areas without Scottish and other devolved Ministers' consent, and never without consulting them.

Clause 2 Implementation of International Trade Agreements

Clause 2 provides a power to the UK Government and devolved authorities to make regulations to implement into UK domestic law non-tariff obligations in certain international trade agreements that the UK reaches with partner countries, provided those countries have signed a corresponding agreement with the EU before 31 January 2020 (when the UK withdrew from the EU). The aim is to provide continuity in existing trade and investment relationships with these partner countries. Tariff obligations are addressed in the Taxation (Cross-Border Trade) Act 2018 (the 2018 Act).

Paragraph 35 of the Explanatory Notes accompanying the Trade Bill state that, in most cases, it is expected that the implementation of any already existing obligations within these UK trade agreements will have been dealt with through the EU (Withdrawal) Act 2018 and the powers under it. However, paragraphs 36-48 set out the circumstances when this will not be possible. The Trade Bill therefore provides a vehicle to deal with

any implementation of or changes required to such agreements after the end of the implementation period which are not covered by the 2018 Act.

The powers provided in clause 2 are sunsetted to 5 years after the end of the implementation period. However, that sunset period can be extended by the UK Government under review, with the approval of both Houses of Parliament, for further periods of no more than 5 years at a time. The UK Government has committed to consult with the devolved administrations before any such extension.

Schedule 1 sets out the restrictions on devolved authorities in the exercise of their powers under clause 2.

An amendment brought forward in the Trade Bill 2017, which altered a consent requirement in Schedule 1, paragraph 2 of the Bill to a consult requirement, has been retained in the Trade Bill 2019. This means that Scottish Ministers would be required to consult with UK Ministers (rather than seek consent as previously proposed) when making regulations relating to the implementation of international trade agreements in devolved areas.

Clause 3 Regulations: devolved authorities and general provision

Clause 4 Interpretation of Part 1

Part 2

Trade Remedies Authority

Clause 5 The Trade Remedies Authority

Clause 6 Provision of advice, support and assistance by the TRA

Clause 5 establishes a new non-departmental public body, the Trade Remedies Authority. Clause 6 sets out further details in terms of what the TRA can do, which include provision of advice, support and assistance to the UK Government in connection with trade remedies, international trade disputes and trade related matters generally. The TRA may otherwise provide such support and assistance as it considers appropriate in relation to international trade and trade remedies. The Taxation (Cross-Border Trade) Act 2018 sets the framework for how trade remedies are to be administered and managed.

Part 2 and the functions of the Trade Remedies Authority are reserved by a number of reservations, including the regulation of international trade, taxation, and in some respects import controls.

Schedule 4 sets out further provision on the composition and governance of the TRA and schedule 5 contains provisions enabling the Secretary of State to create staff transfer schemes in connection with the establishment of the TRA.

The Scottish Government maintains its position that the TRA ought to include a member, whose appointment is endorsed by the Scottish Ministers, on the basis of having demonstrated in depth understanding of Scotland's often differing trade and economic interests and the capacity to evaluate these within a local and national

context in the course of decision making. The Scottish Government will press for such provision to be made in the Bill.

Additionally, the UK Government has made a range of **non-legislative** commitments in relation to the Trade Remedies Authority (TRA), which the Scottish Government would expect to see restated.

Part 3

Trade Information

- Clause 7** **Collection of exporter information by HMRC**
- Clause 8** **Disclosure of information by HMRC**
- Clause 9** **Disclosure of information by other authorities**
- Clause 10** **Offences relating to disclosure under section 9**

These clauses create powers in relation to data sharing and collection.

These powers conferred on HMRC relate to the reserved matter of the regulation of international trade.

Part 4

General

- Clause 11** **Interpretation**
- Clause 12** **Extent**
- Clause 13** **Commencement**
- Clause 14** **Short title**

Schedule 1 **Restrictions on Devolved Authorities**

Schedule 2 **Regulations under Part 1**

Part 1: Statutory Instruments and statutory rules

Part 2: Scrutiny of Regulations under sections 1(1)

Part 3: Scrutiny of Regulations under section 2(1)

Part 4: Scrutiny of Regulations under section 2(7)(b)

Schedule 3 **Exceptions to restrictions in the devolution settlements**

This schedule makes further modifications to the test of devolved competence for devolved authorities. The amendments to section 57 of the Scotland Act 1998 (as amended by the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020) make clear that the constraint on modification of retained EU law in section 57 does not apply when making regulations under clauses 1 and 2 of the Bill.

Schedule 4 **The Trade Remedies Authority**

Schedule 5 **Transfer Schemes**

CLAUSES FOR WHICH LEGISLATIVE CONSENT IS REQUIRED

Provision	Effect
Part 1 (Clauses 1-4)	Provides powers for UK and Scottish Ministers to implement the Agreement on Government Procurement and qualifying International Trade Agreements
Part 3 (Clause 9)	Provides powers for certain public bodies to disclose information for the purpose of facilitating the exercise by a Minister of the Crown of the Minister's functions relating to trade.
Schedules 1-3	Establishes and constrains 'devolved competence' for the purpose of the exercise of the powers set out in Part 1 of the Bill

This Legislative Consent Memorandum relates to the Trade Bill (UK legislation) and was lodged with the Scottish Parliament on 18 August 2020

TRADE BILL – LEGISLATIVE CONSENT MEMORANDUM

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