

TRADE BILL

DELEGATED POWERS – MEMORANDUM BY THE DEPARTMENT FOR INTERNATIONAL TRADE

A. Introduction

1. This Memorandum has been prepared by the Department for International Trade (the Department) for the Delegated Powers and Regulatory Reform Committee to assist the Committee with its scrutiny of the Trade Bill (the Bill). It reflects the Bill as brought from the House of Commons on 18 July 2018. This Memorandum identifies the provisions of the Bill that confer powers to make delegated legislation, and explains in each case why the power has been taken and the reason for the procedure selected.
2. The Bill contains seven individual provisions containing delegated powers. Two of these, Clauses 2(1) and 10(3), include a Henry VIII power.
3. The Department has considered the use of powers in the Bill as set out below and is satisfied that they are necessary and justified.

B. Overview of the Bill

Part 1: Implementation of International Trade Agreements

4. The UK requires powers to legislate to implement the provisions of the Agreement on Government Procurement (GPA) as an independent member and to make changes in domestic legislation to reflect both the accession of new parties to the GPA and the withdrawal of existing parties. The UK also requires a power to implement any modifications to the list of central government entities in Annex 1 to the UK's Appendix I to the GPA to be used after the UK has acceded to the GPA, in order to reflect changes to that list, for example as a result of machinery of government changes or entities ceasing to exist.
5. The EU currently also has a number of trade agreements with partner countries which the UK proposes to adopt as new UK-partner country

agreements on leaving the EU. Implementation in domestic UK law may be required for various reasons, for example because the EU has signed, but not implemented, such an agreement, or because amendments are required to make the agreements work outside of an EU context. In addition, changes may be necessary to ensure the agreements remain operable over time. The Government requires a power to change UK law should that be necessary to implement the agreements.

6. The power to implement trade agreements with partner countries is subject to sunset three years after exit day, but the Government can delay the sunset with the approval of both Houses.
7. The Government will lay reports in both Houses of Parliament, before ratification of any free trade agreements with the EU's pre-exit day free trade agreement partners, or before any regulations under Clause 2(1) implementing such free trade agreements are laid, to set out and explain any significant changes to the new UK-partner country agreements when compared with the original EU-partner country agreements.

Part 2: The Trade Remedies Authority

8. The Bill establishes a new independent body, the Trade Remedies Authority (TRA), to discharge functions in relation to trade remedy cases and to assist in the conduct of international trade disputes.¹

Part 3: Trade Information

9. Regulations will be used to specify the types of information that may be requested in order to assist the Secretary of State to establish the number and identity of persons exporting goods and services from the UK in a professional or business capacity and, how the request for this information can be made.

¹ Functions relating to trade remedies cases will be conferred on the TRA by provisions in the Taxation (Cross-Border Trade) Bill.

10. The Bill also provides for the sharing of trade-related information by HM Revenue and Customs in order for the Government to undertake the functions currently undertaken by the European Commission on behalf of the UK. HMRC will be able to share data with public and private bodies carrying out public functions for the purposes of trade.

Part 4: General

11. Regulations will be used to commence the substantive provisions of the Bill. These regulations may also make transitional, transitory or saving provision.

General justification for delegated powers

12. In respect of the GPA, UK businesses currently benefit from guaranteed access through the GPA to global government procurement opportunities estimated as collectively worth over £1.3 trillion each year. The delegated powers in respect of the GPA will help the UK ensure that this position can be maintained beyond exit day.

13. The UK needs to establish UK trade agreements which ensure continuity in our existing trading relationships as we leave the EU and are no longer party to EU trade agreements. These agreements will have to be established in UK law by the time the UK leaves the EU. The delegated powers in respect of the implementation of trade agreements will support that effort.

14. The delegated powers in relation to collection and sharing of trade information will facilitate the effective establishment of the UK's new independent trade policy.

Devolution

15. The devolved authorities will only be able to make regulations under Clause 1(1) (implementation of the GPA) and Clause 2(1) (implementation of international trade agreements) within their areas of devolved competence. The Government will not normally use the power to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved authority.

C. Analysis of Delegated Powers by Clause

Power to make regulations to implement the GPA (Clauses 1(1)(a) and (b) and 7)

Power conferred on: Appropriate authorities

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

16. The original GPA was negotiated and agreed in 1994 (the 1994 Agreement) following negotiations between likeminded countries to bring public procurement into the field of international trade. It entered into force on 1 January 1996. Subsequent negotiations between the Parties took place and a revised version of the GPA (the revised GPA) was adopted on 30 March 2012 and entered into force on 6 April 2014 by means of the Protocol Amending the Agreement on Government Procurement (the 2012 Protocol). In this memorandum the 1994 Agreement and the revised GPA are collectively referred to as the GPA.

17. Since the GPA's formation, the UK has participated in the GPA by virtue of its EU membership. The GPA is one of the plurilateral agreements within the framework of the World Trade Organisation² (WTO), which means that joining is voluntary for WTO members (unlike a multilateral agreement, which is binding on all WTO members). It provides a framework of substantive and procedural rules, which provide for greater liberalisation in the field of public procurement. Through the GPA, UK businesses have guaranteed access to global government procurement opportunities that are estimated as collectively worth over £1.3 trillion each year. The GPA also ensures that businesses can compete for those public contracts without fear of discrimination. For UK contracting authorities, the GPA provides increased value for money through international competition for procurement contracts, where appropriate.

² See Annex 4 to the Agreement establishing the WTO (the Marrakesh Agreement).

18. The UK's obligations under the GPA are currently given effect in secondary legislation. This includes the public procurement regulations for England, Wales and Northern Ireland: the Public Contracts Regulations 2015 ("PCR³"), the Concession Contracts Regulations 2016 ("CCR⁴") and the Utilities Contracts Regulations 2016 ("UCR⁵"). It also includes Scottish procurement regulations, namely the Public Contracts (Scotland) Regulations 2015⁶, the Utilities Contracts (Scotland) Regulations 2016⁷ and the Concession Contracts (Scotland) Regulations 2016⁸. These implement EU procurement Directives 2014/24/EU, 2014/23/EU, and 2014/25/EU respectively.
19. Unless the UK becomes a member of the GPA in its own right it will exit the GPA when it leaves the EU. The UK needs to ensure that it has achieved independent membership of the GPA by the time it leaves the EU to avoid a cliff edge in market access for UK businesses. If the UK does not obtain that independent membership, UK businesses would not have guaranteed access to the procurement opportunities for which they currently can compete.
20. The powers in Clause 1(1)(a) and (b) are therefore needed to ensure that the UK can legislate to implement any obligations arising from the UK becoming a GPA member in its own right. Those powers will be used to make regulations implementing either the 1994 Agreement or the revised GPA or both. This is because the 1994 Agreement remains in existence until all GPA Parties which were members of the 1994 Agreement before the adoption of the 2012 Protocol have adopted the revised GPA through their acceptance of that protocol. Currently Switzerland is the only remaining GPA Party yet to adopt the revised GPA. As a result, Parties are required to join both the 1994 Agreement and the revised GPA in order to ensure mutual access with the Swiss GPA market.
21. It should be noted that the actual decision for the UK to become an independent member of the GPA will be subject to the procedures of the Constitutional

³ SI 2015/102.

⁴ SI 2016/273.

⁵ SI 2016/274.

⁶ SSI 2015/446.

⁷ SSI 2016/49.

⁸ SSI 2016/65, amended by SSI 2016/125.

Reform and Governance Act 2010 (CRaG Act)⁹, which requires treaties to be laid before Parliament before they can be ratified. This process will allow Parliament to scrutinise the terms of the UK's membership and decide whether the UK should become an independent member.

22. Clause 7(1) provides that regulations made under Clause 1(1) may make different provision for different purposes or areas; general or specific provision; incidental, supplementary and consequential provision; and transitional, transitory or saving provision. This clarifies the scope of the power in Clause 1(1)(a) and (b).

Justification for delegation

23. Clause 1(1)(a) and (b) will give the UK the power to make the legislative provision required to implement the GPA as an independent member. Before the power can be used the UK must join the GPA as an independent member. To join the GPA as an independent member, the UK will need to seek Parliament's approval in accordance with procedures set out in the CRaG Act. This process will provide Parliament with control and scrutiny over whether the UK becomes an independent member of the GPA. The UK Parliament has previously scrutinised changes to the GPA, for example through the European Scrutiny Committee.

24. If Parliament agrees to independent membership of the GPA, the power in Clause 1(1)(a) and (b) will allow the UK quickly to take forward any amendments required to its procurement regulations.

25. As explained above, the UK currently provides for its GPA obligations in the PCR, UCR, CCR and Scottish equivalent regulations. The powers in the European Union (Withdrawal) Act 2018¹⁰ will allow the UK to fix any deficiencies arising out of its exit from the EU. However, what is required in relation to the GPA is a power to legislate to reflect any changes needed as a result of the process whereby the UK becomes an independent member of the GPA. The

⁹ <https://www.legislation.gov.uk/ukpga/2010/25/contents>.

¹⁰ <http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted/data.htm>

GPA power in Clause 1(1)(a) and (b) might be required simply to amend existing procurement regulations, for example to update these regulations to take account of the UK's independent membership, or alternatively to capture changes in the UK's commitments relative to those currently in the UK's part of the EU offer. For example, this could reflect machinery of Government changes.

26. The UK will need to satisfy the GPA parties during its discussions on independent membership that legislation will be in place that will comply with the commitments under the Agreement. GPA parties will be familiar with the UK's procurement regulations and will want to scrutinise the proposed legislative changes to be satisfied they adequately reflect the UK's independent status.
27. The UK will need to have GPA compliant legislation in place and ready to come into force before it can deposit its instrument of GPA accession. Once a party deposits its instrument of accession, the GPA imposes a 30 day waiting period after which time the Agreement enters into force for that party. This means that once the UK has deposited its instrument of accession and this 30 day period has ended, the UK will have an immediate duty to comply with the commitments and obligations under the GPA. Without the power in Clause 1(1)(a) and (b), when the UK leaves the EU and is no longer covered by the EU's GPA Annexes, the UK would not be able to respond quickly to make legislation to implement the GPA as an independent member with its own GPA Annexes.
28. If the legislative changes needed to reflect the UK's status as an independent GPA member had to be made via primary legislation, this could take much longer. It could create a significant delay before the UK could deposit its instrument of accession and be ready to comply with its commitments and obligations. This would be likely to mean that UK businesses would be denied, for some time, their existing guaranteed access to over £1.3 trillion each year of procurement opportunities through the GPA public procurement markets.
29. There is precedent for taking a delegated power to implement an international agreement that the UK has agreed to join. The Intellectual Property Act 2014 contains a power that allows the Secretary of State to make provision by

secondary legislation giving effect in the UK to the provisions of the Geneva Act of the Hague Agreement, providing the necessary legislative framework for acceding to that Agreement¹¹.

30. There is also precedent for using a delegated power to provide for the UK's GPA obligations, as these are presently contained in secondary legislation through the PCR, UCR, CCR and Scottish equivalent regulations. Having a delegated power is also appropriate given the power to implement the GPA could be used to amend this existing secondary legislation to make the changes required.
31. Clause 1(3) makes clear that the power under Clause 1(1) can be used to make secondary legislation modifying "retained direct EU legislation". This term is defined in Schedule 1 to the Interpretation Act 1978 (as amended by paragraph 22 of Schedule 8 to the European Union (Withdrawal) Act 2018) by reference to relevant provisions of the European Union (Withdrawal) Act 2018. Section 7 of that Act treats retained direct EU legislation, and rights preserved under section 4 of the Act, as having the same status as primary legislation.. Because the European Union (Withdrawal) Act introduces this new category of "legislation" and gives it equivalent status to primary legislation, Clause 1(3) is required to provide clarification that the powers in Clause 1(1) can be used to modify such legislation.

Justification for procedure selected

32. As explained above, Parliament will, through the CRaG Act procedures, scrutinise whether the UK should join the GPA and decide whether to approve the UK joining the GPA and the terms on which it would join. If Parliament agrees that the UK should join the GPA, the Government will need a mechanism to implement the legislative changes required to reflect joining the GPA as an independent member. The UK needs to be able to use this mechanism without delay. Any delays in the process will impact significantly on UK businesses that presently benefit from guaranteed access to over £1.3

¹¹ <http://www.legislation.gov.uk/ukpga/2014/18/section/8/enacted>.

trillion each year of procurement opportunities in the GPA market through the UK's membership of the EU.

33. Making the delegated power subject to the negative resolution procedure allows the UK to respond quickly once Parliamentary scrutiny through the CRaG Act procedures has taken place. This will ensure that UK businesses can maintain the significant economic benefits of GPA membership on which they currently rely, without delay.

34. The UK has implemented its existing GPA obligations through procurement regulations (the PCR, UCR, CCR and Scottish equivalent regulations). Those regulations were themselves made using the negative resolution procedure and the UK is likely to exercise the power to implement the GPA by amending these existing regulations.

35. For these reasons it is considered appropriate that the negative resolution procedure should apply to this delegated power.

Power to make regulations to reflect the accession of a party to or a withdrawal of a party from the GPA (Clauses 1(1)(c) and (d) and 7)

Power conferred on: Appropriate authorities

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

36. As described above, the UK gives effect to its GPA obligations in secondary legislation. This includes the public procurement regulations listed in paragraph 18 above.

37. The Government requires a power to allow the UK to make regulations to reflect parties that are joining, or withdrawing from, the GPA. This power is provided for in Clause 1(1)(c) and (d). The Government intends to use this power to amend existing procurement regulations to take account of changes in GPA parties; this might take the form of updating a list of GPA Parties. Amendments to the regulations would be limited in scope to those provided for under the following Articles:-

- Article XXIV:2 (1994 Agreement) and Article XXII:2 (revised GPA), which provide for the accession of other WTO members to the GPA;
- Article XXIV:10 (1994 Agreement) and Article XXII:12 (revised GPA), which provide for the withdrawal of any Party from the GPA either through notification, or automatically if that party ceases to be a member of the WTO.

38. Clause 7(1) provides that regulations made under Clause 1(1) may make different provision for different purposes or areas; general or specific provision; incidental, supplementary and consequential provision; and transitional, transitory or saving provision. This clarifies the scope of the power in Clause 1(1)(c) and (d).

Justification for delegation

39. Existing UK procurement legislation requires contracting authorities and utilities to give no less favourable treatment to the works, services, supplies and economic operators of the signatories to the GPA than they give to the works, supplies, services and economic operators of the EU. The PCR, UCR, CCR and equivalent Scottish regulations also place an express duty on contracting authorities and utilities to comply with any obligations contained in those regulations in respect of economic operators from GPA States.
40. If the UK joins the GPA as an independent member and implements the GPA in regulations, it will need a power to amend those regulations to reflect new parties acceding to the GPA. This is because GPA parties must provide guaranteed market access to suppliers from new GPA parties on a non-discriminatory basis, and when a new party joins the UK will be under an obligation to provide their suppliers with the right to access the UK's procurement remedies regime if required.
41. The UK will also need a power to deal with the situation where existing parties withdraw from the GPA. Here the UK will need to amend its procurement regulations to ensure it no longer gives suppliers from a withdrawing party guaranteed access to procurement opportunities in the UK's public procurement markets.

42. A delegated power will allow the UK to respond promptly to changes in GPA membership. In the case of parties joining the GPA, once a party deposits its instrument of accession there is a 30 day period before the accession comes into force and before the new party becomes a member of the GPA. After the new party has deposited its instrument and the 30 days have ended, as a GPA member, the UK must allow the acceding party guaranteed access, in accordance with the terms of the GPA, to the UK's public procurement markets. If the UK failed to provide that party with guaranteed access after the 30 day period, the UK would be in breach of its GPA commitments.
43. Withdrawals take place 60 days from the withdrawing party notifying the WTO Director-General of its intention to withdraw from the GPA. If the UK failed to amend its regulations by the 60 day point, the UK would be giving access to suppliers from the withdrawing party that that party was not entitled to receive and which was not reciprocated to the UK. If a party left the WTO, it would automatically leave the GPA on the same day, meaning the timescales in which the UK would need to amend its regulations to respond would be even shorter. A delegated power allows the UK to respond promptly where a party leaves the GPA.
44. New accessions to the GPA occur frequently. Four accessions have taken place since 2015 (Montenegro, Moldova, New Zealand and Ukraine). Australia's accession is expected shortly and that of the Kyrgyz Republic and Tajikistan are at an advanced stage. An additional seven WTO members are in the process of conducting accession negotiations, and a further five members have undertaken commitments in their WTO accession protocols to accede to the GPA. If primary legislation was required each time the UK needed to amend its procurement regulations to reflect a new party joining, a significant amount of Parliamentary time would be required. The Government considers a delegated power is appropriate given the requirement for the UK to amend its procurement regulations to take account of a new party's accession within 30 days after that party has deposited its instrument of accession. A new party may decide to deposit its instrument without delay following agreement within the GPA Committee on the terms of accession. Equally, a delegated power will mean the UK can amend its procurement

regulations so that a withdrawing party is removed by the sixtieth day after it withdraws from the GPA, or earlier if a party withdraws from the WTO.

45. A delegated power is also considered appropriate given the power in Clause 1(1)(c) and (d) is intended to be used to amend secondary legislation that implements the UK's GPA obligations. It takes account of the fact the power is given for the narrow purpose of reflecting new accessions and departures from the GPA.

Justification for procedure selected

46. The negative resolution procedure will allow the UK to amend its legislation quickly to reflect new accessions and withdrawals, recognising the need for the UK to meet set timescales expressly provided for by the terms of the GPA. Those timescales are triggered by the party joining or withdrawing from the GPA and the UK will need to be in a position to respond to them without delay.

47. The power in Clause 1(1)(c) and (d) will be used to amend secondary legislation that implements the UK's GPA obligations. The Government considers it appropriate to use the negative resolution procedure to provide a power that will be used to amend secondary legislation for the narrow purpose of adding new GPA parties or removing existing ones.

48. Using the negative resolution procedure for this power is also consistent with the fact that the UK's current implementation of its GPA obligations is by regulations (the PCR, UCR, CCR and Scottish equivalent regulations) which were themselves made using the negative resolution procedure.

Power to implement modifications to the list of central government entities in Annex 1 to the UK's Appendix I to the GPA (Clause 1(1)(e) and (f) and Clause 7)

Power conferred on: Appropriate authorities

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

49. As described above, the UK gives effect to its GPA obligations in secondary legislation. This includes the public procurement regulations listed in paragraph 18 above.
50. The UK's existing coverage is set out in the EU's Appendix I to the GPA. The UK wants to accede to the GPA as quickly as possible, to avoid UK businesses losing guaranteed access to international procurement markets. The UK therefore intends to replicate that existing coverage in the UK's new independent Appendix I for the purpose of accession. However, after accession, the UK will want to amend Annex 1 to its Appendix I to update the UK's list of central government entities. This list is currently out of date and does not reflect recent changes to central government entities, for example, changes caused by machinery of government changes where one body's functions are transferred to another body or where a body has changed its name or ceased to exist.
51. The UK requires a power to make regulations to reflect the modifications made to Annex 1 to Appendix I to the GPA. This power will be used to reflect updates to be made after the UK becomes an independent member of the GPA. Clause 1(1)(e) provides this power in relation to the UK's implementation of the 1994 GPA, which applies in relation to Switzerland. Clause 1(1)(f) provides this power in relation to the UK's implementation of the revised GPA, which will apply to GPA parties other than Switzerland. The Government intends to use this power to amend existing procurement regulations to take account of the updates made to its Annex 1.

Justification for delegation

52. The UK's existing participation in the GPA is given effect through secondary legislation, as listed in paragraph 18 above. Under Clause 1(1)(a) and (b), the UK will implement its independent membership of the GPA using secondary legislation. It is therefore appropriate for the UK to have a delegated power to be able to amend that implementation to reflect updates made to the UK's list of central government entities in Annex 1 of Appendix I to the GPA. Having a delegated power also takes account of the fact the power is only intended to

be used for the narrow purpose of reflecting technical updates to the list of central government entities in the UK's Annex 1.

Justification for procedure selected

53. The delegated power in Clause 1(1)(e) and (f) is a narrow power, limited to modifying the list of central government entities in Annex 1 of the UK's Appendix I to the GPA. The power is only intended to be used to reflect technical changes made to central government entities, for example, to reflect transfer of functions following machinery of government changes, where a body ceases to exist or where a body has been given a new name. For these reasons, the Government considers it appropriate to use the negative resolution procedure in relation to the delegated power in Clause 1(1)(e) and (f).

54. Using the negative resolution procedure for this power is also consistent with the fact that the UK's current implementation of its GPA obligations is by regulations (the PCR, UCR, CCR and Scottish equivalent regulations) which were themselves made using the negative resolution procedure.

Power to make regulations to implement international agreements (Clause 2(1) and 7)

Powers conferred on: Appropriate authorities

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

55. At the point of EU Exit, the Government plans to adopt existing trade agreements between the EU and partner countries as new UK-partner country agreements. The Government will achieve this working with these partner countries with the central aim of maintaining, as far as possible, the status quo for UK businesses, workers and consumers.

56. Although the intention is to keep these trade agreements substantively the same or as similar as possible to the current EU-partner agreements, they will, nevertheless, be legally distinct. There will be textual changes to current agreements that ensure future operability and, potentially, consolidation of agreements. The power is broad enough to allow implementation of substantial amendments, including new obligations.

57. The power will be used in relation to provisions of the relevant trade agreements which:

1) may need to be changed as a result of the UK's discussions with partner countries in order to maintain, as far as possible, the overall effects of the current EU-partner country agreements, or

2) have not yet been fully implemented by the EU by exit day.

Neither of these circumstances are catered for in the European Union (Withdrawal) Act 2018.

58. The power will not be required if the relevant UK-partner country trade agreement has already been completely implemented in the UK, for example through EU law which, at exit, becomes retained EU law under the European Union (Withdrawal) Act 2018. The power specifically excludes provision that could be made under regulations under Clause 9 of the Taxation (Cross-Border Trade) Bill, which allows the setting of preferential duties pursuant to international arrangements. Provisions on tariffs can be implemented through the exercise of powers under that Bill; this power is to deal with other matters.

59. The power in Clause 2(1) will also ensure that those trade agreements that are transitioned as part of this process remain operable going forward, until the power is subject to sunset. While the European Union (Withdrawal) Act 2018 will be able to fix any deficiencies in retained EU law that exist on exit day, it will not deal with subsequent changes to domestic frameworks or changes needed in consequence of decisions made by the joint committees of the parties under the agreements.

60. This power may be required for transitioning obligations under existing agreements and maintaining the status quo, for example in relation to the transitioning of existing Mutual Recognition Agreements. Mutual Recognition Agreements provide a legal framework to allow states to recognise tests and documents issued by expert bodies in certain other states. This means that where the UK has these arrangements in place and the law requires the safety of a product to be tested: a) imported goods do not need to be tested again in the UK before they are sold here if they have already been tested in the exporting state; and b) UK exporters do not need to submit their goods to further sets of tests before they can be sold overseas. Specifically, in this example, the power may be used to amend the definitions of expert bodies in various pieces of UK secondary legislation so that they include expert bodies from any countries that the UK has transitioned a mutual recognition agreement with. This is important to ensure that there is certainty for importing and exporting businesses.
61. This power will allow for delegation of functions and for civil penalties to be established. The power will need to encompass such matters because the Secretary of State may need to delegate functions previously performed by EU institutions or employees to specified persons and to provide for enforcement. The power will not allow for the amendment of primary legislation except to the extent that it will allow for the amendment of retained EU law. Primary legislation which implements EU law will be retained EU law. As retained EU law is defined in the European Union (Withdrawal) Act 2018 to include retained EU law as added to or modified under that Act or other domestic law from time to time, after exit day further primary legislation could come within the scope of retained EU law. Therefore the power would allow for the amendment of primary legislation to the extent that that primary legislation is retained EU law. It also allows for the amendment of retained direct EU legislation, as that term is defined in the European Union (Withdrawal) Act 2018.
62. The power will not allow for the establishment of new criminal offences or extension of existing ones, or for the charging of fees. It specifically provides that it cannot be used for the further delegation of legislative powers. It also

would not allow for the implementation of any agreement to which the EU is a party, so it could not be used to implement (for example) the GPA.

63. Clause 7(3) provides that regulations made under Clause 2 may make different provision for different purposes or areas; general or specific provision; incidental, supplementary and consequential provision; and transitional, transitory or saving provision. This clarifies the scope of the power in Clause 2.

Justification for delegation

64. The process of transitioning EU-partner country trade agreements into UK-partner country trade agreements is uncharted territory, and the Government is seeking to manage this uncertainty in the most proactive way possible. The Government seeks this delegated power for reasons of flexibility, transparency and efficiency.

65. As an EU member, the UK currently benefits from many trade agreements with partner countries. Including annexes, these may run to hundreds of pages, and sometimes to more than a thousand pages. To ensure that consistency in the effects of these agreements is maintained after our exit from the EU, the UK requires a mechanism capable of implementing a potentially broad variety of non-tariff obligations into UK law. Since this makes it difficult to predict where such changes will emerge, it has been necessary to design a mechanism that offers the ability to mitigate this uncertainty. As a result, the scope of the powers has been drawn widely. Though these agreements should in most cases already have been substantially implemented by the EU (and so already brought into UK law), the UK cannot be certain that all changes it needs to make to the replacement agreements will have been implemented in the UK, or that the EU will have done all it needed to do to implement all the original agreements by exit day (for example in the case of an agreement signed by the EU shortly before exit day).

66. This power has two separate legislative functions. First, it allows for the implementation of obligations flowing from what the Government refers to as

“continuity” trade agreements, as part of the process of leaving the EU. These are the new agreements the UK will be making with partner countries, basing them as closely as possible on the trade agreements each country has with the EU. Second, it ensures that these trade agreements remain operable going forward, until the power is subject to sunset, by subsequently implementing adjustments to obligations that emerge after the UK has left the EU. By offering a single legislative vehicle to implement both types of changes, this power helps the Government avoid a ‘piecemeal’ approach to continuity, thereby ensuring a greater level of transparency throughout the process.

67. Finally, to transition existing EU-partner country trade agreements into UK-partner country agreements the UK needs the cooperation and agreement of those partner countries. This power will allow us to reassure our trading partners that we have the necessary legislative framework in place to deliver this efficiently within the short time we have available before day one of our EU exit. Failure to legislate for and then implement obligations within this timescale would risk damaging the UK’s credibility on the international stage, and may provoke concern from potential trade partners that the UK will be unable to deliver on our trading commitments.

Constraints

68. The Government has sought to constrain this power as much as possible to reassure Parliament that it cannot use this power beyond what is necessary to ensure a seamless transition of the agreements in scope. Namely, that it will not be used to assist with the implementation of *new* free trade agreements with *new* partner countries. The Government will bring forward separate plans in relation to such agreements.

69. The power in Clause 2(1) is limited to the implementation of provisions of international trade agreements where the other signatory to the agreement (or each of the other signatories if more than one) is a country that was, immediately before exit day, also a signatory to an international trade agreement with the EU. The power will not allow the implementation of a free trade agreement where there was not a corresponding free trade agreement

signed by the EU. A “free trade agreement”, in the Trade Bill’s terms, is one of the agreements triggering notification requirements to the WTO under the General Agreement on Tariffs and Trade (GATT) or the General Agreement on Trade in Services (GATS), which liberalise substantially all trade between the parties in relevant sectors as set out in GATT or GATS. Because of the way Clause 2 is framed, the power will not allow implementation of any future agreement between the UK and the EU nor any agreement that includes the EU as a signatory.

70. This power will be subjected to a time limit of three years commencing on exit day. Since the power may be required beyond the three year expiry date, the Government is seeking the option to extend this period, for future periods of up to three years, subject to the approval of both Houses.

71. This power will not allow for domestic legislation to keep pace with the original EU-partner country trade agreements which have been transitioned, should those be amended by the EU after the point at which the UK has left the EU. However, it will allow UK legislation to keep pace, until the power is subject to sunset, with changes arising from any review or amendment mechanisms that the UK itself agrees to in a UK-partner country agreement.

72. The power is also subject to a reporting obligation when it is used to implement a free trade agreement. Under Clause 5(2) a Minister of the Crown wishing to make regulations for the purpose of implementing a free trade agreement must lay reports in both Houses of Parliament 10 Commons sitting days before laying the regulations. The reports must cover any significant changes in the trade-related provisions of an agreement when compared with the relevant EU agreement existing immediately prior to exit day, and give the reasons for such changes. A similar obligation applies before a free trade agreement with one of the EU’s pre-exit free trade agreement partners may be ratified.¹² The pre-ratification report laying

¹² Clause 4 provides for reports to be laid as soon as practicable after ratification in exceptional cases where a Minister of the Crown is of the opinion that the report needs to be ratified without the prior laying of a report.

obligation does not apply if a report has already been laid pursuant to the pre-regulation-laying obligation, and vice versa.

Justification for procedure selected

73. The Department considers that this power requires the affirmative resolution procedure. It will allow the implementation of obligations that are intended to, as far as possible, reflect existing obligations which form part of trade agreements between the EU and partner countries. Those agreements have already been through a domestic Parliamentary scrutiny process, but given the potential changes the regulations can make, including the ability to amend primary legislation that is retained EU law, and retained direct EU legislation, the Department considers that the affirmative resolution procedure offers the appropriate level of further scrutiny for the regulations.

Power to provide that the power to make regulations to implement international trade agreements does not expire after three years (Clause 2(7)(b))

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

74. Under Clause 2(7)(a) the power to make regulations under Clause 2(1) expires three years after exit day. Clause 2(7)(b) creates a power to delay that expiry and to allow the power to continue in force for periods of up to three years at a time. The provision to delay the expiry of the Clause 2(1) power allows the Government, with Parliament's approval, to extend the clause should it be useful.

Justification for delegation

75. A sunset clause without provision for extension would mean that only new primary legislation could prevent the expiry of the power in Clause 2(1). Delegating the power to defer the sunset of the provision will allow greater

flexibility in keeping agreements operable after their initial implementation, and in dealing with any agreements or provisions that take longer than anticipated to transition.

Justification for procedure chosen

76. It is considered that the affirmative resolution procedure is appropriate for this power, to ensure that there will be a debate in both Houses.

Power to specify by regulations the type of export information that may be requested and how the information may be requested (Clause 11(3))

Power conferred on: HM Treasury

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution (where amending or repealing an Act of Parliament) otherwise Negative resolution

Context and purpose

77. This power enables the Treasury to specify by regulations the type of export information which may be requested and how it may be requested. The power will allow HMRC to request information from any person which will assist the Secretary of State to assess the number of persons exporting goods and services from the UK in the course of their trade, business or profession. That information will allow the Secretary of State to carry out functions linked to the provision of trade statistics and export trade promotion. The information will be requested on a voluntary basis.

Justification for delegation and for procedure chosen

78. The power in Clause 11(3) is a new function delegated to HM Revenue and Customs. It will allow the Treasury to make regulations determining what information is required and how that information is to be collected to reflect the detailed policy underpinning the clause.

79. The power can be used to amend primary legislation, such as the tax Acts, where that is necessary to provide the mechanism to collect the required

information. In such cases, the use of the power will be subject to the affirmative resolution procedure. In other cases it will be subject to the negative resolution procedure.

80. The details of the information being requested and how it is collected are administrative in nature. The details of the actual questions associated with the collection of the data are procedural matters which are administrative in nature and secondary to delivery of the policy as a whole and therefore, in the view of the Department, appropriate to secondary legislation.

81. The information will be requested on a voluntary basis, so there is no imposition on UK businesses of a requirement to provide the information. This will be made clear in the instruments made under this power.

Power to make transitional, transitory or savings provisions (Clause 15(2))

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: None

Context and purpose

82. This power enables the Secretary of State to make transitional, transitory or savings provisions in regulations commencing the provisions of the Bill.

Justification for delegation

83. This power allows commencement regulations to make such provision as is necessary in relation to:

1. the application of existing enactments affected by the commencement of the provisions of this Bill;
2. the coming into effect of provisions in the Bill with modifications for a limited period; and
3. the saving of existing enactments repealed by provisions in the Bill for limited purposes.

84. The power ensures that the Secretary of State can provide a smooth commencement of new legislation and transition between existing legislation

and the Bill, without creating any undue difficulty or unfairness in making these changes. There are numerous precedents for such a power, for example in section 100 of the Enterprise and Regulatory Reform Act 2013,¹³ section 160 of the Small Business, Enterprise and Employment Act 2015¹⁴ and section 23(6) of the European Union (Withdrawal) Act 2018.

Justification for procedure chosen

85. The Department considers that the power need not be subject to any Parliamentary procedure as the power is just to ensure a smooth transition between existing law and the Bill. This is consistent with numerous precedents, including those cited above.

Department for International Trade

19 July 2018

¹³ <http://www.legislation.gov.uk/ukpga/2013/24/section/100/enacted>.

¹⁴ <http://www.legislation.gov.uk/ukpga/2015/26/section/160/enacted>.