

TRADE BILL

DELEGATED POWERS – MEMORANDUM BY THE DEPARTMENT FOR INTERNATIONAL TRADE

A. Introduction

1. This Memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Trade Bill (“the Bill”) published on 19 March 2020. The Memorandum has been prepared by the Department for International Trade (“the Department”). 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 nature of, and the reason for, the procedure selected.

2. The Bill contains several provisions containing delegated powers. The power in clause 1 (in relation to the WTO Agreement on Government Procurement (GPA)) contains power to amend retained direct principal EU legislation, and the power in clause 2 (implementation of international trade agreements) contains power to amend retained direct principal EU legislation or primary legislation that is retained EU law.

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 Bill provides powers to give effect to the UK’s obligations under the GPA, once it becomes an independent member of the GPA. The Bill also provides powers to make regulations in consequence of specific and narrowly drawn circumstances that may occur once the UK is an independent member of the GPA: where a party accedes to or withdraws from the GPA; where changes are made to the UK’s list of central government entities set out in Annex 1 of Appendix I to the

GPA, which the UK has committed to update within three months of the GPA coming into force for the UK; where other parties make changes to their Appendix I to the GPA which require implementation in UK domestic law; and where a dispute arises between the UK and another GPA party, to allow the UK to suspend concessions or other obligations under the GPA where the other GPA party fails to bring itself into compliance or offer mutually acceptable non-financial compensation if the UK wishes to settle or is not able to bring itself into compliance sufficiently quickly.

5. The Bill also provides powers to allow for the implementation of international trade agreements that the UK signs with countries that the EU had signed an international trade agreement with before 31 January 2020. These may be required for various reasons, for example because the agreement that the EU had signed (and which the UK is now transitioning), requires amendments to domestic law to make the agreements work outside an EU context. In addition, changes may be necessary to ensure the agreements remain operable over time. A power is required to change domestic law should that be necessary to implement the agreements, including power to suspend concessions or other obligations where a dispute arises and the partner country fails to bring itself into compliance or increase concessions should the UK wish to offer compensation.

6. The power to implement international trade agreements with partner countries is subject to sunset five years from the date of exit. This sunset can be extended with the agreement of both Houses of Parliament for further periods of a maximum of five years at a time.

Part 2: The Trade Remedies Authority

7. 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.

Part 3: Trade Information

8. 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. The Bill also provides for the sharing of trade-related information by HM Revenue and Customs.

9. Regulations will be used to amend the list of public authorities who can disclose information for the purpose of facilitating the exercise by a Minister of the Crown of the Minister's functions relating to trade.

Part 4: General

9. 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

10. When the UK was a member state of the EU, the UK participated in the GPA through its EU membership, providing UK businesses with guaranteed access to government procurements in GPA parties' territories, estimated to be worth over £1.3 trillion each year. During the transition period, the UK continues to be covered by the GPA and will accede to the GPA as an independent member at the end of the transition period. The new delegated powers in respect of the GPA will enable the making of regulations to ensure the UK fulfils its obligations as an independent member of the GPA and to implement changes to domestic law arising from a limited range of circumstances once the UK is an independent member. These circumstances are restricted to future events where legislative flexibility will be needed to implement changes to domestic law but which are not sufficiently serious to justify the use of Parliamentary time inherent in a Bill.

11. At the end of the transition period, EU law, including EU-third party trade agreements, will no longer apply to the UK. The UK must establish UK trade agreements to ensure continuity in our existing trading relationships. The powers set out in clause 2 will allow a Minister of the Crown and, where appropriate, the devolved authorities to make provision in regulations, where necessary, to fully implement these agreements.

C. Analysis of Delegated Powers by Clause

Power to make regulations to implement the GPA (clauses 1(1)(a) and 3)

Power conferred on:

a) *a Minister of the Crown; or*

b) *a devolved authority. Power exercisable by: Regulations made by Statutory Instrument*

Parliamentary procedure: Negative resolution

Context and purpose

12. The original GPA was negotiated and agreed in 1994 (“the 1994 Agreement”) following negotiations between like minded 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”). All GPA parties have adopted the 2012 Protocol other than Switzerland, which is in the process of adopting it, which it expects to occur by 1 January 2021. In this Memorandum the 1994 Agreement and the revised GPA are collectively referred to as the GPA.

13. Since the GPA’s formation, the UK has participated in the GPA by virtue of the UK’s EU membership. The GPA is one of the plurilateral agreements within the framework of the World Trade Organization¹ (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 in GPA parties’ territories. The GPA also ensures that businesses can compete for those public contracts on a non-discriminatory basis. For UK contracting authorities, the GPA provides increased value for money through international competition for public procurements.

¹ See Annex 4 to the Agreement establishing the WTO (the Marrakesh Agreement).

14. The UK's obligations under the GPA are currently given effect in secondary legislation made under Section 2(2) of the European Communities Act 1972: the Public Contracts Regulations 2015²; the Concessions Contracts Regulations 2016³; the Utilities Contracts Regulations 2016⁴; and the Public Contracts (Scotland) Regulations 2015⁵; the Utilities Contracts (Scotland) Regulations 2016⁶; and the Concessions Contracts (Scotland) Regulations 2016⁷ ("the Regulations").

15. The power in clause 1(1)(a) is needed to ensure that amendments can be made to the Regulations to implement the UK's obligations as an independent GPA party. For example, amendments will be required to refer to the version of the GPA as it exists when the UK accedes, which will include the UK's market access schedules.

16. Clause 3(1) provides that regulations made under clause 1(1) may make different provision for different purposes or areas; general or specific provision; incidental, supplementary or consequential provision; and transitional, transitory or saving provision. This clarifies the scope of the power in clause 1(1)(a).

Justification for delegation

17. Clause 1(1)(a) will confer a power to make largely technical changes to existing secondary legislation to implement the GPA once the UK is an independent member.

18. These delegated powers will not cover anything particularly novel or unexpected because Parliament has already had the opportunity to scrutinise the UK's independent membership of the GPA. The GPA, including the UK's and all other parties' market access schedules, was laid before Parliament pursuant to the Constitutional Reform and Governance Act 2010 (CRaG). When Australia subsequently acceded to the GPA during 2019, Australia's market access schedules and consequential amendments to other parties' schedules were also laid before Parliament under CRaG. The CRaG process concluded on 3rd October 2019 with no resolution against ratification. If there are any further changes to the GPA, including

² SI 2015/102.

³ SI 2016/273,

⁴ SI 2016/274.

⁵ SSI 2015/446.

⁶ SSI 2016/49.

⁷ SSI 2016/65, amended by SSI 2016/125.

the market access schedules, prior to the UK's accession, these will be laid before Parliament for scrutiny under CRaG.

19. 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 Agreement.

20. Delegated powers are also appropriate since the UK's obligations under the GPA as an independent member will not be significantly different to the UK's current obligations through the EU's membership of the GPA. The UK's current obligations are presently contained in secondary legislation in the UK Regulations and the Scottish Regulations. The delegated power in clause 1(1)(a) will be used to make largely technical changes to these regulations to reflect the UK becoming an independent member of the GPA following the end of the transition period rather than through the current legislative arrangements that pertain to its being treated as a member of the EU under the UK – EU Withdrawal Agreement.

Justification for procedure selected

21. The GPA will come into force for the UK as an independent member 30 days after its accession, according to the terms of the GPA. Making the delegated power subject to the negative resolution procedure allows regulations to be made quickly once the GPA Committee has agreed the UK's accession to the GPA as an independent member and any further CRaG process (as described above) has been completed. This will ensure that UK businesses can subsequently maintain the significant economic benefits of GPA membership on which they currently rely, without delay, at the end of the transition period. Such a short implementation period may not be achievable if the power was subject to affirmative regulations

22. In addition, as has been set out above, these regulations would only be used to make technical provision, in secondary legislation, for the implementation of a series of obligations which have already been subjected to Parliamentary scrutiny through the CRaG process. The negative resolution procedure is therefore appropriate for the use of this 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)(b)(i) and 3)

Power conferred on –

- a) a Minister of the Crown; or*
- b) a devolved authority.*

Power exercisable by – Regulations made by Statutory Instrument

Parliamentary procedure – Negative resolution

Context and purpose

23. The GPA provides for new parties to join the GPA and for parties to withdraw from it as follows:

- Article XXII:2, which provide for the accession of other WTO members to the GPA; and
- Article XXII:12, which provides 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.

24. The power in clause 1(1)(b)(i) is needed to ensure that amendments can be made to the Regulations to give effect in domestic law to changes in GPA parties. The GPA requires parties to provide guaranteed access to covered procurement markets for suppliers from other GPA parties on a non-discriminatory basis. The power would be used to grant such access to newly acceded parties and to withdraw access from the suppliers of a withdrawing party.

25. Clause 3(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)(b)(i).

Justification for delegation

26. Clause 1(1)(b)(i) will give a narrow power to make the necessary changes to the Regulations to reflect new parties acceding to the GPA and parties withdrawing from the GPA.

27. Delegated powers are appropriate because scrutiny of new accessions would have taken place throughout the accession process as a new party's GPA offer would be considered and approved by the GPA membership. At the point a new party accedes or a party withdraws, there will be very limited policy choices around implementation.

28. Delegated powers are also appropriate because the implementation of future accessions to and withdrawals from the GPA do not justify the use of Parliamentary time inherent in a Bill. New accessions to the GPA occur from time to time. Five accessions have taken place since 2015 (Australia, Montenegro, Moldova, New Zealand and Ukraine). At present 10 WTO members are in the process of acceding (Albania, China, Georgia, Jordan, Kazakhstan, Kyrgyz Republic, North Macedonia, Oman, Russian Federation and Tajikistan). Four other WTO members have undertaken commitments, in their WTO accession protocols, to initiate accession to the GPA (Afghanistan, Mongolia, Saudi Arabia and Seychelles). If primary legislation was required to amend the Regulations each time a new party joins, a significant amount of Parliamentary time would be required to reflect these accessions. A delegated power would allow the UK to effectively respond to what may be frequent, new accessions to the GPA. Withdrawals from the GPA are less likely but are possible under the terms of the GPA. It is appropriate the power covers both accessions and withdrawals.

Justification for procedure selected

29. In the case of parties joining the GPA, once a party deposits its instrument of accession, there is a 30-day period before the GPA comes into force for that party. Once the GPA comes into force for a newly acceded party, the UK must provide suppliers from the party guaranteed access on a non-discriminatory basis, in accordance with the terms of the GPA, to the UK's public procurement markets covered by the GPA and to the UK's procurement remedies regime. If the UK failed to provide these rights after the 30-day period, the UK would be in breach of its GPA obligations.

30. Withdrawals take place 60 days from the withdrawing party notifying the WTO Director-General of its withdrawal. If the UK failed to amend the Regulations to reflect the withdrawal by the 60-day point, the UK would be giving access to suppliers from the withdrawing party that they were not entitled to receive, and which was not reciprocated to UK suppliers. 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.

31. The negative resolution procedure will allow amendments to be made quickly to the Regulations 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.

Power to make regulations in consequence of a dispute between the UK and another GPA party (clauses 1(1)(b)(ii) and 3)

Power conferred on –

- a) a Minister of the Crown; or*
- b) a devolved authority.*

Power exercisable by – Regulations made by Statutory Instrument

Parliamentary procedure – Negative resolution

Context and purpose

32. Parties to the GPA are entitled to bring disputes under the Dispute Settlement Understanding⁸ (“DSU”) if they consider that their rights under the GPA have been nullified or impaired or where the object of the GPA is being impaired by another GPA party.

33. If it is found that the UK’s rights under the GPA have been breached, the responding GPA party will be required to bring themselves into compliance. Should another GPA party fail to do so, the UK is entitled to suspend its concessions or other obligations under the GPA equivalent to the level of the nullification or impairment until such time as the responding GPA party brings itself into compliance (“retaliation”).

⁸ A WTO Agreement governing the WTO dispute settlement system.

Alternatively, if the UK is responding to a dispute and wishes to offer mutually acceptable non-financial compensation the powers it should be entitled to increase its concessions or other obligations under the GPA.

34. The power in clause 1(1)(b)(ii) is needed to ensure that the UK can make or amend regulations, where necessary, to implement the suspension of concessions or other obligations in domestic legislation or increase its concessions or other obligations. The power would be used to remove access to UK procurement markets from the GPA party with which the UK has a dispute, until such time as the other GPA party ceases the WTO-incompliant actions; or increase access to UK procurement markets until such time as the UK brings itself into compliance.

36. Clause 3(1) provides that regulations made under clause 1(1) may make different provision for different purposes or areas; general or specific provision; incidental, supplementary or consequential provision; and transitional, transitory or saving provision. This clarifies the scope of the power in clause 1(1)(b)(ii).

Justification for delegation

37. Clause 1(1)(b)(ii) will provide a narrow power to make regulations or other necessary changes to the Regulations to limit access or increase access to the UK's GPA commitments in consequence of a dispute between the UK and another party to the GPA .

38. Delegated powers are appropriate because Parliament has already had the opportunity to scrutinise the UK's GPA commitments pursuant to CRaG. These commitments are enshrined domestically in secondary legislation. It would be necessary to make or amend regulations in order to temporarily suspend or increase those market access commitments.

39. Delegated powers are appropriate because of the temporary and specific nature of the changes or amendments, which are intended to mitigate the impairment the UK or other party is suffering and provide incentive for the responding party to bring itself into compliance. The decision on to what aspects of the UK procurement market to suspend or temporarily increase access will involve economic as well as geopolitical analysis. Retaliatory or compensatory changes or amendments are intended to be temporary in

nature. As such they are more appropriately and easily revoked under delegated powers than primary legislation.

Justification for procedure selected

40. Disputes may arise at any time and in relation to any other GPA party. It is necessary for the UK to have the means to defend itself and its stakeholders or respond to disputes brought against it. Where a GPA party is not complying with its GPA obligations to the UK, the UK must be in a position to respond quickly to make or amend regulations enabling the UK to retaliate. Retaliation is a temporary measure designed to compel the other GPA party to bring itself into compliance. It is not a final state. It is intended to provide leverage to ensure that the responding GPA party complies with its international obligations. Similarly, if the UK were subject to a dispute and mutually acceptable non-financial compensation was a temporary means of de-escalating the dispute, it should be entitled to act quickly to offer it where appropriate, as this could avert retaliation from the other party and give the UK more time to bring itself into compliance.

41. The negative resolution procedure will be used to make or amend secondary legislation, including secondary legislation that implements the UK's GPA obligations. The regulations are likely to be limited to the suspension of part or parts of the UK's Appendix I in relation to the other GPA party with which the UK has a dispute or amending or increasing concessions where the UK needs to offer mutually acceptable non-financial commitments. The Government considers it appropriate to use the negative resolution procedure to provide a power that will be used to make or amend secondary legislation for the narrow purpose of retaliating or compensating in consequence of a dispute as the UK will need to act quickly in order to either compel the other GPA party to bring itself into compliance or provide a temporary fix in order to explore how it can bring itself into compliance.

Power to make regulations in consequence of a modification of another party's Appendix I to the GPA (clauses 1(1)(b)(iii) and 3)

Power conferred on –

- a) a Minister of the Crown; or*
- b) a devolved authority.*

Power exercisable by – Regulations made by Statutory Instrument

Parliamentary procedure – Negative resolution

Context and purpose

42. Parties to the GPA are entitled to modify their market access schedules in their annexes to Appendix I of the GPA, which list the entities and types of procurement (e.g. specific types of goods or services) covered by the GPA as well as the financial thresholds which trigger GPA coverage. Such modifications could include the transfer of an entity from one Annex to another, withdrawal of an entity or another modification.

43. Under Article XIX of the GPA, proposed modifications must be notified to all other parties, who have an opportunity to object to the proposed modification where their rights may be affected by the modification. The parties are required to seek to resolve the objection through consultations but, if the party seeking the modification goes ahead without the objection being resolved, the objecting party can withdraw substantially equivalent coverage from that party.

44. The modifications may become effective as soon as 45 days from the date of notification if no party objects. On this date, the amendments would come into effect under international law and the UK is legally required to comply with them.

45. The power in clause 1(1)(b)(iii) allows for changes to be made to the Regulations arising from modifications made to another party's Appendix I to the GPA. This power could be used to extend market access to suppliers from an expanded territory of a GPA party, for example if a new member joins the EU, or withdrawing equivalent coverage from a party where a UK objection has not been resolved.

46. Clause 3(1) provides that regulations made under clause 1(1) may make different provision for different purposes or areas; general or specific provision; incidental, supplementary or consequential provision; and transitional, transitory or saving provision. This clarifies the scope of the power in clause 1(1)(b)(iii).

Justification for delegation

47. Clause 1(1)(b)(iii) will give a narrow power to amend the Regulations arising from modifications made to another party's Appendix I to the GPA.

48. Delegated powers are appropriate because there are likely to be limited policy choices around implementation arising from another party's modifications. The circumstances in which additional access will be granted through amendments to the Regulations are likely to be limited to granting access to suppliers from an expanded territory of a GPA party, where rights would need to be granted to ensure the UK fulfils its obligations under the GPA, or where another party has removed an exemption against the UK and the UK's schedules provides for reciprocity in that area. The circumstances in which access is likely to be withdrawn through amendments to the Regulations are also limited, for example where a UK objection to another party's modification is not resolved and the UK wishes to withdraw an equivalent level of access from that party.

49. It is anticipated that this power would generally be used only to maintain a reciprocal level of access for UK suppliers in response to circumstances or actions by other parties, in line with the basic principles of the GPA. This would not justify the use of Parliamentary time inherent in a Bill and would need to be delivered to a considerably shorter timetable.

Justification for procedure selected

50. The GPA process for parties to make modifications to their market access schedules in Appendix I of the GPA means that modifications may become effective as soon as 45 days from the date of notification if no party objects. On this date, the amendments would come into effect under international law and the UK is legally required to comply with them. The negative resolution procedure will allow the UK to make some relatively limited and technical amendments to the Regulations quickly to respond to another party's modifications and to ensure the UK complies with its international obligations.

Power to make regulations in consequence of a modification of the list of central government entities in Annex 1 to the UK's Appendix I to the GPA (clauses 1(1)(b)(iv) and 3)

Power conferred on -

- a) a Minister of the Crown; or*
- b) a devolved authority.*

Power exercisable by – Regulations made by Statutory Instrument

Parliamentary procedure – Negative resolution

Context and purpose

51. GPA parties' market access schedules in Appendix I of the GPA list, amongst other matters further described above, the entities covered by the GPA for that party. The UK's list of central government entities is out of date, having not been updated since 2012.

52. In response to request from several GPA parties during the UK's accession process, the UK committed to commence the process for updating its list of central government entities to reflect governmental changes and transfers of functions within three months of the GPA coming into force for the UK.

53. As described above, under Article XIX of the GPA, proposed modifications must be notified to all other parties, who have an opportunity to object to the proposed modification where their rights may be affected by the modification. The modifications may become effective as soon as 45 days from the date of notification if no party objects. On this date, the amendments would come into effect under international law and the UK is legally required to comply with them.

54. Clause 1(1)(b)(iv) provides a narrow power to make regulations to implement changes to the list of central government entities in the UK's Annex 1 of Appendix I to the GPA, once the UK has become an independent member of the GPA.

55. Clause 3(1) provides that regulations made under clause 1(1) may make different provision for different purposes or areas; general or specific provision; incidental, supplementary or consequential provision; and transitional, transitory or saving provision. This clarifies the scope of the power in clause 1(1)(b)(iv).

Justification for delegation

56. Clause 1(1)(b)(iv) will give a narrow power to amend the Regulations to reflect changes to the UK's list of central government entities in the UK's Annex 1 to Appendix I to the GPA, in order to fulfil the commitment given to GPA parties as part of the UK's accession process.

57. Delegated powers are appropriate because the powers are narrowly drafted; restricted to amending the Regulations to remove entities which no longer exist and to add entities to which functions have been transferred from other entities currently on the list. It is anticipated that most updates will reflect uncontroversial machinery of government changes. The amendments required to the Regulations to reflect the updates will be largely technical and would not justify the use of Parliamentary time inherent in a Bill.

Justification for procedure selected

58. The GPA process for parties to make modifications to their market access schedules in Appendix I of the GPA means that modifications may become effective as soon as 45 days from the date of notification if no party objects. On this date, the amendments would come into effect under international law and the UK is legally required to comply with them. The negative resolution procedure will allow the UK to amend the Regulations quickly to reflect updates as soon as the 45 day period expires. It will not be possible to start the legislative process in advance as the nature of the updates may change through consultations with GPA parties.

Power to make regulations for the implementation of international trade agreements (clause 2)

Powers conferred on:

- a) a Minister of the Crown; or*
- b) a devolved authority.*

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

59. After the transition period, the Government plans to bring into force a number of trade agreements which have been negotiated and signed with countries which already had a trade agreement with the EU immediately before Exit Day. While working towards this process of transition with partner countries, the central aim has

been maintaining, as far as possible, the status quo for UK businesses, workers and consumers.

60. Although the intention has been 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. There could be consolidation of agreements. While the power is broad enough to allow implementation of substantial amendments, including new obligations, our expectation is that it will be used primarily to ensure the UK is able to implement procurement obligations that may arise from a number of these agreements, together with obligations arising from transitioning Mutual Recognition Agreements with third countries.

61. The power will be used to amend domestic law to implement the provisions of international trade agreements which the UK has signed with countries which have an existing trade agreement with the EU. Such amendments are not catered for in the European Union (Withdrawal) Act 2018, which preserves existing implemented EU law. The power specifically excludes provision that could be made under regulations under section 9 of the Taxation (Cross-border Trade) Act 2018 that allows allowing the setting of preferential duties pursuant to international arrangements. Provision on tariffs can be implemented through the exercise of powers under that Act; this power is to deal with other matters, e.g. procurement.

62. The power in subsection (1) will ensure that those EU-partner country 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 may fix any inoperability that exists at the end of the transition period, it will not deal with an inoperability that arises from subsequent changes to domestic frameworks or in consequence of decisions made by the joint committees of the parties under the agreements.

63. In addition to providing for the implementation of procurement obligations arising from the transitioning of existing agreements, and maintaining the status quo for business, it may also be needed 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 subject 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.

64. This power will also allow for the 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. As retained EU law is defined in the EU (Withdrawal) Act 2018 to include that body of law as added to or modified under the Withdrawal Act 2018 or other domestic law from time to time, at the end of the transition period, 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 retained EU law is contained in that primary legislation.

65. The power will not allow for sub-delegation of legislative powers, for the establishment of new criminal offences or extension of existing ones, or for the charging of fees. Further, the power would not allow for the implementation of any agreement between the UK and EU, including as parties to a multilateral agreement (it could not be used to implement, for example, the GPA).

66. The power in subsection (1) will also enable the UK to retaliate against the partner country if the UK has obtained a favourable decision under the dispute settlement chapter of the agreement, but the responding party has failed to bring itself into compliance. Alternatively, it will also enable the UK to offer compensation should

the UK be responding to a dispute. The regulation making power will allow the UK to make or amend secondary legislation to suspend or increase its concessions or other obligations under the international trade agreement.

67. Clause 3(1) 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

68. 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 more than a thousand pages. To ensure that consistency in the effects of these agreements is maintained after the transition period ends, the UK has been negotiating transitional agreements in terms that are as close as possible to the predecessor EU agreements. Many of these agreements have already been signed and will come into effect at the end of the transition period.

69. In order to maintain a smooth transition for businesses at the end of the transition period, the UK requires this delegated power to ensure it has the appropriate means to transition and fully implement EU-partner country trade deals.

70. The scope of this power has been drawn widely so as to provide necessary flexibility to implement these agreements. The UK has now signed 20 trade continuity agreements. However, by convention the UK does not ratify agreements unless it is able to implement them fully. We expect that the power will be used primarily to enable the UK to implement the procurement obligations that arise in certain of these transitioned agreements.

71. Although the power is necessarily wide, these agreements should already have been substantially implemented by the EU and as such should already form part of UK law to a large degree. However, flexibility is necessary to be able to address a range of different technical details that may arise in respect of different transitioned

agreements. Additionally, retaining broad flexibility is appropriate to implement other technical changes that may arise under other existing EU agreements which continue to be negotiated and amendments to the agreements as a result of the Republic of Ireland/Northern Ireland Protocol and similar matters.

72. This power has two separate legislative functions. First, it allows for the implementation of obligations mainly flowing from what the Government refers to as trade continuity agreements, as part of the process of leaving the EU. These are the new agreements the UK has made with partner countries, based 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 transitional adoption, thereby ensuring a greater level of transparency throughout the process.

73. To transition existing EU-partner country trade 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 our international obligations beyond the end of the transition period. 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 its trading commitments.

Constraints

74. The power is limited to the implementation of provisions of international trade agreements between the UK and one or more third countries where those countries have signed an international trade agreement with the EU before 31 January 2020. The power will not allow the implementation of a free trade agreement where there was not a free trade agreement signed by the EU before 31 January 2020. It will not allow implementation of a future agreement between the UK and the EU.

75. Such agreements will already have been subject to parliamentary scrutiny through the procedures set out in the Constitutional Reform and Governance Act 2010.

76. This power will be subjected to a time limit of five years commencing at the end of the transition period. Since the power may be required beyond the five-year expiry date, the Government has the option to extend this period, subject to the approval of both Houses.

77. This power will not allow for domestic legislation to keep pace with the original EU-partner country trade agreements, which have been transitioned, should they be amended after the UK is no longer bound by EU law. However, it will allow UK legislation to keep pace with review or amendment mechanisms that the UK itself agrees to in a relevant agreement until the power is subject to sunset.

Justification for procedure selected

78. The Department considers that this power is appropriate for the affirmative procedure. While, the power is intended mainly to allow the implementation of obligations that, as far as possible, reflect existing obligations which form part of trade agreements between the EU and partner countries, it is not entirely clear what changes may be necessary to fully implement all of the transitioned agreements. Accordingly, the precise nature of what regulations may be introduced is not certain and so the respective broad nature of the power means that it may be desirable to subject the power to higher scrutiny.

79. The Department has also considered carefully the views expressed by the Delegated Powers and Regulatory Reform Committee in its scrutiny of the Trade Bill during the course of the last Parliamentary session. In that instance the Committee recommended that the power be subject to the affirmative regulation procedure and this provision respects that view.

80. Notwithstanding the above, a number of the UK-partner country trade deals which have been signed by the UK have already undergone parliamentary scrutiny

through the CRaG process. Any which have not been subjected to this scrutiny will receive parliamentary scrutiny before they come into effect.

Power to provide that the power to make regulations to implement international trade agreements does not expire after five 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

81. Under clause 2(7)(a), the power to make regulations under clause 2(1) expires five years after the end of the transition period. 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 five years at a time.

82. It is expected that it will mainly be agreements signed as part of the Government's "Trade Agreement Continuity" programme that will benefit from implementation through Clause 2. These agreements will likely remain in force for many years and may evolve over time to keep pace with developments in the UK and partner Countries. For example, the thresholds above which procurement obligations apply increase incrementally every two years. The entities covered by such obligations will also change over time, for example in relation to machinery of government changes. It may therefore be necessary to keep alive the power in Clause 2, to allow for continued implementation of those agreements.

83. However, the Department is conscious of the breadth of the power in Clause 2 and is of the view that it should not remain in place beyond the point at which it is needed. The effect of the sunset provision, coupled with a power to extend, means that no less frequently than every five years, the Government will need to consider whether the continued existence of the Clause 2 power is justified and if it is, will have to defend that decision through the making of a set of regulations, subject to the affirmative procedure.

Justification for delegation

84. The continued existence of the power, ie the decision to defer or not, the sunset, is one that can only be taken close to the point at which the power is scheduled to sunset. It is not possible to make that decision “up front”, so a delegated power is needed to allow flexibility to determine the point at which the power is no longer needed.

Justification for procedure chosen

85. It is considered that the affirmative procedure is appropriate for this power, to ensure that there will be a debate in both Houses, at which the Government will have to justify the continued existence of the broad powers in Clause 2.

Power to specify by regulations the type of export information that may be requested and how the information may be requested (clause 7(3))

Power conferred on: HM Treasury

Power exercisable by: Regulations made by Statutory Instrument

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

Context and purpose

86. 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 data in an appropriate way, 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 data will allow the Secretary of State to carry out functions linked to the provision of trade statistics and export trade promotion.

Justification for delegation and for procedure chosen

87. The power is taken to facilitate a new function of HM Revenue and Customs. The Treasury may exercise it to determine what information may be requested and how that information is to be collected.

88. The power can be used to amend primary legislation where this is necessary to provide the mechanism to collect the data. In such cases, the use of the power will be subject to the affirmative procedure. In other cases, it is subject to the negative procedure.

89. The details of the information being requested and how it is collected are administrative in nature and therefore, in the view of the Department, it is appropriate that the powers to do so are set out in secondary legislation.

90. The information will be requested on a voluntary basis, so there is no imposition on UK businesses of a requirement to provide the information.

Power to amend by regulations the list of public authorities who may disclose information (clause 9)

Power conferred on: Ministers of the Crown

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative procedure

Context and purpose

91. This power enables a Minister of the Crown to amend by regulations the list of public authorities in sub-clause (3) who may disclose information under the sub-clause (1). Specifically, this power will enable a Minister of the Crown to add or remove public authorities from the list. Adding a public authority to the list in sub-clause (3) will enable that public authority to disclose information for the purpose of facilitating the exercise by a Minister of the Crown of the Minister's functions relating to trade. Public authorities include devolved public bodies and devolved Ministers.

Justification for delegation and for procedure chosen

92. Certain information held by specific public authorities has been identified as critical for building up data, from which insights may be derived, regarding the flow of traffic, goods and services in and out of the United Kingdom. It is anticipated, however, that those insights are, in themselves, likely to highlight other areas where information is needed in order to provide as complete a picture

as possible of border flows and activity relating to trade. The purpose of the power is to allow a Minister of the Crown to add additional public bodies who may disclose information under the gateway, where the need for that information has been subsequently identified.

93. The scope of the power is narrow. The power will not enable a Minister of the Crown to amend the purpose for disclosure in sub-clause (1), or make disclosure mandatory. The power can only be used to enable a public authority to disclose information, if that public authority wishes to do so and if it is satisfied that the purpose for disclosure (relating to trade) is met. Adding a public authority to the list in sub-clause (3) does not require that public authority to disclose information. The information gateway is permissive rather than mandatory and so there will be no obligation on a public authority to provide information.

94. While the scope of the power is narrow, the Department has taken into account the view of the Delegated Powers and Regulatory Reform Committee that regulations amending primary legislation should be subject to the affirmative resolution procedure. This procedure will also allow active scrutiny of the reasons for the addition of public bodies under the power. On this basis, it is considered that the affirmative resolution procedure is appropriate for this power.

Power to make transitional, transitory or savings provisions (clause 11(4))

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: None

Context and purpose

95. 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

96. 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.

97. 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 2013⁹ and section 160 of the Small Business, Enterprise and Employment Act 2015.¹⁰

Justification for procedure chosen

98. 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.

⁹ [http://www.legislation.gov.uk/ukpga/2013/24/section/100/enacted.](http://www.legislation.gov.uk/ukpga/2013/24/section/100/enacted)

¹⁰ [http://www.legislation.gov.uk/ukpga/2015/26/section/160/enacted.](http://www.legislation.gov.uk/ukpga/2015/26/section/160/enacted)