



HOUSE OF LORDS

Select Committee on the Constitution

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13th Report of Session 2017–19

# Trade Bill

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# Trade Bill

## Introduction

1. The Trade Bill (“the Bill”) was introduced in the House of Commons on 7 November 2017. The Bill was brought to the Lords on 18 July 2018 and received a second reading on 11 September.
2. The Bill is intended to provide a legal framework for UK trade policy after withdrawal from the European Union. As one of a series of ‘Brexit Bills’, it should be read alongside the recently enacted Taxation (Cross-border Trade) Act 2018. While that Act provides for tariff-related issues, the Trade Bill deals with non-tariff barriers.
3. The Bill is a framework measure which, whilst it is largely procedural in nature, does give the Government extensive powers, including delegated law-making powers, to effect new trade policy. As with other Brexit Bills, the Government justifies these powers in part by the need for flexibility given uncertainty over the terms of the withdrawal agreement and any implementation arrangements flowing from it.<sup>1</sup>

## Agreement on Government Procurement (GPA)

4. Clause 1 concerns the Agreement on Government Procurement (GPA). The GPA is an agreement between the EU and 18 countries to open up their public procurement markets, operating under a World Trade Organisation (WTO) framework. The Government intends that the UK will remain part of this system—becoming an independent member—and the Bill provides delegated powers to facilitate this.
5. Clause 1 provides an “appropriate authority”, which includes a UK minister or a devolved administration, with the power to make regulations to implement the GPA, and related powers connected to membership.<sup>2</sup> Clause 1(3) provides that regulations under clause 1 “may make provision modifying retained direct EU legislation”.
6. Retained direct EU legislation is one of the forms of retained EU law created by section 3 of the European Union (Withdrawal) Act 2018 (“the EUWA”). In our scrutiny of what was then the European Union (Withdrawal) Bill, we expressed concern about the status of retained EU law and how it might subsequently be amended.<sup>3</sup> In response to our report, and the debates on the Bill in the House of Lords, Parliament agreed to Government amendments to distinguish between “retained direct principal EU legislation” and “retained

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1 Department for International Trade, ‘[Trade Bill: Delegated Powers – Memorandum by the Department for International Trade](#)’, para 53

2 Regulations to implement the GPA cannot come into force before the UK accedes to the GPA.

3 Constitution Committee, *European Union (Withdrawal) Bill* (9th Report, Session 2017–19, HL Paper 69), paras 58–66

direct minor EU legislation”,<sup>4</sup> the effect of which was to provide greater protection from amendment for more significant elements of retained EU law.<sup>5</sup>

7. **We recommend the Government include in the Trade Bill the definitions of “retained direct principal EU legislation” and “retained direct minor EU legislation” used in the European Union (Withdrawal) Act 2018.**
8. The Bill’s explanatory notes state that “Parliamentary approval for ratifying the UK’s membership of the GPA will be sought separately from the powers in this Bill in accordance with the procedures set out in the Constitutional Reform and Governance Act 2010.”<sup>6</sup> This means that membership of the GPA will be presented to Parliament both as regulations under clause 1, subject to the negative procedure, and as a treaty under section 20 of the Constitutional Reform and Governance Act 2010 (“CRAG”). What is not clear is the sequence of these two processes; whether Parliament will consider the instrument and the treaty simultaneously or sequentially. **We recommend the Government set out the process for parliamentary consideration of future GPA membership.**

#### Implementation of international trade agreements

9. Clause 2 provides both UK ministers and devolved administrations with wide secondary law-making powers for implementing international trade agreements. We have previously expressed concerns about the seeking of broad delegated powers, and in our scrutiny of the European Union (Withdrawal) Bill we recommended that they should not be used to make major policy changes.<sup>7</sup> As part of that Bill’s passage through the Lords, significant additional safeguards were added to prevent the delegated powers being used, among other things, to impose or increase taxation and fees, to create a relevant criminal offence<sup>8</sup> or to establish a public authority.<sup>9</sup>
10. In the explanatory notes to clause 2 of the Trade Bill the Government state that “Subsection (5) does not allow for regulations to make or extend criminal offences, charge fees, amend primary legislation other than retained EU law, or create new public bodies.”<sup>10</sup> However, this is not stated in the text of the Bill. Subsection (5) states that “Regulations under subsection (1) may, among other things, make provision” in a range of areas and does not include the restrictions suggested in the explanatory notes. The restrictions are, in our view, required. **We recommend that the Government introduces an**

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4 “Retained direct principal EU legislation” is any EU regulation or annexe to the European Economic Area (EEA) agreement, excluding tertiary legislation, that forms part of domestic law on or after “exit day” by virtue of section 3 of the European Union (Withdrawal) Act 2018. “Retained direct minor EU legislation” is any EU law saved by section 3 that is not included within the definition of retained direct principal EU legislation. The purpose of this categorisation was to create a hierarchy of retained EU law, somewhat analogous to the distinction between primary and secondary legislation, and afford the more significant elements of retained direct EU legislation (the retained direct principal EU legislation) greater protection from amendment by delegated powers.

5 Constitution Committee, ‘[Government response to the Lords Constitution Committee report on the European Union \(Withdrawal\) Bill](#)’, pp 4–5

6 [Explanatory Notes to the Trade Bill](#) [Bill 127 (2017–19)-EN], para 26

7 Constitution Committee, [European Union \(Withdrawal\) Bill](#) (9th Report, Session 2017–19, HL Paper 69), para 184

8 This is an offence for which an adult may be sentenced to imprisonment for more than two years.

9 European Union (Withdrawal) Act 2018, [section 8\(7\)](#) and [section 9\(3\)](#)

10 [Explanatory Notes to the Trade Bill](#), para 59

**amendment to include in the Trade Bill the restrictions on the use of the clause 2 powers set out in the explanatory notes.**

### **Trade Remedies Authority**

11. The Trade Remedies Authority (TRA) will be a new authority created by clause 9. It will be a non-departmental body which will take over the anti-dumping functions and other operations relating to subsidies etc. currently performed at EU level, to protect UK businesses from unfair business practices. Clause 10 provides for the operation of the TRA and in particular its relationship with the Secretary of State. The Bill also makes provision for the membership, terms of appointment etc. of the TRA.<sup>11</sup>
12. The Bill has little detail on the functions and powers of the TRA. Instead the Secretary of State is given broad discretion in schedule 4 as to the constitution of this body, the appointment of its members and its operations, including the power to issue guidance which the TRA must have regard to when carrying out its functions. **While we recognise the pressing timescales and uncertainties concerning Brexit, in constitutional terms, creating and empowering an important public body in such a manner is inappropriate.**

### **Devolution**

13. The powers to make regulations under clauses 1 and 2 apply to “appropriate authorities” which includes “devolved authorities”. The powers given to devolved authorities apply only in relation to the devolved competence of the relevant authority<sup>12</sup> and are restricted, as with the powers in the EUWA, in relation to anything which is retained EU law. Devolved authorities cannot make regulations inconsistent with retained EU law or modified retained EU law, but can modify direct retained EU law in a way consistent with section 12 of the EUWA. Schedule 1 makes further provision about the exercise of these powers. In some circumstances regulations will require the joint exercise of powers by a devolved authority and a UK minister; in other circumstances a UK minister’s consent is required before a devolved authority may exercise powers; and in other circumstances the devolved authority must consult UK ministers before exercising powers.
14. The Bill applies to the whole of the United Kingdom. As it modifies the scope of the devolved authorities’ delegated powers, the Government has stated that it will seek legislative consent for the provisions in the Trade Bill relating to “the power to implement the Government Procurement Agreement (clause 1) and the power to implement qualifying international trade agreements (clause 2).”<sup>13</sup>
15. The devolved governments in Scotland and Wales are not at present recommending that their respective legislatures consent to the Bill.<sup>14</sup> The two issues in contention are similar to those that hindered legislative consent to the European Union (Withdrawal) Bill.<sup>15</sup> The first concerns safeguards on

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11 [Trade Bill](#), Schedule 4 [HL Bill 127 (2017–19)]

12 [Trade Bill](#), Schedule 1 Para 1

13 [Explanatory Notes to the Trade Bill](#), paras 17–18

14 Welsh Assembly Government, ‘[Trade Bill Legislative Consent Memorandum](#)’, December 2017; Scottish Government, ‘[Trade Bill Legislative Consent Memorandum](#)’, December 2017

15 After extended negotiations with the UK Government, the Welsh Assembly gave its consent to the European Union (Withdrawal) Bill but the Scottish Parliament did not.

the exercise of delegated powers by UK ministers which may affect devolved matters; the second is the fact that the delegated powers given to devolved administrations by clauses 1 and 2 are, by clause 7 and schedule 1, more tightly circumscribed than those of the UK Government. The administrations in Wales and Scotland consider that the powers of the devolved administrations to implement agreements in devolved areas between the EU and third countries would be excessively restricted by the provisions of the Bill.

16. **We urge the UK Government and the devolved governments to engage in constructive dialogue to achieve legislative consent on the Trade Bill.**
17. A wider issue arises regarding the role the devolved administrations might play, not only in the implementation but also in the negotiation of treaties. The Bill provides for the former but not the latter. International relations including treaty-making are a reserved matter in all three devolution settlements, so there is no guaranteed role for the devolved administrations. However, EU treaty-making has hitherto been treated as a special case. Currently the devolved administrations are involved in the EU treaty-making process, as they are in relation to the making of EU law and policy more generally, through the UK's Representation to the EU and through the Joint Ministerial Committee (Europe).
18. **We recommend that the Government state whether the existing arrangements of the Joint Ministerial Committee (Europe) for involving the devolved administrations in the negotiation of agreements with the EU will be replicated for trade agreements under the Bill. The Government should also set out how intergovernmental mechanisms will be adjusted to involve the devolved administrations in international relations and treaty-making after Brexit.**

### Treaty scrutiny

19. Trade agreements involving the EU are negotiated by the European Commission on behalf of EU member states. These processes are subject to scrutiny by committees of the European Parliament, and require that Parliament's consent as well as that of member states. At the UK level, Parliament has well-established committee procedures in place to scrutinise draft EU treaties and legislation, including for instance Council decisions authorising the commencement of treaty negotiations. These processes will cease to apply on withdrawal from the European Union. On that basis the default process of international treaty scrutiny under section 20 of CRAG will apply to any new treaties, including the UK's accession to the GPA as an independent member.
20. Under the CRAG procedure ministers are required to lay treaties before Parliament prior to ratification (the point at which a treaty becomes binding in international law). Either House may then pass a resolution that the treaty should not be ratified, although a resolution of the House of Lords could be overridden by the Government. This takes place at the end of the process, once the Government has concluded its negotiations, but before ratification. It does not provide for Parliament to scrutinise the Government's objectives in negotiating a treaty or its conduct of negotiations.
21. In June 2018 the House of Commons Exiting the European Union Committee described the CRAG procedures as "inadequate, denying Parliament the

right to information during negotiations, and not even guaranteeing a debate or vote on a treaty before it is ratified.”<sup>16</sup>

22. **We agree with the House of Commons Exiting the European Union Committee that the process for treaty scrutiny under the Constitution Reform and Governance Act 2010 is inadequate, and compares poorly with the level of scrutiny currently given, both in Brussels and Westminster, to treaties negotiated on behalf of the UK by the European Union. Post-Brexit the UK Parliament will need to consider new mechanisms for scrutinising proposed treaties.**
23. **We understand that the House of Lords Liaison Committee is considering the scrutiny of treaties as part of its review of select committees and we look forward to its conclusions.**
24. **As part of our future work, we will examine the constitutional issues raised by treaty scrutiny and consider possible new models.**

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<sup>16</sup> House of Commons Exiting the European Union Committee, *Parliamentary scrutiny and approval of the Withdrawal Agreement and negotiations on a future relationship* (Sixth Report, Session 2017–19, HC 1240), paras 105–106