

LEGISLATIVE CONSENT MEMORANDUM

TRADE BILL

Introduction

1. The Scottish Government continues to be of the view that the best option for the UK as a whole, and for Scotland, is to remain in the EU. In the event of withdrawal from the EU being unavoidable, the Scottish Government is clear that membership of the European Single Market and Customs Union would be the least damaging option for the UK, rendering the need to make provision for future trade deals unnecessary. However, and notwithstanding this position, the Scottish Government accepts the need to make preparations for withdrawing from the EU smoothly under other circumstances, and maintaining continuity in trading relationships.

2. The Trade Bill was introduced in the House of Commons on 7 November 2017. As the Bill is a relevant Bill under Rule 9B.1 of the Parliament's Standing Orders¹, this memorandum has been lodged by Derek Mackay, Cabinet Secretary Finance and the Constitution, in accordance with Rule 9B.3.1(a). This memorandum is supported by Keith Brown, Cabinet Secretary for the Economy, Jobs and Fair Work and Michael Russell, Minister for UK Negotiations on Scotland's Place in Europe. The Bill and supporting documents can be found at <https://services.parliament.uk/bills/2017-19/trade/documents.html>. This memorandum relates to the Bill as introduced.

3. The Scottish Government does not currently intend to lodge a legislative consent motion in relation to the Bill. In line with Rule 9B.3.3(d) of the Standing Orders, the Scottish Government's reasons for not lodging a motion are set out in paragraphs 17-20. The Scottish Government is considering amendments which, if made, could allow it to consider recommending that the Parliament gives its consent to the Bill. The Scottish Government may lodge a further supplementary legislative consent memorandum, potentially with a draft legislative consent motion, on this Bill in due course, depending on progress with amendments and on other negotiations with the UK Government, including on this Bill, the European Union (Withdrawal) Bill² and its general approach to legislation arising from exiting the European Union.

Content of the Bill

4. The Explanatory Notes accompanying the Bill set out the UK Government's view of its purpose and main functions, which operate alongside the powers in the European Union (Withdrawal) Bill. The UK Government describes the principal purpose of the Bill as providing the key measures that are required to build a future trade policy for the UK once it leaves the EU (paragraph 1 of the Explanatory Notes).

¹ <http://www.parliament.scot/parliamentarybusiness/26512.aspx>

² <https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>

The main provisions of the Bill are as follows:

Part 1

- Creating powers to allow implementation in UK domestic law of obligations created when, as the UK Government intends after withdrawal from the EU, the UK becomes an independent member of the Agreement on Government Procurement (GPA). The Bill will also allow the UK to reflect in legislation where parties join or leave the GPA;
- Creating powers to allow, so far as necessary, implementation in UK domestic law of trade agreements that the UK has concluded with countries with which the EU has existing trade agreements, and which the UK is currently party to through its EU membership.

Part 2

- Establishing an independent body (the Trade Remedies Authority) to deliver a new UK trade remedies framework.

Part 3

- Creating powers in relation to data sharing with and collection by Her Majesty's Revenue and Customs (HMRC).

5. Further detail on the structure and provisions of the Bill is set out at **Annex A**. Of particular relevance to devolved matters are:

- Clause 1 – which provides powers for both UK and Scottish Ministers (within devolved competence) to make regulations to implement the Government Procurement Agreement;
- Clause 2 – which provides powers for both UK and Scottish Ministers (within devolved competence) to make regulations to implement qualifying international trade agreements;
- Part 1 of the Bill also introduces schedules 1-3, which establish and constrain 'devolved competence' for the purpose of the exercise of those powers, along similar lines to the approach taken to Scottish Ministers' powers in the European Union (Withdrawal) Bill (as introduced).

Background

6. The UK Department for International Trade's White Paper *Preparing for our future UK trade policy*³, published on 9 October 2017, explored the UK Government's emerging approach to establishing an independent international trade policy, guided by 3 strategic objectives:

- ensuring UK-EU trade is as frictionless as possible;

³ UK Government (2017) *Preparing for our future UK trade policy* <https://www.gov.uk/government/publications/preparing-for-our-future-uk-trade-policy/preparing-for-our-future-uk-trade-policy>

- avoiding a hard border between Ireland and Northern Ireland;
- establishing an independent trade policy.

7. The paper said that the UK Government would introduce legislation (including a trade bill and a customs bill) that:

- enables continuity in the UK's current trade and investment relationships;
- creates a UK trade remedies framework;
- enables the UK to enforce or abide by the outcomes of international trade disputes;
- creates a unilateral UK trade preferences scheme;
- provides a gateway to facilitate the collection and sharing of data which the Department for International Trade requires as it takes on functions previously performed by the EU Commission.

8. The Explanatory Notes accompanying the Trade Bill indicate that trade deals agreed after withdrawal from the EU will primarily be dealt with under the European Union (Withdrawal) Bill or in separate legislation. Further, tax-related, elements of the UK Government's trade policy will be legislated for in the Taxation (Cross-Border Trade) Bill⁴, which was introduced in the House of Commons on 20 November 2017. That Bill includes provision in the following areas:

- creating a standalone customs regime and amending the VAT and excise regimes, including provisions to enable the establishment of a new UK tariff;
- creating a new UK trade remedies framework and giving the Trade Remedies Authority to be established under the Trade Bill additional functions;
- putting in place a unilateral trade preferences scheme; and
- creating the ability to vary import duties when a dispute or other issue has arisen between the UK government and the government of another country or countries.

9. The Explanatory Notes to the Trade Bill note that the legislative consent of the Scottish Parliament (and other devolved legislatures) to the Bill would be required under the Sewel Convention⁵.

Link with the European Union (Withdrawal) Bill

10. The powers in this Bill operate alongside the powers in the European Union (Withdrawal) Bill. The European Union (Withdrawal) Bill was introduced into the House of Commons on 13 July 2017. The purpose of that Bill is to preserve EU law existing at the point that the UK leaves the EU, and allow it to be amended to continue to work in a UK context. The UK Government therefore expects that, in most cases, the implementation of any obligations within existing international trade agreements can be dealt with through the European Union (Withdrawal) Bill. There will be certain circumstances where that will not be possible (i.e. in the circumstances set out in paragraphs 42 to 44 of the Explanatory Notes

⁴ UK Government (2017) *Taxation (Cross-Border Trade) Bill* <https://services.parliament.uk/bills/2017-19/taxationcrossbordertrade.html>

⁵ See paragraphs 12-13 and Annex A

accompanying the Trade Bill, discussed in further detail at Annex A). The provisions set out in clause 2 of the Trade Bill seek to bridge that gap.

11. More broadly, the approach taken to the exercise of devolved powers under clauses 1 and 2 of the Trade Bill, and in particular to the restrictions placed on exercising those powers, mirrors the approach taken in the European Union (Withdrawal) Bill.

Requirement for legislative consent

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

13. Legislative consent is required for Part 1 of the Trade Bill (Implementation of International Trade Agreements) (Annex B). The remaining parts of the Bill – Part 2 (Trade Remedies Authority) and Part 3 (Trade Information) – do not trigger the need for legislative consent. The main provisions for which consent is required are:

i. Purposes within the devolved competence of the Scottish Parliament

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

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

The Bill alters the executive competence of the Scottish Ministers by conferring implementation powers on them and placing constraints on the exercise of those powers to modify retained direct EU legislation, modify anything that is retained EU law by virtue of clause 4 of the European Union (Withdrawal) Bill, or make regulations that would create inconsistencies with any modifications of that law by the UK Government. This approach is analogous to the approach taken in the European Union (Withdrawal) Bill. As with the powers in the European (Withdrawal) Bill, the UK Ministers are given powers, as are the Scottish Ministers, in devolved areas. Those powers are exercisable without any devolved consent requirement.

Recommendation to withhold legislative consent

14. It remains a matter of regret to the Scottish Government that the UK plans to withdraw from the EU. The Government nevertheless accepts that preparations should be made for withdrawal from the EU, including maintaining continuity in trading relationships, and ensuring continued access to government procurement markets. In the event of withdrawal, the Government agrees the need for provisions which seek to achieve that, not least to provide much needed continuity for businesses, employees and consumers.

15. The Scottish Government welcomes the powers conferred on the Scottish Ministers in clauses 1 and 2 so far as they relate to devolved matters. As made clear in the legislative consent memorandum on the European Union (Withdrawal) Bill, the Scottish Government has always been prepared to accept that there could be advantages in such legislation being made by the Westminster Parliament for the UK as a whole, for practical and pragmatic reasons, given the time available to pass the necessary primary and secondary legislation⁶. As set out in that memorandum, a similar pragmatic approach is currently taken to implementing EU obligations in devolved areas through secondary legislation. The Scottish Government has also been clear that governments across the UK need to work closely together to ensure effective withdrawal arrangements reflecting the interests of all.

16. However, along with the Welsh Government, the Scottish Government cannot recommend to the Parliament that it gives consent to the Bill as currently drafted. The Scottish Government's key objections to the Bill as introduced are analogous to those in relation to the way in which powers are conferred in the European Union (Withdrawal) Bill.

Scottish Government view

17. The legislative consent memorandum on the European Union (Withdrawal) Bill, submitted to the Scottish Parliament on 12 September, sets out in full the Scottish Government's objections to the way in which the powers in it are conferred on the Scottish Ministers. Policy responsibility and expertise for matters within devolved competence lie with the Scottish Government, accountable to the Scottish Parliament. The Scottish Government believes that, on withdrawal, the Scottish Parliament should be in the same position as the Westminster Parliament, and that it should be able to act on all matters within its area of competence.

18. The Trade Bill places constraints on the Scottish Ministers' ability to act on all devolved matters, by placing restrictions on how they can exercise the powers in clauses 1 and 2 to make regulations. In particular, schedule 1 provides that they cannot use their powers in the Trade Bill to modify any retained direct EU legislation, such as EU regulations, or to make regulations that would create inconsistencies with any modifications to retained law that the UK Government has made, even in devolved areas (schedule 1, paragraph 2). Schedule 1 also sets out scenarios where the consent of the UK Government is required in certain circumstances before

⁶ Scottish Government (2017) *EU (Withdrawal) Bill Legislative Consent Memorandum* <http://www.parliament.scot/S5ChamberOffice/SPLCM-S05-10-2017.pdf>

making regulations under clauses 1 or 2 (there is no requirement for the UK Government to obtain the consent of the Scottish Ministers in exercising its powers in devolved areas). Those circumstances are where such regulations are commenced prior to the day of withdrawal from the EU, or where they make provision about any quota arrangements or are incompatible with any quota arrangements made by the UK Government (schedule 1, paragraph 3). Schedule 1 also sets out where consultation with the UK Government is required, prior to making provision in devolved areas, and where legislation can only be made jointly with the UK Government where existing powers are exercisable in that way.

19. The powers provided in clause 2 of the Bill are sunsetted to 5 years after the date of withdrawal. However, that can be extended by the UK Government under review, with the approval of both Houses of Parliament, for further periods of not more than 5 years at a time. There is no requirement for the UK Government to consult the Scottish Government in altering the powers of the Scottish Government in this way.

20. The Scottish Government cannot accept the restrictions on the exercise of its competence in devolved areas as set out above. As with the European Union (Withdrawal) Bill, these objections to the basic approach of the Bill, and the view of the future governance of the UK after withdrawal which the Bill reflects, are so fundamental that the Scottish Government cannot recommend that the Scottish Parliament gives consent, even conditionally, to the Bill in its current form. As with that Bill, and as set out in the Legislative Consent Memorandum accompanying it, the Scottish Government also considers that the approach taken in the Trade Bill would create a lack of clarity and be impractical.

Draft amendments

21. The Scottish Government is working with the Welsh Government to propose amendments to the Bill which will address the concerns of the governments. We anticipate that these will be made public to inform debate on the Bill both in the Parliament, at Westminster and more widely.

Draft Legislative Consent Motion

22. Under Rule 9B.3.3(d) of the Parliament's Standing Orders, if a member of the Scottish Government does not propose to include a draft motion, the memorandum must explain why not. Paragraphs 17-20 above set out the Government's reasons for not including a draft motion in this memorandum.

23. The Scottish Government may lodge a supplementary legislative consent memorandum on this Bill, potentially with a draft legislative consent motion, in due course, depending on progress with its proposed amendments and other negotiations with the UK Government.

Conclusion

24. It remains a matter of regret to the Scottish Government that the UK plans to withdraw from the EU. The Scottish Government considers this will have

widespread detrimental effects on the UK and Scotland. However, the Scottish Government accepts that proper, responsible preparations should be made for withdrawal, including maintaining important continuity in trading arrangements in the event of the UK leaving the EU. The Scottish Government therefore accepts the main purpose of the Trade Bill, and welcomes the conferral of powers on the Scottish Parliament and Scottish Ministers contained within it.

25. By constraining the Parliament's competence, the European Union (Withdrawal) Bill set out the UK Government's overall approach of centralising control and decision making within it and the Westminster Parliament. The approach taken to this Bill adopts similar constraints, which the Scottish Government cannot accept. On withdrawal from the EU, the governance of the UK must respect the devolution settlements, and recognise the powers and responsibilities of the devolved legislatures and administrations.

26. Given this fundamental difference of view, the Scottish Government cannot recommend the Parliament consents to the Bill in its current form.

27. As set out in full in the memorandum relating to the European Union (Withdrawal) Bill, the Scottish Government also considers that the approach to devolved competence, and the powers for Scottish Ministers, in the Bill raise difficult practical issues, and could lead to a lack of clarity.

28. The Scottish Government is developing, with the Welsh Government, amendments to the Bill that could make it acceptable. Depending on progress with these amendments, and other negotiations, including on the European Union (Withdrawal) Bill, the Scottish Government may lodge a further legislative consent memorandum in due course.

ANNEX A

TRADE BILL – STRUCTURE AND PROVISIONS

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

Part 1

Implementation of International Trade Agreements

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

Clause 1 Implementation of the Agreement on Government Procurement

The Agreement on Government Procurement (GPA) is a plurilateral agreement within the World Trade Organisation framework, between 19 WTO Members. It opens up government procurement markets and seeks to address trade barriers. The UK is currently a member by virtue of its EU membership and will have to re-join as an independent member. Clause 1 provides powers, to be held concurrently by the UK Government and devolved authorities, to ensure that any required changes can be implemented into UK domestic legislation before it does so, and that it can make any changes in the future, for example to reflect new countries joining the GPA.

Schedule 1 sets out the restrictions on devolved authorities in the exercise of their powers under clause 1. Paragraphs 17-20 of this memorandum set out the Scottish Government's views on clause 1 and the restrictions on its devolved competence applied by schedule 1.

Clause 2 Implementation of International Trade Agreements

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

Paragraph 41 of the Explanatory Notes accompanying the Trade Bill note that, in most cases, it is expected that the implementation of any obligations within these UK trade agreements can be dealt with through the EU (Withdrawal) Bill. However, paragraphs 42-44 sets out the circumstances when this will not be possible. The Trade Bill therefore provides a vehicle to deal with any implementation of or changes required to such agreements after the date of withdrawal.

The powers provided in clause 2 are sunsetted to 5 years after the date of withdrawal. However, that period can be extended by the UK Government under

review, with the approval of both Houses of Parliament, for further periods of no more than 5 years at a time.

Schedule 1 sets out the restrictions on devolved authorities in the exercise of their powers under clause 2. Paragraphs 17-20 of this memorandum set out the Scottish Government's views on clause 1 and the restrictions on its devolved competence applied by schedule 1.

Clause 3 Regulations: devolved authorities and general provision

Clause 4 Interpretation of Part 1

Part 2

Trade Remedies Authority

Clause 5 The Trade Remedies Authority

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

These clauses establish a new non-departmental public body, the Trade Remedies Authority, to deliver the new UK trade remedies framework following withdrawal from the EU. Clause 6 requires the TRA to provide advice support and assistance to the UK Government in connection with decisions on trade remedies, international trade disputes at the WTO or under other international agreements that substantially relate to trade. The TRA must also provide such support and assistance to other organisations on its own initiative. The new trade remedies framework will be established by the Taxation (Cross-Border Trade) Bill.

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

The Scottish Government considers that the Scottish Ministers, and Ministers from other devolved administrations, should have a role in the Trade Remedies Authority, and will be calling on the UK Government to provide such a role in legislation.

Part 3

Trade Information

Clause 7 Collection of exporter information by HMRC

Clause 8 Disclosure of information by HMRC

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

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

General

Clause 9	Interpretation
Clause 10	Extent
Clause 11	Commencement
Clause 12	Short title

Schedule 1 Restrictions on Devolved Authorities

Schedule 2 Regulations under Part 1

Part 1: Statutory Instruments

Part 2: Scrutiny of Regulations under Sections 1(1) and 2(1)

Part 3: Scrutiny of Regulations under Section 2(8)(B)

Schedule 3 Exceptions to Restrictions in the Devolved Settlements

This schedule makes clear restrictions on Scottish Ministers' powers to modify retained EU law put in place by the European Union (Withdrawal) Bill do not apply to the powers in the Trade Bill. The restriction in paragraph 2 of schedule 1 to the Trade Bill will apply instead.

Schedule 4 The Trade Remedies Authority

ANNEX B

CLAUSES FOR WHICH LEGISLATIVE CONSENT IS REQUIRED

Provision	Effect
Part 1 (Clauses 1-4)	Provides powers for UK and Scottish Ministers to implement the Agreement on Government Procurement and qualifying International Trade Agreements
Schedules 1-3	Establishes and constrains 'devolved competence' for the purpose of the exercise of the powers set out in Part 1 of the Bill

This Legislative Consent Memorandum relates to the Trade Bill (UK legislation) and was lodged with the Scottish Parliament on 20 December 2017

TRADE BILL – LEGISLATIVE CONSENT MEMORANDUM

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