FINANCE AND CONSTITUTION COMMITTEE

AGENDA

20th Meeting, 2018 (Session 5)

Wednesday 5 September 2018

The Committee will meet at 10.00 am in the David Livingstone Room (CR6).

1. Trade Bill (UK Parliament legislation) The Committee will take evidence from—

   Rt Hon George Hollingbery MP, Minister of State for Trade Policy, Suzanne Greaves OBE, Trade Bill Manager, Department of International Trade, Eleanor Weavis, Head of Domestic Portfolio, Trade Strategy, Department of International Trade, and Rebecca Hackett, Deputy Director Policy, Scotland Office, UK Government;

   and then from—


2. Work programme (in private): The Committee will consider its work programme.

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The Scottish Parliament
Edinburgh
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The papers for this meeting are as follows—

**Agenda Item 1**

Cover note  
FCC/S5/18/20/1

**Agenda Item 2**

PRIVATE PAPER  
FCC/S5/18/20/2  
(P)
Finance and Constitution Committee

21st Meeting, 2018 (Session 5), Wednesday 5 September 2018

Trade Bill: Legislative Consent Memorandum

Purpose

1. This paper provides information relating to the Committee’s evidence session on the UK Government’s Trade Bill and the associated Scottish Government Legislative Consent Memorandum.

2. At this meeting, the Committee will take evidence from The Rt Hon George Hollingbery, Minister of State for Trade Policy for the UK Government followed by evidence from Michael Russell, Cabinet Secretary for Government Business and Constitutional Relations for the Scottish Government.

3. Recent correspondence exchanged between the UK and Scottish Governments on amendments to the Trade Bill in relation to devolution is contained in Annexe A.

Evidence considered to date

4. The previous evidence sessions on this issue were held on:
   a. 21 February 2018,
   b. 18 April 2018
   c. 25 April 2018.

5. The witness names, papers and Official reports for these meetings can be found online at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/101355.aspx

6. The written submissions received from the Committee can be found on the Committee’s webpage at: http://www.scottish.parliament.uk/S5_Finance/General%20Documents/Trade_Bill_20180309.pdf. A summary of those written submissions can be found in Annexe B. The Committee also received 769 emails on the Trade Bill, the text of which has been reproduced on the website at— http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/107476.aspx

7. On 28 March 2018 the Convener of the Culture, Tourism, European and External Relations Committee, Joan McAlpine MSP, wrote to the Committee to highlight an evidence session that her Committee had held on international trade on 15 March.

8. SPICe have also published a briefing on the ‘negotiation of trade agreements in federal countries’ and on ‘UK trade policy and Brexit’ which may be of interest to Members. These briefings can be accessed at the links below:
Trade Bill

9. The UK Government introduced the Trade Bill, in the House of Commons on 7 November 2017, which seeks to legislate for a range of measures that the UK Government considers would be necessary in order to develop trade policy post-Brexit. The Bill, and its accompanying Explanatory Notes, can be accessed at: https://services.parliament.uk/bills/2017-19/trade/documents.html

10. The UK Government considers that the Bill requires the legislative consent of the Scottish Parliament in relation to the following clauses of the Bill:

- Clause 1: Implementation of the Agreement on Government Procurement
- Clause 2: Implementation of international trade agreements
- Schedules 1-3: Restrictions on devolved authorities; Regulations of Part 1; Exceptions to restrictions in the devolution settlements.

11. The Trade Bill is due to commence second reading in the Bill at the House of Lords on 11 September when there will be a general debate about all aspects of the Bill.

Scottish Government Position

12. The Scottish Government lodged a Legislative Consent Memorandum (LCM) on the Trade Bill on 20 December 2017 which can be accessed at— http://www.parliament.scot/parliamentarybusiness/Bills/107243.aspx

13. The Scottish Government state in the LCM that they accept the main purpose of the Trade Bill and “welcomes the conferral of powers on the Scottish Parliament and Scottish Ministers contained within it”¹. However, the Scottish Government note that the Trade Bill adopts a similar approach to the European Union (Withdrawal) Bill in terms of placing constraints upon the Scottish Government and Parliament. Accordingly, the Scottish Government state that—

“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. … Given this fundamental difference of view, the Scottish Government cannot recommend the Parliament consents to the Bill in its current form”².

¹ Scottish Government, Trade Bill: Legislative Consent Memorandum, p.7
14. Further to the statement above, the exchange of correspondence in Annexe A sets out the Scottish Government’s views on the amendments it had previously proposed.

15. Correspondence from the UK Government in Annexe A sets out the UK Government’s response including the amendments it tabled to the Trade Bill and which have been agreed.

28 June 2018

Dear Liam

Keith Brown wrote to Greg Hands on 20 December 2017 to confirm that we had lodged a legislative consent memorandum (LCM) in the Scottish Parliament which explained our objections to the Trade Bill and that we could not recommend that the Scottish Parliament consent to the Bill as introduced. He also said that we intended to produce amendments in consultation with the Welsh Government which, if accepted, would address our concerns.

While we welcomed the powers conferred on Scottish Ministers, the LCM made it clear that we could not accept the constraints placed on the use of those powers in the Bill which were analogous to those in what was then the European Union (Withdrawal) Bill. Four of the six amendments we published in January were drafted to address the concerns we had with the approach taken in the European Union (Withdrawal) Bill which you chose to carry across to the Trade Bill. I attach a copy of the amendments published at that time.

You have since written to the Scottish Government acknowledging the links between the EU (Withdrawal) Bill and our concerns with the Trade Bill and said that any relevant amendments agreed on the former would be taken across into the Trade Bill at the appropriate time.

The UK Government has now said that the Trade Bill will return to the House of Commons before summer recess. DIT officials have told Scottish Government officials that, although they were unable to confirm a date for report stage, they could confirm that DIT would discuss possible amendments with us before the deadline for lodging.

Given the position we have reached with the European Union (Withdrawal) Act and the imminent return of the Trade Bill I thought it would be helpful to write to set out our position on the latter and in particular our view on the amendments we published in January.
Michael Russell made a statement in the Scottish Parliament on 19 June about the European Union (Withdrawal) Bill and legislative consent and wrote to David Lidington on 20 June. The Scottish Government has been very clear about the serious implications for the Sewel Convention (and the future of devolution) of the recent actions of the UK Government. We are therefore seeking urgent discussions on how to protect the Convention before we would consider bringing forward legislative consent motions on Westminster Bills related to EU withdrawal, including the Trade Bill.

I understand that Ken Skates wrote to Greg Hands on 6 June, setting out the Welsh Government’s position on the Trade Bill and the amendments we published in January. This letter sets out our position on the Trade Bill in respect of the Scottish Ministers.

In addition to the measures needed to protect the Sewel Convention, the Scottish Government also believes the following changes are required:

**Amendments 1 and 2**

The issue that Amendments 1 and 2 were intended to address (i.e. the need to seek consent from devolved Ministers before amending any legislation in devolved areas) has a direct read-across to the clauses in the EU (Withdrawal) Act which confer powers on UK Ministers in devolved areas, without any form of devolved consent. The Scottish Government’s supplementary LCM on the then EU (Withdrawal) Bill registers the Scottish Government’s concerns that no amendments have been made to alter this approach, or to require the consent of the Scottish Ministers when UK Ministers make regulations in devolved areas. However, given developments on the EU (Withdrawal) Act and statements made by the UK Government, we believe that there could be a basis on which powers could operate compatibly with the devolution settlement, in order to ensure devolved law is prepared for EU withdrawal, subject to the following:

(i) the Scottish Government will hold the UK Government to its promise to seek the agreement of the devolved administrations before using its fixing power;

(ii) draft protocols (developed by Scottish Government and Scottish Parliament officials) on the scrutiny of regulations made by UK Ministers in devolved areas mean that it should be possible to arrange for proper scrutiny in the Scottish Parliament of the programme of legislation required to prepare for EU withdrawal, even without a formal requirement for consent on the face of the Bill; and

(iii) moves towards the equalisation of powers of the Scottish Ministers and UK Ministers means that, where Scottish Ministers and UK Ministers have corresponding powers, Scottish Ministers will be able to make subsequent, different provision to that made by UK Ministers, thus ensuring that regulations in devolved areas proceed only by agreement, except where UK Framework regulations have been made.

If the UK Government gives the same assurances in terms of the Trade Bill as have been given on the EU (Withdrawal) Act, and equalises UK and devolved Ministers’ powers in the same way (see Amendment 4 below) then we will not continue to press for these amendments in respect of the Scottish Ministers.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

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www.gov.scot
Amendment 3

There is no equivalent provision in the EU (Withdrawal) Act, and no amendment has been made to the existing provision in the Trade Bill, which would allow the renewal of the powers relating to grandfathering trade agreements, for further periods of up to five years at a time. **We therefore ask you to amend the Trade Bill as set out in the attached document to require the Secretary of State to consult with Scottish Ministers before deciding whether or how to prolong the period during which implementing powers can be used.**

Amendment 4

The issue in the Trade Bill that Amendment 4 seeks to address has a direct read-across to clause 11/15 and Schedules 2 and 3 of the EU (Withdrawal) Act, which give Scottish Ministers powers to make fixes to retained EU law. As the EU (Withdrawal) Act now stands, Scottish Ministers will have the power to amend direct retained EU legislation in areas that are otherwise devolved, though not where clause 11/15 UK Framework regulations have been made by the UK Government. In such cases, the Scottish Ministers and Scottish Parliament would not have the power to modify retained EU law, so far as the modification was of a description specified in the regulations. The UK Government has identified 24 areas which are likely to be subject to clause 11/15 regulations, but other areas may be affected.

At present, it is envisaged that the powers in the Trade Bill in relation to the grandfathering of existing free trade agreements with third countries would only have to be used in a limited number of cases that could not be dealt with under the EU (Withdrawal) Act. However, given the uncertainty around the timing of transition and the ease with which existing agreements will in fact be rolled over, this restriction on devolved powers could have a significant impact, not least because many of the 24 areas likely to be subject to clause 11/15 regulations are highly relevant in terms of trade deals.

If left unamended, or only amended along similar lines to the equivalent amendments made to the EU (Withdrawal) Act, this provision in the Trade Bill would in effect allow the UK Government to change the law in devolved areas to allow for the implementation of these agreements, which might not necessarily remain exactly as they are at present. We understand that some countries have signalled that they will be looking for changes before agreeing to roll over the bulk of existing agreements. This could affect a potentially wide range of subjects covered by the 24 categories mentioned above including, for example, public procurement, environmental quality, animal health and welfare.

This amendment in particular goes to the core of our position on the EU (Withdrawal) Act and the threat that leaving the current situation unamended poses to the machinery of devolution. **We therefore ask you to amend the Trade Bill in respect of the Scottish Ministers as set out in Amendment 4 in the attached document.**
Amendment 5

The issue in the Trade Bill that Amendment 5 seeks to address has a direct read-across to Schedule 2 of the EU (Withdrawal) Act. The UK Government have made amendments to the EU (Withdrawal) Act to replace a similar requirement to seek the consent of the UK Ministers before making regulations to be commenced before exit day with a requirement to consult. It has done the same in relation to the making of regulations about quota arrangements, or which are incompatible with any such quota arrangements (i.e. in relation to the same circumstances specified in the Trade Bill).

If the equivalent amendments (made to the EU(Withdrawal) Act) are made to the Trade Bill we will not continue to press for this amendment in respect of the Scottish Ministers.

Amendment 6

The Trade Remedies Authority (TRA) will undertake trade remedies investigations across the UK, which will inevitably touch on devolved areas or areas of significance to Scotland. Its decisions could have a substantial impact on businesses and consumers in Scotland, yet neither the Trade Bill nor Taxation (Cross-border Trade) Bill provides a role for the devolved administrations. The TRA will have an important (and early established) role in the development of a UK trade policy. As I have said in previous correspondence, the composition and early operation of the TRA will provide an important indication of how far you intend to deliver on your commitment to develop a trade policy which reflects the interests of all parts of the UK. We believe that our amendment will help to ensure that the TRA reflects and represents the interests of all producers and consumers throughout the UK.

We therefore continue to press for this amendment to the Bill, which would require UK Ministers to secure the consent of the Scottish Ministers to one non-executive member of the TRA.

Access to trade related data

I would welcome your assurance that the provisions included in the Trade Bill for access to HMRC trade related data will also apply to the Scottish Government and that we would have ready access to HMRC’s data sources on trade both historically and in future.

Future trade policy

The Trade Bill is intended to put in place some of the measures which will be necessary to provide continuity in the UK’s trade and investment arrangements. It does not address the many issues that we will need to discuss and resolve in terms of the future trade policy of the UK. Since the Bill was introduced, we have received commitments from you and other DIT Ministers about your intentions to engage in more detailed discussion with the Scottish Government about our involvement in the development of future trade agreements and their implementation. In return we have made it clear that we are willing to work constructively with you in this, but that we would expect to see far greater involvement and influence to ensure that your stated aim of delivering trade arrangements which reflect the interests of all parts of the UK is realised.
Scottish Government officials have presented DIT officials with an outline of our proposals for improvements in this area and have offered detailed discussion. This offer has not been taken up and it seems that your officials feel unable to do so. The clear need for far greater involvement of the devolved administrations in the development of trade policy is not just about the development of future arrangements once we have left the EU.

In written evidence to the Scottish Parliament’s Finance and Constitution Committee on 23 February Professor Aileen McHarg of Strathclyde University discussed the lack of scrutiny arrangements included in the Trade Bill, saying “This level of scrutiny assumes that the powers will be used to make minor and technical changes only. However, there is the potential at least for them to be used to make more substantial changes. There is no equivalent of the amendments that have been made to the EUWB for recommending a stronger degree of parliamentary scrutiny, or for ministers to explain and justify their use of the regulation-making powers.”

Given the scope of the work that you are engaged in across the trade landscape and the importance of this work to Scotland and the Scottish economy, we need to be involved now in all aspects, including trade agreement continuity and the third country discussions you are having, to ensure that the interests of Scotland are properly identified and taken into account.

I look forward to your early response to these issues and to discussions between our officials in advance of the next Parliamentary stage of the Trade Bill.
TRADE BILL AMENDMENTS PUBLISHED IN JANUARY 2018

1. Clause 1, page 1, line 15 at end insert—

“( ) No regulations may be made under subsection (1) by a Minister of the Crown, so far as they contain provision which would be within the devolved competence of the Scottish Ministers (within the meaning given in paragraph 7 of Schedule 1), unless the Scottish Ministers consent.

( ) No regulations may be made under subsection (1) by a Minister of the Crown, so far as they contain provision which would be within the devolved competence of the Welsh Ministers (within the meaning given in paragraph 8 of Schedule 1), unless the Welsh Ministers consent.”

2. Clause 2, page 2, line 40 at end insert—

“( ) No regulations may be made under subsection (1) by a Minister of the Crown, so far as they contain provision which would be within the devolved competence of the Scottish Ministers (within the meaning given in paragraph 7 of Schedule 1), unless the Scottish Ministers consent.

( ) No regulations may be made under subsection (1) by a Minister of the Crown, so far as they contain provision which would be within the devolved competence of the Welsh Ministers (within the meaning given in paragraph 8 of Schedule 1), unless the Welsh Ministers consent.”

3. Clause 2, page 3, line 3 at end insert—

“(10) No regulations may be made under subsection (8)(b) unless the Secretary of State has consulted with the Scottish Ministers and the Welsh Ministers.”

4. Schedule 1, page 7, line 24 at end insert—

“(4) This paragraph does not apply to regulations made under section 1(1) or 2(1) by the Scottish Ministers or the Welsh Ministers.”

5. Schedule 1, page 8, line 5, at end insert—

“(4) This paragraph does not apply to regulations made under section 1(1) or 2(1) by the Scottish Ministers or the Welsh Ministers.

Requirement for consultation in certain circumstances

[ ] (1) No regulations may be made by the Scottish Ministers or the Welsh Ministers acting alone under section 1(1) or 2(1) so far as the
regulations are to come into force before exit day unless the regulations are, to that extent, made after consulting with a Minister of the Crown.

(2) No regulations may be made by the Scottish Ministers or the Welsh Ministers acting alone under section 2(1) so far as the regulations make provision about any quota arrangements or are incompatible with any such arrangements unless the regulations are, to that extent, made after consulting with a Minister of the Crown.

(3) In sub-paragraph (2) “quota arrangements” has the same meaning as in paragraph 3.”

6. Schedule 4, page 14, line 34, at end insert—

“(aa) a non-executive member appointed by the Secretary of State with the consent of the Scottish Ministers,

(ab) a non-executive member appointed by the Secretary of State with the consent of the Welsh Ministers,”
Dear Derek,

Thank you for your letter dated 28 June 2018, and your patience in waiting for my response. I wanted to wait until the Government had tabled amendments to the Trade Bill in advance of Report Stage before responding.

I am writing to provide you with an update on amendments which the UK Government has tabled to the Trade Bill in relation to devolution.

As you are aware, the UK Government introduced the Trade Bill which:

- Create powers to enable the UK to transition trade agreements that currently exist between the EU and other countries, and which we are party to through our EU membership;
- Create the powers needed for the UK to implement the Agreement on Government Procurement (GPA) as an independent member instead of as part of the EU, maintaining current guaranteed access for UK businesses to global procurement opportunities and offering value for money;
- Establish an independent body (the Trade Remedies Authority) to conduct trade remedies investigations, providing a safety net for domestic industries against unfair and injurious trade practices, or surges in imports, consistent with our legal obligations at the World Trade Organisation (WTO); and
- Ensure the UK Government has the necessary powers in relation to the gathering and sharing of trade information.

The Trade Bill will have its Report Stage in the UK House of Commons on Tuesday, 17 July. Consequently, the Government has tabled amendments to the Trade Bill, and I have outlined below, the amendments which will be of interest to you.
Firstly, in line with the European Union (Withdrawal) Act we are removing the restrictions on the Devolved Administrations using the Government Procurement Agreement power (Clause 1) and the trade continuity agreement continuity power (Clause 2) contained within the Bill to amend directly applicable EU law and replacing it with a narrower restraint that only includes those areas of retained direct EU law that are subject to the new Section 12 power (in the European Union (Withdrawal) Act).

Secondly, amendments would replace the requirement for devolved Ministers to have the consent of a Minister of the Crown to (1) use the trade agreement continuity power to make provision relating to quotas, or (2) use the trade agreement continuity power and or GPA power to provide for pre-exit commencement of regulations, with a requirement to consult a Minister of the Crown before using the power to make such provision. This will ensure a coordinated UK approach whilst allowing for a less rigid process to enable this.

Finally, we will make a change also made in the European Union (Withdrawal) Act, to ensure that if one provision of regulations made by a devolved authority is ultra vires, only the provision that is outside of competence will be ultra vires and not the whole instrument in which it is contained.

The UK Government believes that these amendments improve the legislation, demonstrate continued commitment to the devolution settlement, and address the proposed Amendment 5 proposed by the Scottish Government.

In relation to amendments 1 and 2, the UK Government is happy to re-commit that we will not normally use the powers in the Bill to amend legislation in devolved areas without consent from the relevant devolved Ministers, and I am hopeful our officials can work together to understand your suggestions on draft protocols to ensure scrutiny of regulations.

In relation to amendment 3, we can commit that the UK Government will consult with the devolved administrations in advance of extending the sunset of the trade agreement continuity power should the decision be taken to do so.

In relation to amendment 4, the Government is of the view that our amendments as drafted are a significant extension the powers given to the devolved administrations under this Bill and are in keeping with the spirit of the progress made by the UK, Scottish and Welsh Governments during the passage of the European Union (Withdrawal) Act.

In relation to amendment 6, the Government is of the view that we must make sure that the Trade Remedies Authority (TRA) is led by the right individuals. That is why members of the TRA will be appointed based on merit, following a fair and open competition. While they may come from a particular nation or region, that should not be the reason why they are chosen. We look forward to working with the Devolved Administrations on the establishment and operation of the TRA, to ensure that their views and interests are taken into account where appropriate.
In relation to the sharing of Trade Data, Clause 8 enables departments and organisations which have public functions in respect of trade to have access to HMRC data needed to carry out these functions. Any data can be shared with the DAs subject to the Commissioners of Revenue and Customs allowing that onward disclosure, so it is not envisaged that this would be a problem and, of course, those administrations can also approach HMRC directly under the HMRC data sharing provision (Clause 8 – Disclosure of Information by HMRC) in the Trade Bill to request the information directly as well. We are currently setting up data governance and protocols with HMRC to cover mechanisms for access.

I look forward to continuing to work with you on this important legislation that will provide continuity to the whole of the UK, ensuring that businesses, workers and consumers can continue to enjoy the benefits of free trade, and I am happy to meet with you to discuss any questions you may have.

\[
\text{your sincerely,} \quad \text{[Signature]}
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THE RT HON LIAM FOX MP
Secretary of State, Department for International Trade
& President of the Board of Trade
Overview of Written Evidence

The Committee issued a call for written evidence on the UK Government’s Trade Bill and the associated Legislative Consent Memorandum (LCM). In particular, views were sought on the following issues:

- The appropriateness of the powers proposed in the Bill for UK Ministers and Scottish Ministers;
- The restrictions which the Bill seeks to apply to the powers of Scottish Ministers;
- The implications for the operability of the devolution settlement arising from the Bill’s provisions;
- The interaction between the provisions of the Trade Bill and those contained in the European Union (Withdrawal) Bill and the implications of this interaction for the devolution settlement;
- The implications of the Bill’s provisions for any common frameworks that may be agreed between the Scottish and UK governments relating to the repatriation of powers from the EU;
- The implications of the Bill’s provisions for the operation of public procurement policy in Scotland; and
- What mechanisms should be put in place to ensure that there is parliamentary scrutiny of the powers proposed for Scottish and UK Ministers in the Bill.

Ten responses were received to the call for evidence which closed on 23 February 2018. These responses can be accessed at—
http://www.parliament.scot/S5_Finance/General%20Documents/Trade_Bill_20180309.pdf

This paper provides an overview of the content of the written submissions received.

Scrutiny / Transparency

The main theme common to the responses received was the need for transparency, accountability and parliamentary scrutiny of trade negotiations including a role for the UK Parliament and devolved administrations in influencing and ultimately signing off on trade deals. For example, GMB Scotland commented—

“we would want devolved administrations to have joint powers and consent with UK Government in deciding whether trade agreements are launched, to scrutinise the negotiations transparently and democratically, to influence regulatory standards, and to have an ultimate veto on agreement of a trade agreement is it was found to be detrimental to the interests of the devolved administration”³.

The Law Society of Scotland also stressed the need for transparency and stated that—

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³ GMB Scotland, Written Submission, p.4.
“We continue to support an inclusive and transparent trade policy to which extensive engagement with a wide variety of stakeholder groups is important. In our response to DIT’s consultation on the future approach to trade policy we welcomed the recognition of the importance of engaging with the devolved administrations and legislatures. We also emphasised that it is important to ensure that a whole of governance approach is extended to trade negotiations.”

A number of respondents highlighted that the Trade Bill “makes no provision to ensure democratic accountability or parliamentary scrutiny from either Westminster or Holyrood”. St Andrew’s TTIP Action Group noted that—

“Trade Agreements are currently negotiated under the Royal Prerogative, which gives the UK government power to decide when and who to negotiate with, decide its own priorities, conduct talks (often in secret) and conclude and sign deals.”

**Appropriateness of Powers**

With regard to the appropriateness of the powers proposed in the Bill for UK and Scottish Ministers, concern tended to be expressed at the extent and scope of the powers proposed. Liberty commented that—

“The Trade Bill continues a worrying trend in recent UK Government-proposed legislation – including the Withdrawal Bill, the Data Protection Bill, and the Sanctions and Anti-Money Laundering Bill – of seizing extensive law-making powers from Parliament and granting Ministers the ability to amend primary legislation for a range of broadly defined reasons. This can be done at the discretion of Ministers, with little constraining guidance from legislators and limited to no Parliamentary oversight.”

The Law Society of Scotland also stated that it was “concerned by the extensive scope of the delegated ministerial powers” proposed in the Bill which it considered mirrored concerns the Society had expressed in relation to the European Union (Withdrawal) Bill (EUWB). The Law Society commented that “it is not clear why the Government considers such wide powers to be necessary”.

A number of respondents noted that the Bill appeared to assume that only minor or technical changes would be required to existing trade deals. The potential for more substantial changes to be required to trade deals as a result of Brexit was emphasised by a number of respondents. For example, Trade Justice Dundee stated—

“It is misleading to say that ‘replacement’ deals that the UK is currently part of, due to our membership of the EU, can be simply transferred on Brexit. Some

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4 Law Society of Scotland, Written Submission, p.3.
5 Scottish Trades Union Congress, Written Submission, p.1.
6 St Andrew’s TTIP Action Group, Written Submission, p.2.
7 Liberty, Written Submission, p.3.
renegotiation will be needed and a democratic process for scrutinising and agreeing those changes is vital”\(^8\).

**Powers of Scottish Ministers / Operability of the Devolution Settlement**

Professor Aileen McHarg, of Strathclyde University, considered this issue in detail and highlighted four issues in relation to the devolution aspects of the Bill. These were:

1. “The rationale for the narrower scope of the powers of devolved ministers, compared with UK ministers, is unclear. The EU (Withdrawal) Bill has now been amended to make clear that this restriction does not apply where the subject matter of the legislation has been devolved via the order-making power contained in clause 11. At the very least, the Trade Bill should be similarly amended.

2. The requirement to gain the consent of UK Ministers before devolved ministers make regulations under clauses 1 and 2 is objectionable in principle, and seems particularly hard to justify given that the EU (Withdrawal) Bill has now been amended to remove equivalent consent requirements.

3. There is no requirement for UK Ministers to gain devolved consent before exercising regulation-making powers in devolved areas. This is problematic given that the power under clause 2 could potentially be used to make far-reaching changes in areas of devolved competences to implement trade deals which have been signed but not yet implemented by the EU by exit day. The longer any transitional withdrawal period lasts, the more scope there is for this power to be used in unanticipated ways.

4. It is unclear on the face of the Bill when regulations affecting devolved matters will / should be made by devolved ministers, UK Ministers, or through joint action”\(^9\).

The Law Society of Scotland noted that currently international relations and the regulation of international trade is reserved. The Society did however “urge further consideration of how trade negotiations will be handled where they intersect with the powers of the Scottish Parliament”. The Law Society also observed that the meaning of ‘devolved competence’ as set out in the Trade Bill and in the EUWB deviated from the meaning of ‘devolved competence’ contained in the Scotland Act 1998. The Law Society stated—

“This would lead to a situation where it might be necessary – depending on the topic under discussion – to look at all three Acts in order to establish what is meant by devolved competence. This is likely to create confusion and cuts across the legal certainty which is a central principle of good law-making. To the extent that amendment to the definition of “devolved competence” requires to be amended to take account of the EU (Withdrawal) Bill and Trade Bill, we suggest that it would be preferable to include those adjustments, and the

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\(^8\) Trade Justice Dundee, Written Submission, p.1.  
\(^9\) Professor Aileen McHarg, Written Submission, p.2.
context in which they would apply, by direct amendment of s.54 of the Scotland Act 1998”\(^\text{10}\).

**Common Frameworks / Repatriation of Powers / Public Procurement**

Where respondents commented on common frameworks and the repatriation of powers from the EU there tended to be a recognition of the need for devolved administrations to have a role as well as the need for wider stakeholder involvement. For example, GMB Scotland stated that “the process has to be opened up to allow devolved administrations the scope to protect and promote areas where it has power under the devolution settlement”. The Scotch Whisky Association observed—

“There may be areas where UK wide framework agreements, covering all UK nations, could be the best approach, and where this is the case they should be explored in a collaborative manner with businesses and devolved governments”.

Trade union respondents highlighted the potential impact of trade deals upon devolved competences including public procurement. For example, GMB Scotland stated—

“Resolving the issues relating to Clause 11 of the Withdrawal Bill and related devolved matters will be vital to bringing clarity on the powers to influence existing devolved areas such as environmental standards, health, public procurement, agriculture and many other areas that will be directly impacted by trade policy. GMB would want assurances that more progressive policies being pursued by devolved administrations in these areas will not be undermined by UK Government attempts to reclaim authority over these areas via trade policy”\(^\text{11}\).

In terms of public procurement, GMB Scotland commented that it did not want to see the existing powers of the devolved administrations in this area undermined as a result of either the Trade Bill or the EUWB. Lastly, the Trade Justice Scotland Coalition (TJSC) noted that the impact of an investor protection clause in trade deals would result in the Scottish Government being responsible for any costs with regard to devolved policy areas. TJSC stated in this regard that—

“Scotland has regularly been the first nation in the UK to bring in stronger public policy legislation: from banning smoking in public places, to the extended moratorium on fracking, to greenhouse gas emissions targets. This, and the fact that if Scotland were to be sued using an investor protection clause in a trade deal, then it would be the UK government who would fight the case – but if the UK government lost then the Scottish government would have to pay the compensation costs - mean that Scotland is inextricably linked to any international trade deals signed by the UK Government”\(^\text{12}\).

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\(^{10}\) Law Society of Scotland, Written Submission, p.6.

\(^{11}\) GMB Scotland, Written Submission, p.4.

\(^{12}\) Trade Justice Scotland Coalition, Written Submission, p.3.
Mechanisms to ensure Parliamentary Scrutiny

A range of mechanisms were proposed by respondents as providing a means for ensuring greater scrutiny of the powers proposed in the Bill. The TJSC suggested a range of actions including that the UK Government’s negotiating objectives and mandate for any proposed trade deal should be published and subject to scrutiny in Westminster and the Scottish Parliament. Accordingly, TJSC also considered that the final text of any trade deal should be subject to debate and approval in both Westminster and the Scottish Parliament. In a similar vein, the GMB stated that “there should be a joint committee or Council involving the devolved administrations for consultation and agreement / consent on all stages of the trade process”13.

A number of respondents suggested that a Joint Ministerial Council on Trade should be established in order to strengthen Scottish ministers’ oversight of UK trade policy. In terms of inter-governmental approaches, the GMB observed that it—

“is interested by the suggestion of the Welsh administration for a UK Council of Ministers of the Nations, and believes that, if this structure was developed to assure transparency and scrutiny, it could lend itself well to development of future UK trade policy”14.

A number of respondents also highlighted the need for wider civic society and public consultation to be built into the development of trade policy. The Law Society of Scotland highlighted the recommendations of a number of Westminster committees in relation to strengthened procedures for scrutiny of delegated powers proposed in the EUWB and suggested that these proposals should also apply to the Trade Bill. Lastly, the TJSC highlighted a number of international examples of jurisdictions, including Belgium, Canada and the United States, where sub-national governments and legislatures have a locus in trade policy. In this regard the TJSC commented—

“Including the Scottish Parliament (and the other devolved administrations of the UK) in the development, negotiation and scrutiny of international trade deals in not a radical ask”15.

Committee Clerks
12 April 2018

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13 GMB Scotland, Written Submission, p.5
14 Ibid, p.4.
15 Trade Justice Scotland Coalition, Written Submission, p.5.