



The Scottish Parliament  
Pàrlamaid na h-Alba

## FINANCE AND CONSTITUTION COMMITTEE

### AGENDA

**11th Meeting, 2019 (Session 5)**

**Wednesday 15 May 2019**

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

1. **Decision on taking business in private:** The Committee will decide whether to take item 3 in private.
2. **Trade negotiations:** The Committee will take evidence from—  
  
Ivan McKee, Minister for Trade, Investment and Innovation, and Stephen Sadler, Head of Trade Strategy Team, Scottish Government.
3. **Annual report:** The Committee will consider a draft annual report for the parliamentary year from 12 May 2018 to 11 May 2019.

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The papers for this meeting are as follows—

**Agenda Item 2**

Cover note

FCC/S5/19/11/1

PRIVATE PAPER

FCC/S5/19/11/2  
(P)

**Agenda Item 3**

PRIVATE PAPER

FCC/S5/19/11/3  
(P)

## Finance and Constitution Committee

11 Meeting, 2019 (Session 5), Wednesday 15 May 2019

### The role of devolved institutions in Trade negotiations

#### Purpose

1. This paper provides information relating to the Committee's evidence session on the UK Government's Trade Bill, the associated Scottish Government Legislative Consent Memorandum and subsequent policy developments on the role of devolved institutions in trade negotiations.
2. The Committee published [its report on the Trade Bill Legislative Consent Memorandum](#) on 31 October 2018. [The Scottish Government](#) and [UK Government](#) each responded to the Committee's report on 29 November 2018.
3. Since that time the Trade Bill has been progressing through the UK Parliament, having recently completed third reading stage in the House of Lords (on 20 March) 2019. The Bill will next go to the House of Commons for consideration of House of Lords amendments. No date has been set for this consideration.
4. The purpose of this evidence session is to discuss with the Minister for Trade, Investment and Innovation developments with the Trade Bill following the Committee's report on the Trade Bill LCM and arising from the UK Parliament's ongoing consideration (as set out below).

#### Trade Bill

5. 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.
6. On Monday 21 January 2019 the House of Lords agreed an amendment by Baroness Fairhead to the Trade Bill motion that resolved that "the committee's report be not received until Her Majesty's Government has presented to both Houses proposals for a process for making international trade agreements once the United Kingdom is in a position to do so independently of the European Union, including roles for Parliament and the devolved legislatures and administrations in relation to both a negotiating mandate and a final agreement"
7. Responding to this [the Committee wrote to Rt. Hon. George Hollingbery MP](#), Minister of State for Trade on 30 January 2019 inviting him to give evidence to the Committee and reiterating the comments made in the Committee's report regarding the role of the Scottish Parliament. This includes that "robust processes and new institutional mechanisms are urgently developed to allow for the four nations of the UK to develop a consensual position before the beginning of trade negotiations".

8. The Committee also set out that the Scottish Parliament “should have a role in all stages of the trade negotiation process – preparation, negotiation and finalisation”.

9. The Minister of State for Trade responded on 18 February 2019 (see **Annexe A**) and stated that—

“The UK Government is committed to ensuring that future trade agreements deliver for all parts of the United Kingdom and draw on the expertise of each of the devolved nations. That is why we recently committed to establishing a new intergovernmental Ministerial Forum to provide a formal mechanism for Devolved Government Ministers to discuss and provide input to future trade negotiation. It will be a matter for the Scottish Parliament to determine how it will scrutinise the role of the Scottish Government in those arrangements.”

10. He also welcomed the Committee’s response to the UK Government’s “commitment to not normally using the powers in the Trade Bill to legislate in areas of devolved competence without the consent of the relevant devolved administration and certainly not without first consulting them”.

11. On 28 February 2019, responding to the agreed House of Lords amendment, the UK Government published a command paper entitled [“Processes for making free trade agreements after the United Kingdom has left the European Union”](#) which sets out further details of its approach, including to public transparency and the role of Parliament and the devolved administrations in relation to future trade deals. It does not apply to “to other international negotiations and treaties, including negotiations on the future relationship with the EU” and to existing agreements that the UK is currently party to as a result of EU membership.

12. In addition to setting out the role of the UK Parliament’s scrutiny role the paper includes the following proposals regarding a role of devolved governments and Parliaments:

- As part of its Intergovernmental Relations Review, in summer 2018 the Department for International Trade held a deep dive on trade policy with the devolved administrations. This has resulted in a regular Senior Officials’ Groups, held every six weeks and an ongoing programme of monthly round-tables on technical policy areas.
- Continued discussion with devolved administrations on their role with future free trade agreements. This complements the existing [Memorandum of Understanding for devolution](#).
- a new Ministerial Forum for international trade to support discussion and engagement between the UK Government and the devolved administrations on trade agreements.
- Where FTA requires legislation in order to implement it, the UK Government commits to respecting the devolution settlements and work with the devolved administrations to secure legislative consent for UK-wide legislation where appropriate.
- It will be for each devolved legislature to determine how it will scrutinise their respective Governments as part of the ongoing process although UK Ministers may engage directly with devolved legislatures.

13. The paper also sets out the UK Government proposals on transparency and public consultation including the information it will publish at the beginning, end and throughout negotiations. This includes laying in the UK Parliament:
- a. An Outline Approach published prior to negotiations commencing;
  - b. A Round Report published following each substantive round of negotiations
  - c. Full Treaty text at the end of negotiations as well as a full Impact Assessment.
14. An Annual Trade Report will also be published covering the progress across the full programme of negotiations.

### Scottish Government Position

15. 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>

16. The Scottish Government states 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”<sup>1</sup>. However, as the Trade Bill adopts a similar approach to the European Union (Withdrawal) Bill in terms of placing constraints upon the Scottish Government and Parliament, the Scottish Government states 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”<sup>2</sup>.

17. In response to the Committee’s report recommendations the Cabinet Secretary for Government Business and Constitutional Relations comments on the Bill’s approach to devolved competence, the Sewell Convention and membership of the proposed Trade Remedies Authority. In relation to the role of the Scottish Government and Scottish Parliament the Cabinet Secretary highlights the recommendations of the Scottish Government’s discussion paper [Scotland’s Role in the Development of Future UK Trade Arrangements \(published in August 2018\)](#), which calls for—

“a radical overhaul of the arrangements within the UK for developing, scrutinising and agreeing trade deals. In particular, it made an evidence based case for a guaranteed and statutory role for the Scottish Government and Scottish Parliament in the development of all such agreements.”

18. In that paper the Scottish Government explains that the best option for Scotland is remaining within the EU (and if not, then remaining within the EU customs union). In the event that Scotland leaves the customs union then the paper explains that:

<sup>1</sup> Scottish Government, Trade Bill: Legislative Consent Memorandum, p.7

<sup>2</sup> Ibid, p.7.

- a. The conduct and content of future trade policy, negotiations and agreements will have very important implications for Scotland (as they will deal with and merge a range of devolved and reserved policy areas). It is therefore vital that the Scottish Government is fully involved in the process for determining them;
- b. the Scottish Government and Scottish Parliament must play a much enhanced role in the development of future trade policy and the preparation, negotiation, agreement, ratification and implementation of future trade deals, to help industries, protect devolved public services and ensure the highest standards of environmental and consumer protection in Scotland and across the UK. This will require a change to the current arrangement for scrutiny and democratic engagement.

19. The discussion paper also considers and examines the effectiveness of the current arrangements within the UK for agreeing trade policy and international trade deals, assesses the approach taken so far by the UK Government to future arrangements and sets out specific proposals for Scotland's future role.

20. On 11 March 2019 the Cabinet Secretary for Government Business and Constitutional Relations wrote to the Committee to confirm the Scottish Government's position on the Trade Bill (see **Annexe B**). In summary that position is that—

“In the absence of any movement by the UK Government to address the Scottish Government's concerns in relation to the Trade Bill, I can confirm that as set out in detail in my letter of 29 November we cannot seek formal legislative consent for the Bill.”

### Common Frameworks

21. In its latest update [Revised Framework Analysis \(April 2019\)](#), the UK Government set out a revised breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland. A number of these framework areas will impact on the terms of current and future trade agreements. Public procurement is one such area where a non-legislative common framework agreement covering EU Law areas of public procurement contracts for supplies, services, and works (along with other aspects) is expected.

22. State Aid is another policy area which may impact on current and future trade deals. The revised framework analysis identifies it as one of four areas<sup>3</sup> that the UK believes are reserved, but which are subject to ongoing discussion with the devolved administrations. The revised framework analysis highlights State Aid as including the rules relating to State Aid and the framework for assessing compatibility of aid with the internal market, investigating complaints about allegedly unlawful aid and creating exemptions for certain categories of aid.

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<sup>3</sup> The other three areas are: Elements of product safety and standards relating to explosive atmospheres, Food Geographical Indications (Protected Food Names) and Data Sharing- Eurodac.

23. On 21 January the UK Government laid the [State Aid \(EU Exit\) Regulations 2019](#) in the UK Parliament. On 28 January the Minister for Trade, Investment and Innovation [wrote to the Energy and Fair Work Committee](#) explaining that—

“While officials in both the UK and Scottish Governments are broadly in agreement on the proposed UK wide State aid regime, it is the view of Scottish Government that State aid is not reserved and that legal competence rests with Scottish Ministers and the Scottish Parliament.”

24. These Regulations have yet to be approved by the House of Commons but were approved by the House of Lords on 14 March 2019.

### Discussion areas

25. In considering the recent amendments to and developments with the Trade Bill, members may wish to explore the Scottish Government’s involvement in and any agreement to:

- a. The UK Government command paper on ‘Processes for making free trade agreements after the United Kingdom has left the European Union’
- b. The proposal for regular meetings of the Senior Officials Group
- c. A new Ministerial Forum for discussion and engagement between the UK Government and devolved administrations on trade agreements (underpinned by official-led technical engagement).
- d. The role the Scottish Parliament should have in informing the Scottish Government’s consultation responses to UK Parliamentary Committees on draft negotiating mandates and the text of the draft agreements (as is currently required by the Trade Bill);

26. Members may also wish to discuss:

- a. what scrutiny role the Scottish Government envisages for the Scottish Parliament in relation to trade agreements (such as replicating the UK Government proposals to lay in Parliament information on the negotiation and agreement of Trade Deals);
- b. the extent to which common frameworks may either impact on the negotiating terms of future trade deals or require to be changed to reflect ratified trade agreements;
- c. what role, if any, the Scottish Government has in relation to the Trade Agreement Continuity programme (for rolling over existing agreement that the UK is party to via its EU membership) especially where any changes are proposed to the terms of the existing agreements;
- d. to what extent the Scottish Government has discussed with the UK Government any protocol to enable Scottish Parliamentary consideration of UK Government secondary legislation which relates to devolved areas and is required to implement treaties.

**Committee Clerks  
10 May 2019**



## Department for International Trade

FCC/S5/19/11/1

Annexe A

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Ref: MCB2019/00394

18<sup>th</sup> February 2019

Thank you for your letter dated 30<sup>th</sup> January regarding the amendment to the House of Lord's committee motion tabled by Baroness Smith of Basildon.

The Finance and Constitution Committee's paper Trade Bill LCM provided valuable insight to our consideration of the role of devolved administrations in the Trade Bill and our subsequent engagement with the Scottish Government.

I have noted the recommendations in your report on the role of the Scottish Parliament in future trade negotiations and their particular relevance to the House of Lords resolution. The Trade Bill seeks continuity of existing arrangements and so the role of the devolved legislatures and administrations in the negotiation of new arrangements does not feature in the Trade Bill.

The UK Government is committed to ensuring that future trade agreements deliver for all parts of the United Kingdom and draw on the expertise of each of the devolved nations. That is why we recently committed to establishing a new intergovernmental Ministerial Forum to provide a formal mechanism for Devolved Government Ministers to discuss and provide input to future trade negotiation. It will be a matter for the Scottish Parliament to determine how it will scrutinise the role of the Scottish Government in those arrangements.

I welcome your positive reaction to the Government's commitment to not normally using the powers in the Trade Bill to legislate in areas of devolved competence without the consent of the relevant devolved administration and certainly not without first consulting them. I trust the repeated statements that Baroness Fairhead and I have made in Parliament confirm the Government's ongoing commitment to respecting this important convention in relation to regulations made under the Trade Bill.

I am grateful for your invitation to return to the Finance and Constitution Committee. You will appreciate that there is a significant amount of work going in Westminster and in my Department but I will endeavour to return to your Committee as soon as possible.



**GEORGE HOLLINGBERY MP**  
Minister of State for Trade Policy  
Department for International Trade

Cabinet Secretary for Government Business and  
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Michael Russell MSP



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Bruce Crawford MSP  
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11 March 2019

Dear Bruce

I am writing to confirm the Scottish Government's position on the Trade Bill (ahead of the Report Stage of the Bill at Westminster which is due to begin on 6 March).

The Bill was introduced by the UK Government on 7 November 2017 and the Scottish Government lodged a Legislative Consent Memorandum (LCM) to the Bill on 20 December. The LCM stated that the Scottish Government "cannot accept the restrictions on the exercise of its competence in devolved areas" in the Bill as introduced and "cannot recommend that the Scottish Parliament gives consent, even conditionally, to the Bill in its current form." The restrictions, of course, had been carried forward from the, then, EU (Withdrawal) Bill.

I wrote to the Finance and Constitution Committee on 19 January 2018 setting out a proposed set of amendments which, if accepted by the UK Government, would address these concerns. These amendments were not accepted by the UK Government.

The Finance and Constitution Committee published its *Report on the Trade Bill LCM* on 31 October 2018 and you wrote to me on 1 November.

Among other things, the Committee recommended that "If [voluntary political agreement cannot be reached for all the governments of the UK not to bring forward legislation in areas where common frameworks are likely to be needed] and the Section 12 [of the European Union (Withdrawal) Act] restrictions continue to apply to clauses 1 and 2 of the Trade Bill then the Committee recommends that the Scottish Parliament does not consent to these clauses."

I responded to your Committee's report in my letter of 29 November and welcomed the Committee's support for the Scottish Government's position in relation to the Trade Bill and wider constitutional implications. In particular I was pleased to note the Committee's general support for our view that the Trade Bill should reflect and protect the Scottish Government and Scottish Parliament's legitimate interests in this area.

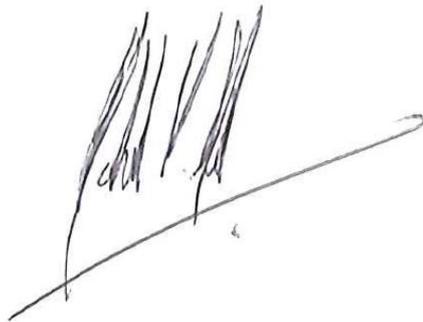
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The approach taken in the Trade Bill is an approach which the Scottish Parliament already rejected in its rejection of the EU (Withdrawal) Bill. The Scottish Government's views on the Trade Bill were clearly set out in the LCM in December 2017. Relevant provisions within the Trade Bill have not changed since that time and both the Finance and Constitution Committee and the Delegated Powers and Law Reform Committee have considered and reported on the Bill. The LCM, Committee reports and my letter to you are all in the public domain. The Scottish Government's approach to the Trade Bill is therefore well documented.

In the absence of any movement by the UK Government to address the Scottish Government's concerns in relation to the Trade Bill, I can confirm that as set out in detail in my letter of 29 November we cannot seek formal legislative consent for the Bill.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.



**MICHAEL RUSSELL**

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