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# **Finance and Constitution Committee Comataidh Ionmhais is Bun-reachd**

## **Report on Trade Bill LCM**



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# Finance and Constitution Committee

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(b) any report made by a committee setting out proposals concerning public revenue or expenditure;

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(d) any other matter relating to or affecting the revenue or expenditure of the Scottish Administration or other monies payable into or expenditure payable out of the Scottish Consolidated Fund.

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# INTRODUCTION

1. The Trade Bill (“the Bill”) was introduced by the UK Government in the House of Commons on 7 November 2017 <sup>1</sup>. The Bill sets out a number of “measures that are required to build a future trade policy for the UK” <sup>2</sup> in the event of the UK leaving the European Union. The Explanatory Notes to the Bill state that Part 1 of the Bill would alter devolved competences and therefore the UK Government is seeking legislative consent from the Scottish Parliament in relation to Part 1 of the Bill – Implementation of international trade agreements.
2. Clause 1 of the Bill deals with the power to implement the Government Procurement Agreement (GPA). Clause 2 of the Bill deals with a power to implement international trade agreements. Clause 3 of the Bill introduces Schedules 1 to 3 of the Bill which seek to place a restriction on devolved competence with regard to retained EU law in a similar manner to that in the European Union (Withdrawal) Bill (EUWB) as introduced.
3. The other measures, for which the UK Government is not seeking legislative consent, set out in the Bill are:
  - Setting out the basis of a new Trade Remedies Authority (TRA) to deliver the new UK trade remedies framework;
  - Enabling the TRA to provide advice, support and assistance to the Secretary of State for International Trade in connection with the conduct of international disputes and other functions of the Secretary of State relating to trade and functions of the TRA. The TRA may also provide such advice, support and assistance to other organisations on its own initiative;
  - A power for HMRC to collect data on behalf of the government to confirm the number of exporters of goods and services in the UK and to be able to identify those exporters for trade promotion purposes;
  - A power to establish a data sharing gateway between HMRC and other public and private bodies, so that those bodies, including Department for International Trade (DIT), can discharge their public functions and access record-level data for research, monitoring and evaluation. <sup>2</sup>
4. The Scottish Government lodged a Legislative Consent Memorandum (LCM) <sup>3</sup> to the Bill on 20 December 2017 and the Finance and Constitution Committee (“the Committee”) was designated as the lead Committee. The LCM states 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 Minister for UK Negotiations on Scotland’s Place in Europe<sup>i</sup> subsequently wrote to the Committee on 19 January 2018 <sup>4</sup> setting out a proposed set of amendments which if accepted by the UK Government would address these concerns. These proposed amendments were developed jointly with the Welsh Government.

5. The Bill has completed its passage through the House of Commons and is now being considered by the House of Lords. The UK Government tabled a number of amendments at Report Stage in the House of Commons in relation to the powers of Scottish Ministers and these are discussed in more detail below.
6. The Committee wishes to thank all those who submitted written evidence and provided oral evidence to the Committee on the Bill. The Committee also wishes to thank its former adviser on constitutional issues, Christine O'Neill, for the expert advice and assistance provided throughout the scrutiny process. The Delegated Powers and Law Reform Committee produced a report on the Bill on 2 October 2018 <sup>5</sup>. The Culture, Tourism, Europe and External Relations Committee also wrote to the Committee regarding an evidence session it held on the 'United Kingdom's future trade policy' <sup>6</sup>.

# RESTRICTIONS ON THE POWERS OF SCOTTISH MINISTERS

7. Clause 1 of the Bill empowers an “appropriate authority” to use secondary legislation to implement the GPA. An “appropriate authority” for the purpose of Clause 1 includes the Scottish Ministers. The Bill empowers the Scottish Government to give effect to GPA requirements using secondary legislation.
8. Clause 2 of the Bill similarly empowers “appropriate authorities” (including the Scottish Ministers) to use secondary legislation to implement international trade agreements to which the UK is a signatory. The Bill’s powers extend not only to agreements that are explicitly ‘free trade’ agreements but also to any “international agreement that mainly relates to trade, other than a free trade agreement”.
9. Schedule 1 of the Bill as introduced contained a range of restrictions on the powers of Scottish Ministers (and other devolved governments) to make regulations under sections 1 and 2 of the Trade Bill. The LCM states that the 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.” These are similar restrictions to those within the EUWB as introduced. These restrictions are discussed in more detail below.

## The Power to Amend Retained Direct EU Legislation

10. Schedule 1 of the Bill as introduced provides that Scottish Ministers 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 EU law that the UK Government has made, even in devolved areas. This is a similar restriction to Clause 11 of the EUWB as introduced.
11. The Bill was amended at Report Stage in the House of Commons to remove this restriction and replace it with a narrower restraint that includes those areas of retained EU law that are subject to the new Section 12 power in the European Union (Withdrawal) Act. This means that Scottish Ministers will have the power to amend direct retained EU legislation in areas that are otherwise devolved but not where Section 12 regulations have been made by the UK Government. The UK Government has published a list of 24 policy areas which are likely to be subject to Section 12 regulations and these are detailed in Annexe A of this report. Other policy areas may also be affected.
12. The Scottish Government’s view is that this restriction on devolved powers “could have a significant impact, not least because many of the 24 areas....are highly relevant in terms of trade deals” and this “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.”



13. The UK Minister of State for Trade Policy was asked by the Committee at its meeting on 5 September 2018 why the UK Government was proceeding with the same restrictions in the Trade Bill given that the Scottish Parliament had refused consent for the section 12 powers in the European Union (Withdrawal) Act. He responded that-

”there are certain areas in which consistency of approach across the UK as a whole is the driving force that we must work with and make sure that, when we transition existing EU trade agreements, it is maintained.”

Source: Finance and Constitution Committee 05 September 2018 [Draft], George Hollingbery, contrib. 4<sup>7</sup>

14. **The Committee’s position on Section 12 of the European Union (Withdrawal) Act is explained in our interim report on the EUWB LCM <sup>8</sup> and our report on the supplementary LCM <sup>9</sup>. The Committee remains of the view that any constraints to the powers of Scottish Ministers to amend retained direct EU legislation should be voluntary on the same basis as the commitments given by the UK Government. On this basis, as we have stated previously, if a voluntary political agreement can be reached for all the governments of the UK not to bring forward legislation in areas where common frameworks are likely to be needed then the Section 12 restriction should be removed.** <sup>ii</sup>

15. **If such an agreement cannot be reached and the Section 12 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. In doing so we note that despite the refusal of the Scottish Parliament to consent to the EU (Withdrawal) Bill the UK Parliament proceeded to pass the legislation and that Bill has now been enacted. This has led to a clear impasse between the UK Government and the Scottish Government regarding the operation and meaning of the Sewel Convention.** <sup>iii</sup>

16. **As stated by the House of Commons Public Administration and Constitutional Affairs Committee (PACAC) “there is a considerable level of ambiguity surrounding the Sewel Convention.” <sup>10</sup> PACAC recommended that the UK Government “sets out a clear statement of circumstances under which legislative consent is not required by the Sewel Convention.”** <sup>11</sup>

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<sup>ii</sup> Alexander Burnett MSP, Murdo Fraser MSP and Adam Tomkins MSP dissented from this paragraph.

<sup>iii</sup> Alexander Burnett MSP, Murdo Fraser MSP and Adam Tomkins MSP dissented from this paragraph.

17. **The UK Government responded to PACAC that it “is fully committed to the Sewel Convention and the related practices and procedures for seeking legislative consent” but “it has never been the case that devolution means that the Scottish Parliament, or any devolved legislature, has a veto over...the UK Parliament’s ability to make laws for each of the devolved nations.”<sup>12</sup>**
18. **The Committee believes that the impasse between the Scottish Government and the UK Government in relation to the Sewel Convention needs to be addressed as a matter of urgency and ideally in advance of the final amending stage of the Trade Bill in the House of Lords.**
19. **The Committee intends to write to the Secretary of State for Scotland and the Cabinet Secretary for Government Business and Constitutional Relations requesting that they seek a solution to the impasse over the Sewel Convention as a matter of urgency. The Committee also intends to take further evidence on this issue with a view to exploring possible solutions including that proposed by PACAC as discussed above.**

## **The Power to Introduce Regulations Before Exit Day**

20. The Bill as introduced required Scottish Ministers to have the consent of the UK Government to the making of regulations under clauses 1 and 2 before exit day. The Bill was amended at Report Stage in the House of Commons to require the Scottish Ministers to consult with the UK Government but not to obtain its consent to such regulations. The UK Government made similar amendments to the EU (Withdrawal) Bill to replace a similar requirement to seek the consent of UK Ministers before making regulations to be commenced before exit day with a requirement to consult.
21. **The Committee welcomes the amendments to the Trade Bill replacing the requirement to consent with a requirement to consult when making regulations under clauses 1 and 2 before exit day.**

## **Sunset Clause**

22. The power to make regulations under clause 2(1) in relation to implementing international trade agreements would expire, or "sunset", three years after exit day. Clause 2(8)(b) confers power on UK Ministers to delay that expiry and allow the power to continue in force for further periods of up to 3 years at a time. These

periods were originally set at 5 years but were amended at Report stage in the House of Commons.

23. The Scottish Government's view is that there should be a requirement for the UK Government to consult the devolved governments before altering their powers in this way. The UK Government has confirmed that it is committed to consulting "with the devolved administrations in advance of extending the sunset of the trade agreement continuity power should the decision be taken to do so."

24. **The Committee welcomes the UK Government's commitment to consult with the Scottish Government when seeking to extend the clause 2 powers beyond the initial 3 year period. The Committee notes the recommendation of the DPLR Committee that the UK Government should consider placing its commitment to consult with the Scottish Government and other devolved administrations ahead of any extension to the 3 year sunset period on the face of the Bill.**

# UK MINISTERIAL POWERS IN DEVOLVED AREAS

25. The Bill provides UK Ministers with powers to make regulations under clauses 1 and 2 in devolved areas without any form of devolved consent. Both the Scottish Government and the Welsh Government proposed amendments which would require UK Ministers to secure the consent of the devolved governments before making provision within devolved competences.
26. The Cabinet Secretary for Finance, Economy and Fair Work subsequently wrote to the Secretary of State for International Trade on 28 June 2018<sup>13</sup> updating the Scottish Government's position following the supplementary LCM on the EUWB. He noted that there is a direct read across between the UK Ministerial powers to make regulations in devolved areas in the Trade Bill and similar powers in the EU (Withdrawal) Act and proposed a similar approach to the supplementary LCM on the EUWB.
27. While the Scottish Government continues to have concerns that UK Ministers can make regulations under clauses 1 and 2 of the Trade Bill in devolved areas without any form of devolved consent, these powers could operate compatibility with the devolution settlement on the following basis—
- The Scottish Government will hold the UK Government to its commitment to seek the agreement of the devolved administrations before using its regulation making powers in devolved areas;
  - Protocols developed between the Scottish Government and Scottish Parliament would ensure scrutiny of the programme of legislation required for EU withdrawal;
  - Measures taken towards an equalisation of powers in the 2018 Act should ensure that regulations in devolved areas would only proceed by agreement.
28. The Secretary of State for International Trade responded that he 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.”<sup>14</sup>
29. **The Committee noted in our interim report on the EUWB LCM that we were “deeply concerned that Clauses 7 to 9 in the Bill would allow UK Ministers to make statutory instruments in devolved areas without any statutory requirements to seek the consent of Scottish Ministers or the Scottish Parliament.”<sup>15</sup> We stated that this “cuts across the devolution settlement.” We reaffirmed this view in our report on the EUWB supplementary LCM and do so again here in relation to similar provisions within the Trade Bill.**

# TRADE REMEDIES AUTHORITY

30. Part 2 of the Bill provides for the establishment of a new non-departmental public body termed the 'Trade Remedies Authority' (TRA). The Explanatory Notes to the Bill explain that trade remedies measures-
- ” “protect domestic industries against injury caused by unfair trading practices, such as dumping and subsidies, and from unforeseen surges in imports. Investigations, decisions and monitoring of trade remedies measures are currently performed by the European Commission on behalf of all Member States.” <sup>16</sup>
31. The Trade Bill will establish a UK body – the TRA – to ensure the UK can continue to provide a safety net to domestic industries after the UK has left the EU.
32. The Explanatory Notes to the Bill summarise the role of the TRA as being-
- ” “when requested to do so, the TRA must provide the Secretary of State with advice, support and assistance in connection with decisions on trade remedies and international trade disputes. The Secretary of State is required to consult the TRA before making such a request. When making a request, the Secretary of State is also required to have regard to the TRA's operational independence, impartiality and expertise.” <sup>17</sup>
33. Schedule 4 of the Bill sets out the governance arrangements for the TRA. The membership which must not exceed 9 is to consist of-
- ” “(a) a Chair appointed by the Secretary of State, (b) other non-executive members appointed by the Secretary of State, (c) a chief executive appointed by the Chair with the approval of the Secretary of State or, if the first Chair has not been appointed, by the Secretary of State, and (d) other executive members appointed by the Chair.”
34. GMB Scotland stated in written evidence that it is concerned-
- ” “that there is no recognition of the need for- or facility for the involvement of devolved authorities in the work of the Trade Remedies Authority (TRA). GMB believes that there should also be trade union involvement in this Authority. GMB is alarmed about the level of power and authority the Secretary of State has over the membership and functioning of the TRA. The Taxation (Cross Border Trade) Bill also gives the SoS power to overrule advice or recommendations of the TRA.” <sup>18</sup>
35. The Scottish Government has proposed an amendment to the Bill which would require UK Ministers to secure the consent of Scottish Ministers to one non-executive member of the TRA. The Scottish Government's view is that the TRA's “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.” <sup>19</sup>

36. In response to the Scottish Government's proposed amendment the Secretary of State for International Trade stated—

” "the [UK] 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 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." <sup>20</sup>

37. The House of Commons International Trade Select Committee examined the appointment process as part of its inquiry on the TRA. It concluded that “there is a strong case for requiring that some TRA board members be appointed to represent the interests of particular groups (for example, consumers and trade unions) or that appointees to the TRA have expertise which would enable them to understand these groups' interests in detail.” <sup>21</sup>

38. However, in evidence to us the Minister of State for Trade Policy stated that

” "I am absolutely clear that no narrow group, or narrower group, whether it is a devolved authority or sectoral interest, should be directly representative of or chosen by a body to be on that board."

Source: Finance and Constitution Committee 05 September 2018 [Draft], George Hollingbery, contrib. 96<sup>22</sup>

39. The Cabinet Secretary for Government Business and Constitutional Relations told the Committee that he was disappointed in this response and that the Scottish Government's proposed amendment would solve the problem. He also suggested that the public appointments process could include a requirement for one individual with knowledge of the Scottish economy and related trade issues and another individual with knowledge of the Welsh economy and related trade issues. This approach could also be extended to Northern Ireland.

40. **The Committee agrees with the House of Commons Select Committee on International Trade that diverse representation is “vital to ensuring that the TRA is viewed, both domestically and internationally, as credible and transparent.” <sup>21</sup> The Committee recommends that the need for diverse representation, including knowledge of the Scottish, Welsh and Northern Ireland economies, should be reflected in the appointment process.**

# IMPLEMENTATION OF INTERNATIONAL TRADE AGREEMENTS

41. The UK Government is seeking to negotiate new bi-lateral trade agreements with 'third countries' that the EU currently has trade agreements with. The Explanatory Notes to the Bill state—

” "The Government has committed to providing continuity in the UK's existing trade and investment relationships with these partner countries. The aim is to establish a UK trade agreement with each partner country based, as closely as possible, on the corresponding trade agreement that country has with the EU." <sup>23</sup>

42. The Delegated Powers Memorandum (DPM) to the Bill also notes that the UK Government's intention is to keep these new trade agreements "substantively the same or as similar as possible to the current EU partner agreements". However, the DPM notes that "the power is broad enough to allow implementation of substantial amendments, including new obligations" <sup>24</sup>. The House of Commons Library observes that the powers in Clause 2 "could therefore be used to implement treaty provisions that are different from the UK's current obligations under EU treaties" <sup>25</sup>.

43. Some of our witnesses cautioned that despite the stated intention of the UK Government to retain the content of existing trade agreements, these agreements could be subject to significant change. For example, Helen Martin from the Scottish Trades Union Congress noted that—

” "Some of the executive powers of rewrite in the bill mean that we could end up with quite different agreements from the ones that we started with, even if that is not necessarily the intention."

Source: Finance and Constitution Committee 25 April 2018, Helen Martin, contrib. 49<sup>26</sup>

44. This is a view shared by the House of Commons Select Committee on International Trade which has stated that "our evidence strongly suggests that substantive changes will be necessary when EU trade arrangements are rolled over." <sup>27</sup>
45. The UK Minister of State for Trade Policy told the Committee that the UK Government's intention is to alter the existing trade arrangements "as little as possible." When pressed by the Committee that this was not the view of the International Trade Committee he responded that "I believe that there will not be such changes, which would not be in our interests. I also believe that time militates against them." <sup>28</sup>
46. The Scottish Government's recent discussion paper on *Scotland's Role in the Development of Future UK Trade Arrangements* <sup>29</sup> points out that "a number of reports have suggested that third countries are likely to seek concessions either now or as part of a future FTA with the UK as a condition of agreeing to grandfather existing arrangements." On this basis the discussion paper suggests that "the UK Government is therefore proceeding on the basis of a very optimistic assumption



that the process of grandfathering existing arrangements will be straightforward or quick.”

47. **The Committee notes that regardless of whether or not there will be substantive changes to existing trade arrangements, it is very disappointing that the Bill is silent on the role of the devolved institutions in the negotiation of the new arrangements.**<sup>iv</sup> The remainder of this report addresses this issue.

## The Role of The Devolved Governments and Legislatures

48. Responsibility for foreign affairs, including international relations and the regulation of international trade, is a reserved competence under Schedule 5 of the Scotland Act 1998. Section 35 of the Scotland Act 1998 enables the Secretary of State for Scotland to prohibit the Presiding Officer from submitting Bills for Royal Assent which contain provisions that are incompatible with international obligations. Section 58 of the 1998 Act also provides the Secretary of State for Scotland with a power to prevent or require action to secure compliance with international obligations. This includes requiring the Scottish Government to introduce primary legislation.
49. The Scottish Government, however, highlights “important exceptions to this general reservation of foreign affairs” in its discussion paper on *Scotland’s Role in the Development of Future UK Trade Arrangements*. These are as follows-
- The Scottish Parliament and Scottish Ministers are responsible for implementing international, ECHR and EU obligations relating to devolved matters;
  - The Scotland Act 1998 enables the Scottish Government to assist the UK Government in relation to international relations (including the regulation of international trade), so far as relating to devolved matters;
  - The Scottish Government could, therefore, assist the UK Government in the formulation, negotiation and implementation of policy relating to regulation of international trade issues regarding devolved matters;
  - The Scottish Government could, therefore, participate in relevant international obligations.
50. Scottish Government officials commented on this position in the following terms—

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<sup>iv</sup> Alexander Burnett MSP, Murdo Fraser MSP and Adam Tomkins MSP dissented from this sentence.



” "International trade is reserved, but the implementation of some aspects is a devolved matter, which is why the UK Government has acknowledged that point in the trade white paper, in the Explanatory Notes to the Trade Bill and in subsequent discussions at official and ministerial level."

Source: Finance and Constitution Committee 21 February 2018, Stephen Sadler, contrib. 10<sup>30</sup>

51. As the Committee highlighted in our interim report on the EU (Withdrawal) Bill the main expression of this relationship is contained in a Concordat on International Relations <sup>31</sup>. The House of Commons Library explains that the Concordat while not binding in law—

” "promises cooperation on exchanging information, formulating UK foreign policy, negotiating treaties and implementing treaty obligations. It also provides for Ministers and officials from the devolved administrations to form part of UK treaty-negotiating teams and for apportioning any qualitative treaty obligations, as well as imposing penalties should the devolved bodies default on any agreed liability." <sup>32</sup>

52. Perhaps the main institutional expression of this approach to date has been the operation of the JMC (Europe) which meets quarterly to discuss EU issues of relevance to the devolved governments.

53. The UK Government's White Paper on future UK Trade Policy recognised that devolved administrations "will have a direct interest in our future trade agreements" and commented that the UK Government would "work closely" with devolved governments in order to "deliver an approach that works for the whole of the UK, reflecting the needs and individual circumstances" of the constituent parts of the UK. <sup>33</sup>

54. The UK Government, in its subsequent response to the submissions received to the White Paper, commented with regard to the role of devolved governments that—

” "We recognise that if we are to represent the UK effectively on the international stage, we must build support for our vision across all four nations and deliver real, tangible benefits. We are committed to working with the devolved administrations on our approach to the implementation of trade agreements signed after EU exit, as well as the role they will play in shaping the UK's future trade negotiations." <sup>34</sup>

55. We welcome this commitment as a useful starting point but, as noted above, the Bill is silent on what the role of the devolved governments and legislatures will be in relation to future trade negotiations and agreements.

56. In evidence to the Committee, Scottish Government officials welcomed the commitments that have been made by the UK Government with regard to involving the devolved governments in the negotiations of future trade deals. However, officials expressed a note of caution when commenting that "at the moment, there is not a huge amount of consultation going on." <sup>35</sup>

57. The Committee heard a range of evidence which stressed the need for the devolved governments to be integrally involved in trade negotiations particularly

where devolved competences were engaged. A wide range of international examples where sub-national administrations were involved were cited by witnesses. Prominent examples considered in evidence were Belgium and Canada. For example, Professor Keating told the Committee in relation to the trade negotiations between Canada and the EU that it was agreed that the provinces would be involved “because when CETA<sup>v</sup> came to be ratified in Canada there was a constitutional problem concerning the federal Government ratifying provisions that impinged on provincial jurisdictions.”<sup>36</sup> A summary of how the sub-state institutions in Canada and Belgium are involved in trade negotiations is attached as Annexe B.

58. Whilst there was a recognition that there is no perfect model which could be adopted in its entirety, there was a general view that involving sub-national authorities in trade negotiations led to improved outcomes and an ability to respond more effectively to any subsequent legal challenges.

59. The importance of the devolved institutions being fully engaged in trade negotiations was also a common theme in the evidence the Committee heard. For example, Professor Lang from Edinburgh University observed—

”The Scottish Government will be called upon to respond to civil society concerns, including through careful oversight and engagement with the processes of trade policy-making and trade negotiations.

There are numerous recent examples of the actions of sub-national bodies being challenged in the context of international trade and investment disputes. In such cases, experience suggests that sub-national entities with prior knowledge of the content and implications of the FTA, are better equipped to respond effectively.”<sup>37</sup>

60. In a similar vein, GMB Scotland stated—

”future trade policy and agreements may necessitate the agreement of common frameworks and standards in certain areas. However, 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 if it was found to be detrimental to the interests of the devolved administration.”<sup>38</sup>

61. The House of Commons Select Committee on International Trade recommends, in relation to the Trade Bill, that the UK Government should set out provisions for enhanced involvement by the devolved administrations where substantive changes are necessary when EU trade arrangements are rolled over.

62. The limited role for parliamentary scrutiny was also a key theme within the evidence received by the Committee. For instance, Professor Michael Keating observed that “the provisions for Westminster scrutiny and ratification of trade deals are really inadequate and problematic”<sup>39</sup>. The formal role of the UK Parliament in relation to international treaties is governed by Part 2 of the Constitutional Reform and Governance Act 2010. The UK Government does not require the approval of the UK

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<sup>v</sup> EU-Canada Comprehensive Economic and Trade Agreement

Parliament in order to ratify treaties. Instead, the UK Parliament can object to ratification but has no means of amending a trade agreement. The House of Commons Library comments on the Westminster scrutiny process as follows—

” “The UK Parliament – in contrast to many other parliaments around the world – currently has no formal role in scrutinising most treaties (other than EU ones) while they are being negotiated. This is the only point at which the terms of a proposed treaty could be amended.” <sup>40</sup>

63. In contrast, the role of the European Parliament and other national parliaments, in scrutinising EU trade deals was the subject of widespread comment in evidence heard by the Committee. For example, Daphne Vlastari of Scottish Environment Link noted that—

” Over the past few years, because of our membership of the EU, trade agreements have been negotiated at EU level with the participation of the European Parliament and elected MEPs. We need to be revisiting our domestic structures in that respect and taking devolution into account.

Source: Finance and Constitution Committee 18 April 2018, Daphne Vlastari (Scottish Environment LINK), contrib. 7<sup>41</sup>

64. Similarly, Clare Slipper from NFU Scotland commented—

” “I understand that the European Parliament will be able to vote on new trade deals that the EU strikes, but the Trade Bill takes away that step in terms of the parliamentary scrutiny aspect. That is an important step to miss.”

Source: Finance and Constitution Committee 18 April 2018, Clare Slipper, contrib. 21<sup>42</sup>

65. In particular, the role of the European Parliament’s Committee on International Trade was cited in evidence to the Committee. Following, the Lisbon Treaty the role of the Committee was strengthened. In broad terms, the role of the Committee in relation to EU trade negotiations can be summarised as follows:

- To be regularly informed about negotiations;
- To issue resolutions, to state its position and recommendations during any stage of the negotiations;
- To provide or decline its consent to the final text of the agreement.

66. The role of the EU in reforming its scrutiny processes in order to enable Member State parliaments to scrutinise EU trade negotiations was also highlighted in evidence to the Committee. For instance, Dr Melo-Araujo of Queens University (Belfast) noted that—

” “The EU provides a good model. The EU faced a lot of criticism concerning a lack of transparency and a lack of involvement of national Parliaments, and it has reformed the system significantly so that national Parliaments are informed and have an opportunity to debate during the negotiation process, not just at the end of the process. Not all Parliaments take up the opportunity, but those that have done so have impacted on trade policy.”

Source: Finance and Constitution Committee 21 February 2018, Billy Melo Araujo, contrib. 169<sup>43</sup>

67. The Committee also heard some evidence of international examples of mechanisms via which sub-national legislatures scrutinise trade negotiations. Notable examples included the role of sub-national legislatures in Belgium, Canada and Denmark. For example, Professor Keating explained to the committee that in Denmark, “there is a very good system of parliamentary scrutiny and parliamentary mandates before negotiations are entered into.”<sup>44</sup> However, he did also say that “generally speaking, the process tends to be Executive dominated.”<sup>45</sup>
68. The main message which the Committee heard in evidence was that it was vital for the Scottish Parliament to have a formal role in the process for negotiating trade agreements. Professor Andrew Lang stated—

” “we can talk for ever about the particular institutional arrangements for consultation, but probably the single most important thing to provide the impetus for genuine consultation would be a formal role in approval or in setting the negotiating mandate, because if there is some kind of blocking power, consultation becomes very important.”

Source: Finance and Constitution Committee 21 February 2018, Professor Lang, contrib. 139<sup>46</sup>

69. Helen Martin, from the STUC, considered that what was required is—

” “an appropriate framework that allows the devolved institutions to play a role and scrutinise trade agreements, not just after they are agreed but while they are being agreed, in a similar way to what was done by the European Parliament at the European level. That should allow some democratic scrutiny for the Westminster Parliament and the devolved Administrations.”

Source: Finance and Constitution Committee 25 April 2018, Helen Martin (Scottish Trades Union Congress), contrib. 13<sup>47</sup>

70. Lastly, Martin Bell from the Scotch Whisky Association, observed in relation to EU trade negotiations that—

” “A well-run negotiation will involve the negotiators talking to the Parliament throughout the process....Increasingly in the European system, the chief negotiator will constantly talk to the relevant committees. The informal element is important, too. Agreement of the mandate would seem an obvious touch point on which the Scottish Parliament should have a voice.”

Source: Finance and Constitution Committee 25 April 2018, Martin Bell, contrib. 25<sup>48</sup>

71. The Committee also received evidence emphasising the need for public consultation in relation to the negotiation of trade deals. The Committee received nearly 800 emails recommending that the Bill “guarantees public scrutiny on any trade deals after Brexit.”<sup>49</sup> The Trade Justice Scotland Coalition suggested in written evidence that the “campaign against TTIP showed how sceptical the public is of trade deals that are negotiated in secret and not subject to public or parliamentary scrutiny.” Their view is that “there are many examples of how regional, provincial and state parliaments and assemblies and their representatives are involved in the negotiation and ratification of trade deals” and that the Bill should be amended to give the Scottish Parliament “a meaningful role in the scrutiny and ratification of international trade deals.” Otherwise, they argue that the Scottish Parliament should not give its consent to the Bill.

72. The Scottish Government's position is that involving the devolved administrations from an early stage in trade negotiations will benefit the UK and any future trading partners. In its discussion paper on *Scotland's Role in the Development of Future UK Trade Arrangements* the Scottish Government proposes "a statutory requirement that new trade arrangements with otherwise devolved content, or which touch on devolved issues, must be agreed by the Scottish Government and the Scottish Parliament." The Scottish Government's view is that, in practice, this "would almost certainly mean all such agreements" including the grandfathering of existing trade arrangements.
73. The Scottish Government proposes that there should be a role for both the Scottish Government and the Scottish Parliament in the preparation, negotiation and finalisation of trade deals. This should include a monitoring role in relation to the progress of negotiations with a vote on any significant changes to the agreed negotiating mandate. The Scottish Parliament should also have a role in the ratification and implementation of international trade agreements. The Scottish Government also proposes that in order "to establish these new arrangements and ensure they work well, a new statutory intergovernmental international trade committee should be established as soon as possible." <sup>50</sup>
74. The Minister of State for Trade Policy told the Committee that he welcomed the Scottish Government's discussion paper on *Scotland's Role in the Development of Future Trade Policy* and that his officials were discussing it with their Scottish Government counterparts. He also told the Committee he is "absolutely clear that, as far as future trade arrangements are concerned, the devolved Parliaments and Assemblies should be very involved." He was asked by the Committee what that role would be and responded that "there is extensive discussion with the devolved authorities at official level about the UK's trade policy as it emerges and evolves." <sup>51</sup>
75. The Minister of State for Trade Policy was also asked whether Parliament will have a role in signing off negotiating mandates, having scrutiny of draft texts and ultimately approving trade agreements. He responded that "I re-emphasise that this remains a UK competence and the royal prerogative is used to sign off the treaties. There is no intention to change that position." However, he also pointed out that "parliamentarians will still have an opportunity to infinitely delay the ratification of a treaty if they object sufficiently" as provided for by the Constitutional Reform and Governance Act 2010. He also pointed out that this includes MPs representing 59 constituencies in Scotland.
76. The Cabinet Secretary for Government Business and Constitutional Relations was asked by the Committee whether he agreed with the Minister of State for Trade Policy that there had been meaningful engagement between Scottish Government officials and UK Government officials on trade policy issues. He responded that he is "pretty critical of the nature of that engagement" and "where I see what is essentially a tick-box exercise going on, I have an obligation to say that is what it is." <sup>52</sup>
77. He was also asked about Annexe B of the discussion paper, *Scotland's Role in the Development of Future Trade Arrangements*, which sets out a number of areas where the agreement of the Scottish Government and Scottish Parliament would be required. Specifically, whether this amounted to the Scottish Government and Scottish Parliament having a veto at various stages of the trade negotiations. He

responded that the “only veto in the devolution settlement is that of the UK Government. There is no other veto because, in the settlement, the actions of any devolved Administration can be vetoed by the UK Government.” <sup>52</sup>

78. **The Committee recognises that international trade is a reserved competence. Equally the Committee also recognises that trade agreements include a wide range of issues which fall within devolved areas. This means that future trade agreements may well limit the legislative competence of the devolved institutions. It is therefore essential that the devolved institutions are involved at all stages of the trade negotiation process particularly, as stated by the House of Commons Select Committee on International Trade, that “each of the four nations of the UK may differ in their priorities for trade deals.” <sup>53</sup> The Committee’s view is it is imperative 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.**

79. **As a useful starting point the Committee welcomes the views of the Minister of State for Trade Policy that “as far as future trade arrangements are concerned, the devolved Parliaments and Assemblies should be very involved.” It is also helpful that he has welcomed the publication of the Scottish Government’s discussion paper, *Scotland’s Role in the Development of Future Trade Arrangements*. The Committee recommends that the UK Government should publish a similar discussion paper setting out its views on the roles of the UK’s respective governments and legislatures in the development of future UK trade arrangements with a view to introducing legislation which provides a statutory basis for these respective roles. The Committee also recommends that the UK Government responds publicly to the recommendations in the Scottish Government’s discussion paper. The Committee will write to the Minister of State for Trade Policy with these proposals.**

# CONCLUSION

80. The Committee believes that there is an urgent need for a transparent and consultative debate about whether or not the devolution settlement is robust enough to deal with Brexit. While the Trade Bill is relatively narrow it nonetheless raises significant questions about the future role of the devolved institutions in trade negotiations. The Scotland Act 2012 and Scotland Act 2016 both marked a shift from a reserved powers model of devolution towards a more complex system which includes shared powers. If the UK leaves the European Union then this will undoubtedly add to complex constitutional arrangements which increasingly depend on close levels of inter-governmental co-operation. Until now these arrangements have tended to develop on an ad-hoc and informal basis. The Committee questions whether this approach is sustainable or whether a more formal and structured approach based on statutory provision is now required. We will continue to explore these fundamental questions as part of our ongoing work on common UK frameworks.



# ANNEXE A: Policy Areas Likely to be Subject to Clause 11 Regulations

(Source: Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks<sup>vi</sup>)

1. Agricultural support
2. Agriculture - fertiliser regulations
3. Agriculture - GMO marketing and cultivation
4. Agriculture - organic farming
5. Agriculture - zootech
6. Animal health and traceability
7. Animal welfare
8. Chemicals regulation (including pesticides)
9. Elements of reciprocal healthcare
10. Environmental quality - chemicals
11. Environmental quality - ozone depleting substances and F-gases
12. Environmental quality - pesticides
13. Environmental quality - waste packaging and product regulations
14. Fisheries management & support
15. Food and feed safety and hygiene law (food and feed safety and hygiene law, and the controls that verify compliance with food and feed law (official controls))
16. Food compositional standards
17. Food labelling
18. Hazardous substances planning
19. Implementation of EU Emissions Trading System
20. Mutual recognition of professional qualifications (MRPQ)
21. Nutrition health claims, composition and labelling
22. Plant health, seeds and propagating material

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<sup>vi</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/702623/2018-04-24\\_UKG-DA\\_IGA\\_and\\_Memorandum.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IGA_and_Memorandum.pdf)



23. Public procurement

24. Services Directive

## **ANNEXE B: Involvement of Sub-National Administrations in Trade Negotiations and International Agreements in Canada and Belgium**

81. Canada has a federal system whereby the governments and parliaments of the ten provinces have responsibility for a number of policy areas whilst the federal government and Parliament retain responsibility for areas including foreign affairs and trade deals. Constitutionally, the federal government and parliament can negotiate trade deals without consulting or otherwise involving the provinces. However, a framework has developed over time to facilitate dialogue between federal and provincial officials on trade matters and representatives of the provinces formed part of the official delegation for the negotiation of the CETA deal. This enabled “the dynamic incorporation of provincial interests in the pan-Canadian negotiating positions”<sup>68</sup>. This inclusion was, at least in part, a result of lobbying by the provinces, most notably by Quebec.
82. The C-Trade committee provides a forum for relevant federal and provincial ministers to discuss trade issues. In practice, this serves to advance regional and sectoral interests as well as fostering cooperation in the implementation of trade agreements at provincial level.
83. Prior to the commencement of the CETA negotiations, the provinces were consulted within their areas of interest and nominated their own representatives to the Canadian delegation. During the negotiations themselves, the role of provincial representatives was described as “consultative” and “advisory” with them only being permitted to speak when invited to do so by the federal negotiator. Negotiation papers were made readily available to provincial representatives as a result of an upfront agreement to share information as freely as possible. Negotiators from some provinces, notably Quebec, also pursued bilateral discussions with EU negotiators outwith the formal negotiations and published position papers on issues of particular significance.
84. Following agreement in principle of the CETA deal, as provided for by the constitution, only the federal parliament was required to ratify the agreement. However, Quebec is unique in that it is the only province to require parliamentary approval to assent to an international agreement. This does not amount to a veto as it takes place after the federal government has ratified the treaty so cannot block its adoption nationwide.
85. Instead, a rejection from the Quebec Parliament would amount to a refusal to adopt the provisions of the deal within areas of the provinces jurisdiction and within its territory. In practice, any such refusal would be likely to necessitate renegotiation of relevant aspects of the agreement.
86. Belgian constitutional arrangements also played a high-profile role in relation to CETA. Belgium has a three-tiered legislative structure at a federal, regional and community level with community representation for specific linguistic and cultural

groups. Importantly, these constitutional arrangements are non-hierarchical with the relevant legislature having sovereignty within its competence, including in relation to international affairs which impact on areas under its jurisdiction. Regions are constitutionally responsible for trade policy although, as the member state, the federal government is responsible for cooperation at an EU level. In what have been described as “relatively complex” constitutional arrangements, legislative responsibility for different categories of policy areas is assigned to different levels of government.

87. In order to formulate and agree a pan-Belgian position, federal, regional and community representatives meet frequently under the jurisdiction of the Directorate General for Coordination and European Affairs. Unanimity is required for any such agreement meaning that compromises may be required to reach consensus. In the absence of consensus, refusal to grant consent by any of the levels of government attending these meetings effectively precludes the federal government from assenting to international agreements. The role of the federal government in international affairs has been described as being “to facilitate the reaching of compromise, and to communicate that consensus position externally as required.”
88. Under the Belgian constitution therefore, the regions must give consent to the federal government before Belgian assent can be given to an international agreement. Regional parliaments must also ratify any such agreement before it can be implemented. Towards the end of the CETA negotiations, the Walloon Parliament refused to grant consent to Belgium’s assent to the agreement citing concerns about certain dispute resolution mechanisms. Following internal Belgian negotiations along with further negotiations with EU and Canadian representatives, the Walloon Parliament agreed a memorandum clarifying the contested arbitration procedures and subsequently consented to the federal government approving the adoption of CETA at an EU level. As part of this agreement, the Canadian Government and European Commission agreed to issue a joint interpretive instrument clarifying their interpretation of the agreement and committing them to seeking to improve labour and environmental regulatory standards on an ongoing basis. The Belgian Government was also required to request an opinion from the European Court of Justice on the legality of the dispute-resolution procedures, meaning that the CETA agreement could not be fully implemented until the court has delivered its verdict. Ultimately, ratification of the agreement by the Walloon Parliament will be dependent on the ECJ’s decision.

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