



The Scottish Parliament
Pàrlamaid na h-Alba

Published 7 October 2020

SP Paper 827

9th Report (Session 5)

Finance and Constitution Committee Comataidh Ionmhais is Bun-reachd

Report on the Trade Bill 2020 Legislative Consent Memorandum



Published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish
Parliament website at:
[http://www.parliament.scot/abouttheparliament/
91279.aspx](http://www.parliament.scot/abouttheparliament/91279.aspx)

For information on the Scottish Parliament contact
Public Information on:
Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

Contents

Introduction	1
The Trade Bill 2017	3
Constraints on devolved powers	4
UK Ministerial powers in devolved areas	6
Sunset provisions in the Bill	8
Rolling over agreements	10
The role of devolved Governments and legislatures	12
Trade Remedies Authority	15
Disclosure of information by other authorities	18
Conclusions	19
Annexe A: Record of Divisions	20
Bibliography	23

Finance and Constitution Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any report or other document laid before the Parliament by members of the Scottish Government containing proposals for, or budgets of, public revenue or expenditure or proposals for the making of a Scottish rate resolution, taking into account any report or recommendations concerning such documents made to them by any other committee with power to consider such documents or any part of them;

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

(c) Budget Bills; and

(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.

(e) Constitutional matters falling within the responsibility of the Cabinet Secretary for the Constitution, Europe and External Affairs.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/Finance-Constitution-Committee.aspx>



finance.constitution@parliament.scot



0131 348 5215

Committee Membership



Convener
Bruce Crawford
Scottish National Party



Deputy Convener
Murdo Fraser
Scottish Conservative
and Unionist Party



George Adam
Scottish National Party



Tom Arthur
Scottish National Party



Jackie Baillie
Scottish Labour



Alexander Burnett
Scottish Conservative
and Unionist Party



Angela Constance
Scottish National Party



Patrick Harvie
Scottish Green Party



Dean Lockhart
Scottish Conservative
and Unionist Party



John Mason
Scottish National Party



Alex Rowley
Scottish Labour

Introduction

1. The UK Government introduced the [Trade Bill](#), in the House of Commons on 19 March 2020 (“Trade Bill 2020”), in which it seeks to replace trade agreements the UK had as an EU Member State. The Bill seeks to give the UK and Devolved Governments powers to implement “rolled-over” trade agreements. The Bill also makes provision for the implementation of the Government Procurement Agreement (GPA) to which the UK has become a party in its own right.
2. The explanatory notes to the Bill state that “the Trade Bill provides key measures that are required as the UK Government develops its trade policy for the UK now it has left the European Union (EU).” It identifies (at Annexe A) that certain provisions within the Bill affect devolved competences and the UK Government will therefore seek legislative consent from the devolved legislatures for those provisions.
3. The Scottish Government introduced the [Trade Bill Legislative Consent Memorandum](#) (LCM) in the Parliament on 18 August 2020. At that stage the Trade Bill 2020 was being considered in the House of Lords.
4. The LCM explains that the parts of the Bill which trigger the need for legislative consent are: Part 1, aspects of Part 3 and schedules 1, 2 and 3. The remaining parts of the Bill do not themselves trigger the need for legislative consent. Of particular relevance to devolved powers are—
 - Clause 1 – which provides a power for both UK and the Scottish Ministers (within devolved competence) to make regulations to implement the Agreement on Government Procurement;
 - Clause 2 – which provides a power for both UK and the Scottish Ministers (within devolved competence) to make regulations to implement qualifying international trade agreements;
 - Clause 9 (added by amendment in the House of Commons) – which provides that certain public authorities may disclose information for the purpose of facilitating the exercise by a Minister of the Crown of the Minister’s functions relating to trade;
 - Part 1 of the Bill also introduces schedules 1-3, which define “devolved competence” for the purpose of the exercise of those powers.
5. Other measures in the Bill on which the UK Government is not seeking legislative consent are—
 - a. Provisions establishing a new body, the Trade Remedies Authority (TRA), to deliver the new UK trade remedies framework, and to enable the TRA to provide advice, support and assistance to the Secretary of State in connection with the conduct of international disputes, other functions of the Secretary of State relating to trade and functions of the TRA. The TRA may also provide advice, support and assistance in relation to international trade and trade remedies to others as it considers appropriate

b. Creating powers for Her Majesty's Revenue and Customs (HMRC) to collect information to confirm the number of exporters of goods and services there are in the UK and allowing it to share data with public or private bodies in order that it can fulfil its public functions as they relate to trade.

6. In its LCM the Scottish Government explains that although there remain concerns about the content and coverage of the Trade Bill—

” It is the potential significant risk to businesses in Scotland of disruption to existing trading relationships and access to current and future procurement markets if the Scottish Government were to recommend not consenting to the Bill that draws the Scottish Government to lodge a Legislative Consent Motion in the Scottish Parliament and to recommend that the Scottish Parliament agree to such a motion. ¹

7. The Delegated Powers and Law Reform Committee also considered the delegated provisions in the Bill and reported its views on 25 September 2020. ²

8. The Committee thanks all those who have contributed to its scrutiny through written and oral evidence – details of which can be found [online](#). We also thank our Advisors, Professor Kenneth Armstrong and Professor Tom Mullen, for their expertise and assistance.

The Trade Bill 2017

9. The Trade Bill 2020 is broadly comparable in policy objectives and scope to a previous Trade Bill which was introduced in the UK Parliament in November 2017 (“Trade Bill 2017”) and for which legislative consent was also sought from the Scottish Parliament.
 10. One significant difference, however, was that Schedule 1 of the Trade Bill 2017 as introduced provided that Scottish Ministers could not 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.³
 11. The Scottish Government lodged a LCM in respect of the Trade Bill 2017 which stated that it “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.”
 12. The Committee reported its views on the Trade Bill 2017 LCM on 31 October 2018.⁴ In its report on the LCM the Committee recommended that unless 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.”ⁱ This recommendation refers to section 12 of the European Union (Withdrawal) Act (EU (W) A) which places restrictions on the power of Scottish ministers to amend retained EU law in certain devolved areas as determined in regulations that could be made by UK ministers.
 13. The Committee further stated that “if such an agreement cannot be reached and the section 12 restrictions continue to apply...then the Committee recommends that the Scottish Parliament does not consent to these clauses.”ⁱⁱ
 14. Whilst the constraint in section 12 EU(W)A remains, the Trade Bill 2020 has disapplied it and other restrictions on acting contrary to EU law for the purposes of implementing the agreements within the scope of the Bill.
15. We welcome that the Trade Bill 2020 does not include the previous Trade Bill 2017 prohibition on Scottish Ministers on using their powers, under that Bill, to modify any retained direct EU legislation in devolved areas.

ⁱ Alexander Burnett MSP, Murdo Fraser MSP and Adam Tomkins MSP dissented from this recommendation in the Committee’s report on the 2017 Trade Bill LCM.

ⁱⁱ Alexander Burnett MSP, Murdo Fraser MSP and Adam Tomkins MSP dissented from this recommendation in the Committee’s report on the 2017 Trade Bill LCM.

Constraints on devolved powers

16. Clause 3 provides for how regulations under clauses 1 and 2 can be made. It gives the devolved administrations some powers to implement the obligations arising from the GPA and the trade agreements in the scope of the Bill. However, these are subject to a number of restrictions, set out in Schedule 1. This Schedule sets out the circumstances in which devolved authorities must consult with a Minister or the Crown or must seek the consent of a Minister of the Crown or must act jointly with a Minister of the Crown.
17. The Committee's Internal Market Advisor, Professor Armstrong, explains that Clause 3 of the Bill recognises *inter alia* that implementing regulations may make different provisions for different purposes or areas. That could result in different approaches between UK and devolved authorities but it must be read in the context of the Schedules to the Bill and restrictions which may apply to devolved authorities.
5
18. In essence, the Bill requires devolved authorities to consult with, seek the consent of, or work jointly with, a Minister of the Crown if the provisions made in accordance with the Trade Bill 2020 would have required consultation, consent or joint working if they were made under another Act. This is intended to prevent devolved authorities getting round such procedural requirements by using the powers contained in the Bill.
19. Conversely, if the provision could have been contained in an Act of the Scottish Parliament or could have been made by different subordinate legislation that did not require, consultation, consent or joint working, then the requirement to consult, seek consent or joint working do not apply.
20. The UK Government has also retained an amendment brought forward to the Trade Bill 2017, which altered a consent requirement in Schedule 1, paragraph 2 of the Bill to a consult requirement. This means that the Scottish Ministers will be required to consult with UK Ministers when they wish to—
 - a. Make regulations that are to come into force before the end of the transition period, or
 - b. Make provisions in respect of any quota arrangement or are incompatible with such an arrangement to the implementation of international trade agreements in devolved areas or changes to or affecting the operation of the GPA.
21. In its LCM the Scottish Government expresses ongoing concerns with this requirement under Schedule 1, paragraph 2 to consult. They explain that they consider that it acts as a “constraint on the ability of the Scottish Ministers to exercise the powers set out in clauses 1 and 2 of the Bill in devolved areas in certain circumstances by virtue of the need to consult the UK Government.”¹

22. The Committee notes that the Trade Bill requires the Scottish Government to consult the UK Government in relation to aspects of quota arrangements and when regulations are to come into force before the end of the transition period. We seek clarification from the UK Government of why it considers consultation necessary in these circumstances.

UK Ministerial powers in devolved areas

23. Whilst restrictions in Schedule 1 apply to the Scottish Government (as set out above), there is no statutory requirement in this Bill for the UK Government to seek the consent or consult with the Scottish Government in relation to statutory instruments laid in the UK Parliament which relate to devolved areas. The LCM identifies that the Scottish Government remain concerned about the UK Government's refusal to commit, via statute, not to exercise the concurrent regulation making powers, which clauses 1 and 2 of the Bill provide for, in devolved areas without first consulting and ideally obtaining the consent of the Scottish Ministers.
24. In evidence to the Committee, the Minister of State for Trade Policy (hereafter referred to as "the Minister of State") recognised that devolved Administrations and legislatures would want reassurance that the powers in the Trade Bill 2020 will be used appropriately. He therefore restated the UK Government's commitment to—
- ” not normally using the concurrent powers in areas of devolved competence without the consent of the relevant devolved Administration or Administrations, and never without consulting them first. That is one of the many commitments and amendments to the bill that we have made at the request of the devolved Administrations.”⁶
25. When questioned as to why this commitment was not included within the Bill when it does appear in other Billsⁱⁱⁱ, he explained that it was because of the legal status of international trade, which is a reserved matter, adding—
- ” It is important for us to keep that and to make sure that the two Governments work well together on that. I do not think that it is necessary or desirable to put the confirmation that you asked for in the bill because that would create the potential to erode the legal status of international trade as a reserved matter.”⁷
26. The Minister of State explained that because parts of trade agreements touch on devolved matters, the Bill provides concurrent powers which will provide greater flexibility in how continuity agreements will be implemented. That will “allow each devolved Administration to implement the agreements, independently in some cases, while also allowing the UK Government to legislate on a UK-wide basis when it makes practical sense for it to do so.”⁸
27. The Minister for Trade, Investment and Innovation (hereafter referred to as “the Minister”) when questioned on whether the Scottish Government wants a power of veto over UK Trade Policy or UK Trade agreements, stated that “We are not asking for a veto; we are asking that, with regard to devolved areas, there should be due process that takes us into account.”⁹

ⁱⁱⁱ See the Fisheries Bill - clauses 14 (British fishing boats required to be licensed) and 16 (foreign fishing boats required to be licensed if within British fishery limits) where the Secretary of State has power to make exceptions to the prohibition on fishing without a license, only with consent of the Scottish Ministers, the Welsh Ministers and the Northern Ireland department.

28. As to why the Scottish Government is recommending consent given these and other concerns, the Minister explained that the Bill relates to trade deals that are already in place and that “we are, in effect, preserving where we are.” In that regard he considered that not consenting runs the risk of taking a step back.⁶
29. The Minister confirms in the LCM that work is underway on a revised protocol between the Scottish Government and the Scottish Parliament on scrutiny of decisions by the Scottish Ministers to consent to UK secondary legislation relating to or arising from EU exit and affecting devolved matters.
30. We note that the UK Government has committed to not normally using the concurrent powers in areas of devolved competence without the consent of the relevant devolved Administration or Administrations, and never without consulting them first.
31. The Committee has, however, previously reported¹⁰ its view that it is “deeply concerned” about provisions which allow UK Ministers to make statutory instruments in devolved areas without any statutory requirement to seek the consent of Scottish Ministers or the Scottish Parliament. We stated that this “cuts across the devolution settlement.”
32. We reaffirmed this view in our reports on the EU (Withdrawal) Bill supplementary LCM, EU (Withdrawal Agreement) Bill and the previous Trade Bill 2017 LCM. We do so again here in relation to similar provisions within the Trade Bill 2020.

Sunset provisions in the Bill

33. The power to implement qualifying international trade agreements is subject to a sunset requirement. The revised explanatory notes state that this means that five years after the end of the transition period the power will cease to have effect. However, this period can be extended by the UK Government on review, with the approval of both Houses of Parliament for further periods of up to 5 years at a time
34. This contrasts with the Trade Bill 2017 where the power to make regulations in relation to implementing international trade agreements would expire three years after exit day. UK Ministers could 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.
35. A key concern of the Scottish Government in relation to the Trade Bill 2017 was there should be a requirement for the UK Government to consult the devolved governments before altering their powers in this way. The UK Government then confirmed that it has committed to “consult the Scottish Government and other devolved administrations before extending the sunset for the power in clause 2 (i.e. before extending the period during which clause 2 powers can be used under the Bill).”¹
36. In evidence to the Committee the Minister of State explained that the purpose of this power is to enable amendments to be made to primary legislation to keep the rolled over agreement operable, not as some would contend, to provide additional time to revisit rolled over agreements. In that regard he explained that—
- ” The power is limited in scope and, on balance, we think that the right way to do that is to have the clause in place for five years and then, with the agreement of both UK Houses of Parliament—as well as honouring our commitment to consult the devolved Administrations—roll over those powers for a further five years.”¹¹
37. In relation to an amendment during House of Commons scrutiny which sought to remove the ability to extend for five years, the Minister of State explained that this could “undermine the UK’s ability to implement obligations arising from trade agreements beyond the first five years which risks putting us in breach of the agreements and could open us up to legal challenge.”¹²
38. In evidence to the Committee, the Minister confirmed that in relation to the length of time in the sunset provisions in the Bill “We are not overly exercised about the issue, given the narrow scope of the bill. We understand that there could be a situation in which, for a small number of countries, the process could be lengthier than we would like.”¹³
39. The Committee acknowledges the UK Governments commitment to consult with the Scottish Government when seeking to extend the clause 2 powers beyond the initial 5-year period.

40. We note the DPLR view that, as with other recent LCMs on UK Bills arising from EU withdrawal, “the power should be subject to a requirement for the Scottish Ministers” consent, rather than consultation alone”.

Rolling over agreements

41. The explanatory notes to the Bill note that “Although the Government’s policy intention is to ensure continuity as far as possible.... the new UK-partner country agreements that are implemented using this power will be legally distinct from the original EU-partner country agreements on which they are based. It may be necessary to amend the text of the previous EU agreements, for example so that the new agreements can work in a UK legal context.”
42. In its LCM the Scottish Government explains that “The UK Government has stated that the powers of implementation in this Bill are intended to facilitate the “rolling over” of existing international trade agreements. However, as drafted, they are broad powers and could allow the implementation of substantial changes to those agreements: a concern that the Scottish Government also raised in relation to the Trade Bill 2017.”
43. The Trade Justice Coalition Scotland raised similar concerns in their written evidence – citing examples from international trade agreements that had already been rolled over such as “excluding provisions on social security for migrants with Israel, excluding provisions related to the Single Market with Andean countries and not including food safety and plant or animal health regulations (SPS) or other technical regulations (TBT) with Norway and Iceland because of their close alignment with EU regulations.”¹⁴
44. The Trade Justice Coalition Scotland also highlight the interaction between the provisions of the Trade Bill and those contained in the UK Government White Paper proposals for the UK Internal Market. They express concern that there is an additional risk that the pressure to harmonise rules and regulations with the third-party country could put a downward pressure on standards set by the UK and the devolved nations in the important areas such as food safety and animal health. The UK Internal Market Bill has now been introduced on similar terms to the White Paper.
45. In evidence to the Committee the Minister of State confirmed that 20 continuity agreements have been signed with 48 countries, covering trade worth more than £110 billion, in 2018 figures. He added that those agreements “stick very close to the original agreement” and the UK Parliament has had the opportunity to scrutinise fully all the continuity trade agreements under the process set out in the Constitutional Reform and Governance Act 2010 (CRAG).¹⁵
46. In addition, in the Trade Bill 2017, the UK Government also introduced amendments which required it to produce a report showing where the UK’s rolled over agreements differed from the EU agreements they were replacing (although this requirement could be dropped in exceptional cases). These amendments have not been carried over into the new Bill although the UK Government has confirmed it will continue to produce these reports on a voluntary basis.¹⁶
47. These UK Parliamentary scrutiny mechanisms do not, however, provide a role for the devolved legislatures to scrutinise any new parts of rolled over trade agreements which impact on devolved areas. Responding to this concern the Minister of State confirmed that—

” I am very happy to have a further discussion with Ivan McKee [the Minister] in particular about how your scrutiny might be able to kick in. I am keen to work with you and to make sure that the Scottish Parliament is involved in our trade policy. It is important.¹⁷

48. In relation to the impact of rolled over trade deals on standards, the Minister of State confirmed that there “would be no compromise with any of our trade partners on standards in areas such as animal welfare, the environment and food safety” and that “It is entirely for the UK Government and devolved Administrations to set those standards.”¹⁸
49. The Minister confirmed that despite the Scottish Government’s concerns about the potential scope of the powers in Clause 2, it was content that the Bill has a narrow focus and is of a technical nature. As such it is about ensuring that Scotland does not lose the benefits of the current EU trade agreements. He added that “Not consenting to the bill would open up a range of technical aspects that would have to be put in place through legislation to ensure that Scotland continued to benefit from those deals, and likewise with the WTO GPA.”¹⁹
50. The Scottish Government’s concerns about the risks of future trade deals resulting in lower standards being applied in Scotland would, the Minister commented, be allayed “by the sharing of that information and by greater involvement of us in that process”²⁰

51. We recognise the scope of the power in clause 2(1) is broad. Both the UK Government and Scottish Government, however, consider that this power will only be narrowly used to ensure continuity with previous EU agreements.
52. Whilst there are a range of mechanisms, such as CRAG, for the UK Parliament to scrutinise the terms of rolled over agreements, there is no role for devolved legislatures to scrutinise any new parts of such agreements which impact on devolved areas. While the Minister of State’s commitment to work with the Scottish Government to address this is welcome, we believe that this work should have been done prior to the passage of the Bill. We request confirmation from both governments that this will be taken forward before the powers in the Bill come to be exercised, and that they will keep the Committee updated on the progress with discussions.^{iv}

^{iv} These two last sentences were agreed to by division (For 8: George Adam, Tom Arthur, Jackie Baillie Bruce Crawford, Angela Constance, Patrick Harvie, John Mason, Alex Rowley; Against 3: Alexander Burnett, Murdo Fraser, Dean Lockhart; Abstentions: 0)

The role of devolved Governments and legislatures

53. 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.
54. 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.
55. The Trade Bill 2020, like its predecessor, is silent on the role of devolved governments and legislatures in relation scrutiny of trade negotiations and agreements.
56. In the Committee’s Report on the LCM for the Trade Bill 2017, we received 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. The limited role for parliamentary scrutiny was also a key theme within the evidence received by the Committee. As a result we stated in our report that
- ” 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.” 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. ⁴
57. In relation to the Trade Bill 2017, a number of amendments were made during its partial passage including: amendments relating to future UK parliamentary scrutiny

of agreements; and amendments relating to requirements for consultation with devolved administrations before draft negotiating mandates and texts of agreements are laid before the UK Parliament for final approval.¹⁶ These were not included in the Trade Bill 2020 as introduced nor were similar amendments, subsequently proposed to the Bill, agreed to.

58. Given its concerns that rolled over internal trade agreement could be substantially different from their EU predecessors and that the Bill provisions could extend to “new” international trade agreement, the Scottish Government, in its Trade Bill 2020 LCM, called for “enhanced procedures for parliamentary scrutiny and engagement with the devolved administrations as being particularly important.” The Scottish Government also confirms that it will continue to press the UK Government for clarification on how it intends to use these powers.
59. 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 August 2018, the Scottish Government published its discussion paper entitled *Scotland’s Role in the Development of Future UK Trade Arrangements* in which it 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.
60. On 16 June 2020, in a response to points raised during the House of Commons Second Reading, the Minister of State set out the UK Government’s approach to involving the devolved administrations in the trade agreement process. He stated that as the UK Government recognises modern trade deals cover an increasingly wide range of areas, including some areas of devolved competence, his department works closely with the devolved administrations to ensure that the UK Government can deliver agreements that reflect the interests of all parts of the UK.
61. He added that a Ministerial Forum for Trade with the devolved administrations had been established which meets regularly to discuss the UK Government’s approach to trade negotiations. This was in addition to bilateral calls with devolved administration Ministers to update them on the negotiations programme as well as substantive engagement at official level on the policy detail of the UK Government’s negotiation positions.²¹
62. Responding to a House of Commons amendment to the Trade Bill 2020 which proposed a joint ministerial committee with powers to discuss international trade issues with the devolved Administrations, the Minister of State explained that such an amendment was “unnecessary and impractical.” He was however committed to continuing to “work closely” with devolved administrations at all stages of trade negotiations including via bilateral ad hoc engagement “to reflect the sometimes fast-paced nature of trade negotiations.”²²
63. In evidence to the Committee the Minister acknowledged that whilst there is engagement and discussion, the sharing of information has been “partial and limited.”²³ He explained that the engagement fell short of what the Scottish Government expected and that “Irrespective of the extent to which UK trade policy engages with and impacts on areas of devolved policy and competence, the

Scottish Government has had no meaningful involvement in trade negotiations, nor has it had any input into the identification of priority partners for trade negotiations. We do not support the UK Government's intended light-touch approach to engagement with, and parliamentary scrutiny of, trade agreements.²⁴

64. When pressed on why, in light of these concerns, the Scottish Government was recommending consent in the Trade Bill 2020 LCM, the Minister explained that whilst they had concerns about the limited extent of Scottish Government and Scottish Parliament involvement—

” This is by no means a perfect scenario—we have concerns about it, which we have raised. Nonetheless, considering all the other things that would flow from there not being consent, on balance, the marginal decision of the Scottish Government has been to take the position that it makes sense to give consent to the bill at this time.²⁵

65. We welcome the commitment of the Minister of State to work closely with the devolved Administrations in relation to the negotiation and implementation of trade agreements. However we recognise that this commitment is voluntary and therefore both temporary and entirely unenforceable. The Committee considers that the Bill should be amended to make a process of negotiation a statutory requirement.^v
66. As such we reiterate the recommendation made in our report on the 2017 Trade Bill LCM that “it is essential that the devolved institutions are involved at all stages of the trade negotiation process.”
67. We note the creation of a Ministerial Forum for Trade, however, it is important that it provides for meaningful engagement between the UK Government and the devolved administrations and allows for the four nations of the UK to develop a consensual position before the beginning of trade negotiations.
68. It is also essential that the Ministerial Forum for Trade is accountable to the devolved legislatures enabling scrutiny of its decisions.

^v This paragraph was agreed to by division (For 8: George Adam, Tom Arthur, Jackie Baillie, Bruce Crawford, Angela Constance, Patrick Harvie, John Mason, Alex Rowley; Against 3: Alexander Burnett, Murdo Fraser, Dean Lockhart; Abstentions: 0)

Trade Remedies Authority

69. Part 2 of the Bill established the Trade Remedies Authority as a non-departmental public body. The UK Government explains that a legally independent trade remedies investigatory body is an important element in ensuring that trade remedies investigations are conducted objectively, based on available data and evidence, and reduce the risk of political interference.²⁶
70. Trade remedies measures protect domestic industries against injury caused by unfair trading practices, such as dumping and subsidies, and from unforeseen surges in imports. The Trade Remedies Authority (TRA) will therefore ensure the UK can continue to provide a safety net to domestic industries after the UK has left the EU.
71. It will be responsible for conducting trade remedies investigations under a statutory framework provided by the Taxation (Cross-border Trade) Act 2018, and for making impartial recommendations to the Secretary of State.
72. The explanatory notes set out that “Measures in the Bill will also require the TRA, upon request, to provide advice, support and assistance to the Secretary of State in connection with the Secretary of State’s trade-related functions, international trade disputes, and the TRA’s functions.” This provision also allows the TRA to provide advice, support and assistance to others as it considers appropriate in relation to international trade and trade remedies.
73. Schedule 4 sets out further provision on the composition and governance of the TRA and schedule 5 contains provisions enabling the Secretary of State to create staff transfer schemes in connection with the establishment of the TRA. The TRA is to comprise of no more than 9 members, with the Secretary of State responsible for appointing non-executive members, including a Chair.
74. The Chair is responsible for appointing executive members, including a Chief Executive. The appointment of the Chief Executive is subject to the approval of the Secretary of State. The Secretary of State may also appoint the first Chief Executive, but only in certain circumstances.
75. The TRA will be required to prepare both an annual report on the performance of its functions and an annual statement of accounts. Both documents will then be laid before the House of Commons for scrutiny. The Authority will also be accountable to Parliament through investigation by Parliamentary bodies (the Parliamentary Ombudsman, NAO) and Committees.
76. In its Trade Bill 2020 LCM the Scottish Government maintains its position that the Trade Bill 2020 should be amended to provide that the TRA include a member, whose appointment is endorsed by the Scottish Ministers, on the basis of having demonstrated in depth understanding of Scotland’s often differing trade and economic interests and the capacity to evaluate these within a local and national context in the course of decision making.
77. Responding on this issue, the Minister of State set out the ways in which the devolved Administrations’ views are sought on the appointment and recruitment of

nonexecutive members of the trade remedies authority. He was clear, however, that there would be no specific representatives from the devolved Administrations on the board as “This is not a body for interests, it is a body of experts in international trade, trade remedies and the actions that might be taken.”²⁷

78. In a letter to the Scottish Government in March 2020, the UK Government restated previous commitments given during the passage of the Trade Bill 2017, namely that—

- The Secretary of State will notify the devolved administrations on decisions to initiate a trade investigation when there is a particular impact on the devolved nation;
- The Secretary of State will notify the devolved administrations of the TRA’s recommendations to the Secretary of State at the same time as consulting other government departments so that they can feed in their views;
- The devolved administrations can proactively submit any information to the TRA that they consider relevant to an investigation; and
- The Secretary of State will seek the devolved administrations suggestions on the optimal way of recruiting TRA non-executive members with regional knowledge skills and experience.²⁸

79. The Minister observed that it is too early to tell how the TRA will operate, although to date the Scottish Government’s involvement on appointing TRA board members has been limited to sight of the recruitment advert which it then circulated within Scotland.²⁹

80. When questioned on the role of the Scottish Parliament in scrutinising the work of the TRA, the Minister of State suggested that—

” the trade remedies authority’s annual report could perhaps be deposited with the Scottish Government and the other devolved Administrations, which would give the Scottish Parliament the opportunity to scrutinise the TRA’s work. I am all in favour of your committee and the Scottish Parliament looking at how the trade remedies authority is working.³⁰

81. As we stated in our previous report on the Trade Bill 2017, we consider that diverse representation in the members of the TRA is “vital to ensuring that the TRA is viewed, both domestically and internationally, as credible and transparent.” We therefore reiterate our previous recommendation (in our report on the Trade Bill 2017) that the need for diverse representation, including knowledge of the Scottish, Welsh and Northern Ireland economies, should be reflected in the appointment process for the TRA.

82. In addition as our Internal Market Committee Advisor notes, the creation of the TRA alongside the new powers for the Competition and Markets Authority proposed by the UK Internal Market Bill “raises important questions about how these UK-wide institutions – albeit acting at arm’s length from government – interact with executive and parliamentary structures at both UK and devolved

levels.” As such the Scottish Parliament has an important role in scrutinising how these bodies and agencies discharge their responsibilities consistent with the devolution settlement.⁵

83. We welcome the UK Minister’s acknowledgement that the Scottish Parliament has a legitimate role in scrutinising the activities of the Trade Remedies Authority. We recommend that the UK Government considers formally recognising this reporting role by including a requirement in the Trade Bill 2020 that the TRA annual report is laid in the Scottish Parliament. Similar reporting requirements already exist in the Scotland Act 2016 for other UK wide bodies such as OFGEM.

Disclosure of information by other authorities

84. The Trade Bill 2020 was amended during House of Commons consideration with the addition of clause 9 on disclosure of information by other authorities.
 85. The revised explanatory notes explain that after leaving the EU, Government departments with trade functions (in particular the Department for International Trade and Cabinet Office) will need to have access to data held by other public authorities to assist them to carry out their functions relating to trade. Clause 9 allows the Secretary of State, the Minister for the Cabinet Office, strategic highways companies and port health authorities to disclose information for the purposes of facilitating government functions relating to trade.
 86. Clause 9 sets out which public bodies and what functions are subject to the power as well as consent provisions enabling further disclosure of the information provided.
 87. Clause 10 sets out that an offence is committed where a person discloses information in contravention of clause 9 which relates to a person whose identity is specified in the disclosure or can be deduced from it.
 88. The Scottish Government explains in its LCM that it is pressing the UK Government to amend new clause 9 to provide devolved administrations with direct access to the relevant trade related information.
89. We request clarification from the Scottish Government on the reasons why such access is being sought and on the progress of its discussions with the UK Government.

Conclusions

90. In our report on the Trade Bill 2017 we recommended that the Parliament should not consent to clauses 1 and 2 of the Trade Bill 2017 if the Section 12 EU(W)A restrictions continue to apply to clauses 1 and 2 of the Trade Bill 2017.^{vi} The Trade Bill 2020 has addressed this significant Committee concern in that it disapplies the constraint in section 12 and other restrictions on the Scottish Government acting contrary to EU law for the purposes of implementing the agreements within the scope of the Bill.
91. That said, we remain of the view that it is essential that the devolved institutions are involved at all stages of the trade negotiation process.
92. It is also important that the new Ministerial Forum for Trade provides for meaningful engagement between the UK Government and the devolved administrations and allows for the four nations of the UK to develop a consensual position before the beginning of trade negotiations. It is essential that the Ministerial Forum for Trade is accountable to the devolved legislatures enabling scrutiny of its decisions.
93. We recommend that the Scottish Parliament agrees to the Legislative Consent Motion on the Trade Bill 2020^{vii}.

^{vi} Alexander Burnett MSP, Murdo Fraser MSP and Adam Tomkins MSP dissented from this recommendation in the Committee's report on the 2017 Trade Bill LCM.

^{vii} This recommendation was agreed to by division (For 10: George Adam, Tom Arthur, Jackie Baillie, Alexander Burnett, Bruce Crawford, Angela Constance, Murdo Fraser, Dean Lockhart, John Mason, Alex Rowley; Against 1: Patrick Harvie; Abstentions: 0)

Annexe A: Record of Divisions

During consideration of the draft report, various changes were proposed and decided upon (eight by division). The Committee then agreed its report for publication.

Patrick Harvie moved the following amendments—

In paragraph 30, to delete “has committed to” and replace with ““has given a verbal commitment of its present intention to”

The amendment was disagreed to (by division)—

- For 2 (Patrick Harvie, John Mason)
- Against 8 (Tom Arthur, George Adam, Jackie Baillie, Alexander Burnett, Bruce Crawford, Murdo Fraser, Dean Lockhart, Alex Rowley)
- Abstentions 1 (Angela Constance)

After paragraph 30, to add “The Committee believes that the Bill should be amended to turn this commitment into a statutory requirement.”

The amendment was disagreed to (by division)—

- For 1 (Patrick Harvie)
- Against 9 (Tom Arthur, George Adam, Jackie Baillie, Alexander Burnett, Bruce Crawford, Murdo Fraser, Dean Lockhart, John Mason, Alex Rowley)
- Abstentions 1 (Angela Constance)

After paragraph 40, to add new paragraph—

“Given that the Bill itself requires the legislative consent of the Scottish Parliament, the Committee considers that this should also be a requirement for any extension.”

The amendment was disagreed to (by division)—

- For 1 (Patrick Harvie)
- Against 10 (George Adam, Tom Arthur, Jackie Baillie, Alexander Burnett, Angela Constance, Bruce Crawford, Murdo Fraser, Dean Lockhart, John Mason, Alex Rowley)
- Abstentions 0

In paragraph 52, to delete from “We welcome” to end and replace with—

“While the Minister of State’s commitment to work with the Scottish Government to address this is welcome, we believe that this work should have been done prior to the passage of the Bill. We request confirmation from both governments that this will be taken forward before the powers in the Bill come to be exercised, and that they will keep the Committee updated on the progress with discussions.”

The amendment was agreed to (by division)—

- For 8 (George Adam, Tom Arthur, Jackie Baillie, Angela Constance, Bruce Crawford, Patrick Harvie, John Mason, Alex Rowley)
- Against 3 (Alexander Burnett, Murdo Fraser, Dean Lockhart)
- Abstentions 0

In paragraph 65, to delete from “and may not therefore” to end and replace with “and therefore both temporary and entirely unenforceable. The Committee considers that the Bill should be amended to make a process of negotiation a statutory requirement.”

The amendment was agreed to (by division)—

- For 8 (George Adam, Tom Arthur, Jackie Baillie, Angela Constance, Bruce Crawford, Patrick Harvie, John Mason, Alex Rowley)
- Against 3 (Alexander Burnett, Murdo Fraser, Dean Lockhart)
- Abstentions 0

In paragraph 91, to add—

“The Trade Bill 2020 fails to create a framework for this involvement in relation to input to negotiating priorities, scrutiny of draft agreements or approval of completed agreements, particularly in respect of devolved impacts. The Committee recognises that only a limited number of trade agreements will be within the scope of the current Bill, but is concerned that it establishes a precedent for this inadequate level of involvement.” The amendment was disagreed to (by division)—

- For 5 (Tom Arthur, George Adam, Bruce Crawford, Angela Constance, Patrick Harvie)
- Against 6 (Jackie Baillie, Alexander Burnett, Murdo Fraser, Dean Lockhart, John Mason, Alex Rowley)
- Abstentions 0

After paragraph 92, to add new paragraph—

“The Committee regrets that the Trade Bill 2020 and the Scottish Government’s response to it have not been accompanied by a broader debate, addressing questions of how trade policy could be developed in an open, deliberative and democratically accountable way, and of how principles such as sustainability, human rights and trade justice could be embedded in legislation.”

The amendment was disagreed to (by division)—

- For 2 (Patrick Harvie, John Mason)
- Against 9 (George Adam, Tom Arthur, Jackie Baillie, Alexander Burnett, Angela Constance, Bruce Crawford, Murdo Fraser, Dean Lockhart, Alex Rowley)
- Abstentions 0

In paragraph 93, to delete “agrees” and replace with “does not agree”.

The amendment was disagreed to (by division)—

- For 1 (Patrick Harvie)
- Against 10 (George Adam, Tom Arthur, Jackie Baillie, Alexander Burnett, Angela Constance, Bruce Crawford, Murdo Fraser, Dean Lockhart, John Mason, Alex Rowley)
- Abstentions 0

- [1] Scottish Government. (2020, August 18). Legislative Consent Memorandum: Trade Bill. Retrieved from https://www.parliament.scot/S5_Bills/SPLCM-S05-44.pdf [accessed September 2020]
- [2] Delegated Powers and Law Reform Committee. (2020, September 25). Report on the 2020 Legislative Consent Memorandum: Trade Bill. Retrieved from <https://sp-bpr-en-prod-cdnep.azureedge.net/published/DPLR/2020/9/25/Legislative-Consent-Memorandum--Trade-Bill/DPLRS052020R56.pdf> [accessed September 2020]
- [3] UK Government. (2020, August 18). Explanatory Notes: Trade Bill. Retrieved from <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0122/en/18122ennew.pdf> [accessed September 2020]
- [4] Finance and Constitution Committee. (2018, October 31). Report on the Trade Bill LCM. Retrieved from <https://sp-bpr-en-prod-cdnep.azureedge.net/published/FCC/2018/10/31/Report-on-Trade-Bill-LCM/FCC-S5-18-11.pdf> [accessed September 2020]
- [5] Professor Kenneth Armstrong, Committee Advisor. (2020, September). Briefing on the Trade Bill and its Legislative Consent Memorandum. Retrieved from [https://www.parliament.scot/S5_Finance/General%20Documents/Advisor_Briefing_-_Trade_Bill_LCM\(3\).pdf](https://www.parliament.scot/S5_Finance/General%20Documents/Advisor_Briefing_-_Trade_Bill_LCM(3).pdf) [accessed September 2020]
- [6] Finance and Constitution Committee. (2020, September 23). Official Report, Column 28. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12840&mode=pdf> [accessed September 2020]
- [7] Finance and Constitution Committee. (2020, September 23). Official Report, Column 32. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12840&mode=pdf> [accessed September 2020]
- [8] Finance and Constitution Committee. (2020, September 23). Official Report, Column 27. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12840&mode=pdf> [accessed September 2020]
- [9] Finance and Constitution Committee. (2020, September 23). Official Report, Column 58. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12840&mode=pdf> [accessed September 2020]
- [10] Finance and Constitution Committee. (2018, January 9). European Union (Withdrawal) Bill LCM - Interim Report, paragraph 129. Retrieved from <https://sp-bpr-en-prod-cdnep.azureedge.net/published/FCC/2018/1/9/European-Union--Withdrawal--Bill-LCM---Interim-Report-1/FCCS052018R1.pdf> [accessed September 2020]
- [11] Finance and Constitution Committee. (2020, September 23). Official Report, Column 44. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12840&mode=pdf> [accessed September 2020]
- [12] House Of Commons Public Bill Committee. (2020, June 25). Official Report, Column 256. Retrieved from https://publications.parliament.uk/pa/cm5801/cmpublic/Trade/PBC120%20Trade_1st-8th_Compilation_25_06_2020.pdf [accessed September 2020]
- [13] Finance and Constitution Committee. (2020, September 23). Official Report, Column 52. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12840&mode=pdf> [accessed September 2020]

- [14] Trade Justice Coalition Scotland. (2020, September). Written Submission. Retrieved from https://www.parliament.scot/S5_Finance/Inquiries/Trade_Justice_Scotland.pdf [accessed September 2020]
- [15] Finance and Constitution Committee. (2020, September 23). Official Report, Column 28. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12840&mode=pdf> [accessed September 2020]
- [16] House of Commons Briefing Paper. (2020, July 15). Trade Bill 2019-2021: Committee Stage Report. Retrieved from <https://researchbriefings.files.parliament.uk/documents/CBP-8936/CBP-8936.pdf> [accessed October 2020]
- [17] Finance and Constitution Committee. (2020, September 23). Official Report, Column 31. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12840&mode=pdf>
- [18] Finance and Constitution Committee. (2020, September 23). Official Report, Column 39. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12840&mode=pdf> [accessed October 2020]
- [19] Finance and Constitution Committee. (2020, September 23). Official Report, Column 59. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12840&mode=pdf> [accessed October 2020]
- [20] Finance and Constitution Committee. (2020, September 23). Official Report, Column 56. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12840&mode=pdf> [accessed October 2020]
- [21] UK Government. (2020, June 16). Letter from the Minister of State for Trade Policy to all Members of Parliament. Retrieved from http://data.parliament.uk/DepositedPapers/Files/DEP2020-0323/Minister_Hands_to_all_MPs_FTAs_letter.pdf [accessed October 2020]
- [22] House of Commons Public Bill Committee, UK Parliament. (2020, June 16). Hansard, Column 240. Retrieved from https://publications.parliament.uk/pa/cm5801/cmpublic/Trade/PBC120%20Trade_1st-8th_Compilation_25_06_2020.pdf [accessed October 2020]
- [23] Finance and Constitution Committee. (2020, September 23). Official Report, Column 50. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12840&mode=pdf> [accessed October 2020]
- [24] Finance and Constitution Committee. (2020, September 23). Official Report, Column 48. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12840&mode=pdf> [accessed October 2020]
- [25] Finance and Constitution Committee. (2020, September 23). Official Report, 23 September 2020. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12840&mode=pdf> [accessed October 2020]
- [26] UK Government. (2020, August 18). Trade Bill 2019-2021: Impact Assessment. Retrieved from <https://publications.parliament.uk/pa/bills/cbill/58-01/0120/ImpactAssess.pdf> [accessed October 2020]

- [27] Finance and Constitution Committee. (2020, September 23). Official Report, Column 46. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12840&mode=pdf> [accessed October 2020]
- [28] UK Government. (2020, March 18). Letter from the Minister of State from the Department of International Trade. Retrieved from https://www.parliament.scot/S5_Bills/DfIT_letter.pdf [accessed October 2020]
- [29] Finance and Constitution Committee. (2020, September 23). Official Report, Column 53. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12840&mode=pdf> [accessed October 2020]
- [30] Finance and Constitution Committee. (2020, September 23). Official Report, Column 47. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12840&mode=pdf> [accessed October 2020]

