

The Welsh Government's Legislative Consent Memorandum on the Trade Bill

March 2018

Background

The UK Government's Trade Bill

1. The UK Government's Trade Bill¹ (the Bill) received its first reading in the House of Commons on 7 November 2017. The Committee Stage in the House of Commons ended on 1 February 2018. The date of the House of Commons Report Stage is yet to be announced.
2. The Explanatory Notes to the Bill say that the Bill "provides key measures that are required to build a future trade policy for the UK once we leave the EU".²
3. The measures include:
 - Regulation-making powers to ensure that the UK can implement any procurement obligations arising from the UK becoming a member of the GPA (Agreement on Government Procurement) in its own right.
 - The implementation of agreements with partner countries corresponding to the EU's Free Trade Agreements and other trade agreements in place before the UK's exit from the EU. The Bill includes regulation-making powers to

¹ UK Government, [Trade Bill 2017-2019 Bill 122](#)

² UK Government, [Trade Bill Explanatory Notes](#), November 2017, paragraph 1



implement any changes to domestic law which will be necessary for the UK to meet obligations flowing from these agreements.

- Establishing the 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 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.
- Power for HM Revenue and Customs (HMRC) to collect data on behalf of the UK 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.
- Power to establish a data-sharing gateway between HMRC and other public and private bodies, so that those bodies, including Department for International Trade, can discharge their public functions and access record-level data for research, monitoring and evaluation.

The Welsh Government's Legislative Consent Memorandum

4. On 7 December 2017, Ken Skates AM, the Cabinet Secretary for Economy and Transport (the Cabinet Secretary), laid before the National Assembly a Legislative Consent Memorandum (LCM) in respect of the Bill.³

5. The Business Committee referred the LCM to this Committee, the External Affairs and Additional Legislation Committee and the Economy, Infrastructure and Skills Committee for consideration on 12 December 2017. The Business Committee set a reporting deadline of 27 February 2018, which was subsequently extended to 16 March, following a letter from the Chair of this Committee.⁴

³ Welsh Government, *Legislative Consent Memorandum Trade Bill*, December 2017

⁴ Business Committee, *Revised timetable for consideration of the Legislative Consent Memorandum on the Trade Bill*, March 2018

Consideration

6. We took evidence from the Cabinet Secretary in a concurrent meeting with the External Affairs and Additional Legislation Committee on 12 February 2018.⁵

Provisions for which the National Assembly's consent is required

7. The LCM notes that clauses 1, 2, 3 and 4 and the associated Schedules 1, 2 and 3 require consent on the basis that they are making provision for a purpose that is within the National Assembly's legislative competence.⁶

8. The UK Government's Explanatory Notes to the Bill also say that consent is needed for clauses 1, 2, 3 and 4 and the associated Schedules 1, 2 and 3.⁷

9. The Welsh Government's view in the LCM is that "it is appropriate to deal with these provisions in this Bill as the Bill covers both devolved and non-devolved matters".⁸ However, the Welsh Government adds that "devolved areas may be heavily impacted by future trade agreements therefore it is important Welsh interests are adequately reflected in the Trade Bill".⁹

10. The LCM states that the question of whether or not consent should be given will depend on the UK Government's response to amendments suggested by the Welsh Government.¹⁰

11. On 18 January 2018, the Cabinet Secretary made a statement setting out the Welsh Government's proposed amendments (which were developed alongside the Scottish Government and would apply equally in respect of the regulation-making powers of Scottish Ministers).¹¹ In brief, the amendments would bring the regulation-making powers of the Welsh Ministers more in line with the regulation-making powers of UK Ministers. The amendments would also require UK Ministers to obtain the consent of the Welsh Ministers before UK Ministers used their regulation-making powers in devolved areas.

⁵ Constitutional and Legislative Affairs Committee and the External Affairs and Additional Legislation Committee, RoP, 12 February 2018

⁶ Welsh Government, *Legislative Consent Memorandum Trade Bill*, December 2017, paragraph 6

⁷ UK Government, *Trade Bill Explanatory Notes*, November 2017, paragraphs 15-17 and Annex A

⁸ Welsh Government, *Legislative Consent Memorandum Trade Bill*, December 2017, paragraph 18

⁹ Welsh Government, *Legislative Consent Memorandum Trade Bill*, December 2017, paragraph 18

¹⁰ Welsh Government, *Legislative Consent Memorandum Trade Bill*, December 2017, paragraph 16

¹¹ Welsh Government, *Amendments to the UK's Trade Bill proposed by the Scottish and Welsh Governments*, 18 January 2018

Our view

General observations

- 12.** This report outlines the main issues we wish to raise in relation to the LCM. However, we repeat the observations we made in our LCM report on the European Union (Withdrawal) Bill regarding the constitutional arrangements of the United Kingdom.¹²
- 13.** In brief, we repeat the importance of respecting the legislative consent process as a central safeguard to the devolution settlement. We repeat the fundamental role played by the Sewel convention. However, we also stress the importance of applying the legislative consent process to subordinate legislation.
- 14.** In respect of UK Bills arising from exiting the EU, we have already noticed a pattern where UK Ministers are being given broad powers to make regulations in devolved areas. This is particularly true for the European Union (Withdrawal) Bill and the Trade Bill. Therefore, it is crucial that the Statutory Instrument consent arrangements set out in Standing Order 30A of the National Assembly are respected, and continue to be respected. Whenever UK Ministers are making subordinate legislation that amends primary legislation in devolved areas (and a Legislative Consent Motion is tabled), the consent of the National Assembly is required.
- 15.** We note, however, that the Cabinet Secretary for Economy and Transport said in evidence that when UK Ministers use their concurrent powers under the Bill in devolved areas (whether to amend primary legislation or not), that consent should be a matter for the Welsh Ministers:

“It's a judgment call at the end of the day, this is. I think there's a strong argument for both, but, ultimately, the decision was made against a backdrop of a clock that is completely out of our control. Speed and time are in short supply, and I didn't feel it would be particularly helpful to introduce another procedure. Therefore, I made the decision that I did, but I do accept that, equally, there is a strong argument in favour of the whole Assembly having a role in this.”¹³

¹² Constitutional and Legislative Affairs Committee, *The Welsh Government's Legislative Consent Memorandum on the European Union (Withdrawal) Bill*, December 2017

¹³ Constitutional and Legislative Affairs Committee and the External Affairs and Additional Legislation Committee, RoP [47], 12 February 2018

16. That approach is confirmed in the proposed amendments to the Bill published by the Welsh and Scottish Governments.¹⁴

The procedure that applies to regulations laid before the National Assembly

17. We repeat the concerns we raise in our LCM report on the European Union (Withdrawal) Bill¹⁵ that the Bill sets out the procedure that applies to regulations that are: (1) made by the Welsh Ministers, and (2) laid before the National Assembly.

18. In our view, it is for the National Assembly to decide what procedures should apply to regulations that are laid before the National Assembly. While we acknowledge the National Assembly has the competence to pass its own primary legislation setting out such procedures, given the time constraints and the desirability of having all the provisions in one place, we accept that it is appropriate for the procedures to be set out in the Bill. However, as far as we are aware, the National Assembly has not been consulted on what procedures should apply to regulations that are made by the Welsh Ministers and laid before the National Assembly under the Bill.

19. The Bill says that the negative resolution procedure applies to almost all regulations made under the Bill, even where the regulations amend primary legislation. It is our long-standing view that any regulations that amend primary legislation should be subject to the affirmative procedure at least.

20. We are particularly concerned that the regulation-making powers contained in the Bill allow regulations to modify “primary legislation that is retained EU law” (see clause 2(6) of the Bill). Parts of the *Government of Wales Act 2006* are retained EU law; therefore clause 2(6) would allow regulations to be made that modify the *Government of Wales Act 2006*. Such modification would be as the Ministers (Welsh or UK) “consider appropriate” for the purpose of implementing an international trade agreement; such regulations would follow the negative procedure.

21. Although the scope of the regulation-making powers in the Bill are limited to powers to implement the GPA and international trade agreements, the nature of international trade agreements in particular is still unclear. What will these international trade agreements look like? Also, when implementing them, how much scope will there be to modify domestic legislation by regulations?

¹⁴ Welsh Government, *Amendments to the UK's Trade Bill proposed by the Scottish and Welsh Governments*, 18 January 2018

¹⁵ Constitutional and Legislative Affairs Committee, *The Welsh Government's Legislative Consent Memorandum on the European Union (Withdrawal) Bill*, December 2017

22. Given such uncertainties, we do not believe that applying the negative procedure to all implementing regulations is appropriate.

Regulation-making powers “as they consider appropriate”

23. We echo the concerns of many that the power to make regulations (in this Bill and the European Union (Withdrawal) Bill) as Ministers “consider appropriate” is too broad.

24. The Cabinet Secretary agreed during our evidence session:

“It should be 'as necessary'. 'Appropriate' is too vague, I think.”¹⁶

25. The concern about the breadth of the regulation-making powers is even greater because the Bill does not set out a list of things that regulations cannot do under clauses 1 and 2 (apart from one relatively minor restriction in clause 2(5)). Also, although the Bill does not go as far as to say that regulations can do anything that an Act of Parliament can do, regulations under clause 2 are a Henry VIII power that can modify primary legislation that is retained EU law.

26. Further, the way that the time limit on making regulations under clause 2 can be extended, means that these powers could be used for many years to come.

27. Finally, as noted above, it appears to be impossible to define the full scope of the clause 2 powers without knowing what the international trade agreements will look like. How much flexibility will there be when implementing an international trade agreement? It may be that there is a great deal of flexibility, meaning that the regulation-making powers in clause 2 will have broad scope to modify domestic law in order to implement an international trade agreement. In such cases, we believe that the negative resolution procedure is inappropriate.

Inequality between UK Ministers and the Welsh Ministers

28. As in the EU (Withdrawal) Bill, there are constraints on the use of the clause 1 and 2 powers by the Welsh Ministers (and Scottish Ministers and Northern Ireland departments) that do not apply to the UK Ministers.

29. For example, the Welsh Ministers cannot use the clause 1 and 2 powers to modify retained direct EU legislation or in a way that is inconsistent with modifications made by UK Ministers under the EU (Withdrawal) Bill.

¹⁶ Constitutional and Legislative Affairs Committee and External Affairs and Additional Legislation Committee, RoP [47][12 February 2018

30. We note the proposed amendments published by the Welsh Government which remove that inequality in relation to regulation-making powers under the Bill in devolved areas.

31. As we noted in our report on the LCM for the European Union (Withdrawal) Bill,¹⁷ there is a clear lack of parity between the powers of the Welsh Ministers and the powers of UK Ministers in devolved areas. This makes it even more important that when UK Ministers use their powers under the Bill (or any primary legislation) in devolved areas, that the consent of the National Assembly is required (see our conclusion in paragraph 40 of this report).

The Trade Remedies Authority

32. While we accept that clause 5 (which establishes the Trade Remedies Authority) does not require the consent of the National Assembly, it still raises important issues for Wales.

33. The TRA must provide advice, support and assistance to the Secretary of State about international trade. The TRA may provide advice, support and assistance about international trade as TRA considers appropriate to anyone else.

34. If the Welsh Ministers need advice, support and assistance from the TRA in respect of international trade, there is no duty on the TRA to provide it (while there is a duty to do so for the Secretary of State).

35. This is another example of how the Bill does not treat the Welsh Ministers and UK Ministers in the same way.

Interaction with the European Union (Withdrawal) Bill

36. We note that the Bill does not contain all the regulation-making powers that will be needed in respect of trade issues that arise as a result of exiting the EU. The breadth of the regulation-making powers in the EU (Withdrawal) Bill can also be used in relation to the GPA and international agreements, where the issues around the GPA and international agreements arise as a result of exiting the EU.

37. This is confirmed in the Explanatory Notes to the Bill with regard to clause 2:

¹⁷ Constitutional and Legislative Affairs Committee, *The Welsh Government's Legislative Consent Memorandum on the European Union (Withdrawal) Bill*, December 2017

“...in most cases, the implementation of any obligations within these UK trade agreements can be dealt with through the EU (Withdrawal) Bill.”¹⁸

CONCLUSIONS

38. We agree that the National Assembly's consent is required for clauses 1, 2, 3 and 4 and associated Schedules 1, 2, and 3. This is because those clauses and Schedules make provision in relation to Wales for any purpose within the legislative competence of the National Assembly for Wales.

39. The Bill gives the Welsh Ministers powers to make regulations as they consider appropriate. If the Welsh Ministers consider it appropriate, they can make regulations under clauses 1 and 2 in respect of any subject area that is within the Assembly's legislative competence. Therefore, the National Assembly's consent is required.

40. We do not agree with the Cabinet Secretary that the use of concurrent powers by UK Ministers to make regulations that amend primary legislation in devolved areas should be subject to consent by the Welsh Ministers. In our view, consent should be sought from the National Assembly.

41. We agree with the Cabinet Secretary that the phrase “as they consider appropriate” in relation to the Welsh Ministers making regulations under the Trade Bill provides powers that are too broad and that “as necessary” would be sufficient. We note however that amendments to reflect this were not included in the proposed amendments to the Trade Bill published by the Welsh Government on 18 January 2018.

42. In the circumstances, we believe that it is probable that amendments to the Trade Bill will be necessary before the National Assembly will be in a position to provide its consent.

43. We intend to report separately on the scrutiny of regulations made under the Trade Bill.

¹⁸ UK Government, *Trade Bill Explanatory Notes*, November 2017, paragraph 41