

The Trade Bill:

Second report on legislative consent and associated issues

March 2019

Summary

We published our first report on the Trade Bill a year ago, in March 2018.

Changes have been made to the Bill during its consideration in Parliament, changes that have led to the Welsh Government publishing a Supplementary Legislative Consent Memorandum.

This report provides our view on the Supplementary Memorandum and the extent to which the conclusions and recommendations made in our first report have been addressed.

We draw 10 conclusions that are aimed at informing the Assembly's debate on the associated legislative consent motion, currently scheduled for 12 March 2019.



1. Introduction

Our previous work

1. We have previously reported on the Trade Bill, in our March 2018 report *The Trade Bill: Report on legislative consent and associated issues*.¹ For the sake of clarity, we refer to it as our “first report” hereafter.

2. The first report concluded that:

“We are unable to recommend that the National Assembly for Wales grants its consent to the provisions in the Bill that relate to Wales.”

3. Our conclusion was based on concerns about the powers to be granted to Welsh Ministers, the granting of concurrent powers to UK Ministers in devolved areas, and protecting the devolution statutes.

4. We did not draw conclusions based on the Bill’s stated policy objectives.

Current consideration

5. Following a hiatus in the Bill’s passage through the Parliamentary process in Westminster, the House of Lords began its committee consideration of the Bill on 21 January 2019.

6. In response to amendments made to the Bill, the Welsh Government laid a Supplementary Legislative Consent Memorandum on 14 February 2019.²

7. It is anticipated that a Legislative Consent Motion will be tabled for debate on Tuesday 12 March 2019.

8. We hope that this report helps inform this debate.

¹ EAAL Committee, *The Trade Bill: Report on legislative consent and associated issues*, March 2018

² Welsh Government, *Trade Bill: Supplementary Legislative Consent Memorandum (memorandum no 2)*, 14 February 2019

2. Provisions of the Bill that require legislative consent

9. The Welsh Government's Supplementary Legislative Consent Memorandum (the Supplementary Memorandum) states that:

“We consider that Part 1 of the Bill and its associated Schedules require consent on the basis that they are making provision for a purpose that is within the Assembly's legislative competence. The following clauses which require consent were already set out in detail in the first legislative consent memorandum [...]: Part 1, clauses 1 to 4 and schedules 1, 2 & 3.”³

CONCLUSIONS

Conclusion 1. We agree with the statement in the Supplementary Memorandum that Part 1 of the Bill and its associated Schedules, i.e. clauses 1 to 8 and Schedules 1, 2 and 3, require the legislative consent of the Assembly, on the basis that they are making provision for a purpose that is within the Assembly's legislative competence.

Conclusion 2. Amendments relevant to the Assembly's competence have been made to these provisions since the original Legislative Consent Memorandum was laid. Moreover, clause 6, a new clause, has been inserted into Part 1 of the Bill since the original Memorandum was laid, and we agree with the Welsh Government that this clause requires the Assembly's consent.

³ [Welsh Government, Trade Bill: Supplementary Legislative Consent Memorandum \(memorandum no 2\), 14 February 2019](#)

3. Have the concerns we raised in our first report been addressed?

Whilst amendments to the Bill have addressed some of our concerns, they have not addressed them all.

Some of our concerns have been exacerbated by the use of concurrent powers under the EU (Withdrawal) Act 2018.

3.1. The scope of Ministerial powers

10. In our first report, we concluded that:

“The powers proposed for Welsh Ministers are framed too widely. Our preference would be to see them amended to restrict them to only making provision that ‘is essential’.”⁴

11. This was consistent with the view we took in relation to the EU (Withdrawal) Act 2018⁵ during its passage through Parliament.

12. Our position was not accepted in relation to the Withdrawal Act, and amendments to the Bill have not narrowed the scope of the powers conferred on the Welsh Ministers.

CONCLUSIONS

Conclusion 3. Our concern about the scope of the powers to be granted to Welsh Ministers has not been addressed.

3.2. Concurrent powers

13. In our first report, we stated our preference for all powers relating to Welsh devolved competence to be granted solely to the Welsh Ministers, whilst

⁴ EAAL Committee. *The Trade Bill: Report on legislative consent and associated issues*, March 2018

⁵ European Union (Withdrawal) Act 2018 c.16

acknowledging that this position was not supported by the Welsh or UK Governments.⁶

14. This was in line with our position on the EU (Withdrawal) Act 2018.⁷

15. We concluded the following, should concurrent powers remain part of the Bill:

“We support the Welsh Government’s call for the use of powers held concurrently between Welsh Ministers and Ministers of the Crown to require consent. Whilst the Welsh Government’s proposal to require executive consent for the use of these powers is preferable to the current absence of consent arrangements, we would prefer to see the Trade Bill amended to also require the Assembly’s consent for the use of these powers.”⁸

16. The Welsh Government states, in its Supplementary Memorandum, that:

“We have now obtained commitments in the UK Parliament including:

- UK Government Ministers will not normally use the powers in devolved areas without Welsh Ministers’ consent. This is in line with the approach taken in the EU (Withdrawal) Act.
- UK Government will not use the powers to introduce new policy in devolved areas and that administrative efficiency will be the primary driver.”⁹

17. We note that these commitments are non-statutory and therefore not legally binding. Moreover, there is no commitment to seek the Assembly’s consent; only that of the Welsh Ministers.

18. We also have a wider concern about the creation of new concurrent powers for UK Ministers in the Bill.

⁶ EAAL Committee. *The Trade Bill: Report on legislative consent and associated issues*, March 2018

⁷ EAAL Committee. *Six objectives for changing the EU (Withdrawal) Bill*, October 2017

⁸ Ibid

⁹ Welsh Government. *Trade Bill: Supplementary Legislative Consent Memorandum (memorandum no 2)*, 14 February 2019

19. Since the original LCM was laid, the new devolution settlement for Wales, set out in the Wales Act 2017,¹⁰ has come into force.

20. Under this settlement, the Assembly is restricted from removing or modifying UK Ministerial powers in devolved policy areas, where those powers are concurrent with a Welsh Ministers' power (or where the Welsh Ministers need the consent of, or need to have consulted, UK Ministers before they can exercise the power).¹¹

21. Therefore, every time a new concurrent power is created (or a Welsh Ministerial power is made subject to the consent of or consultation with UK Ministers), future Assembly legislative competence is restricted.

22. Non-statutory commitments such as the ones referred to above do not lift this restriction on the Assembly's future competence.

23. A further concern is raised by the Constitutional and Legislative Affairs Committee, which very recently reported its view that the UK Government has breached its existing commitment to refrain from using similar powers under the European Union (Withdrawal) Act 2018 to introduce new policy in devolved areas.¹²

24. As a committee, we have raised concerns in relation to the approach taken by the Welsh and UK Governments to legislating for Brexit. Of relevance to this report is our concern that concurrent powers provided under the European Union (Withdrawal) Act 2018 have been utilised to such an extent by the UK Government (with the consent of the Welsh Ministers) to make corrections to EU law in devolved areas, that the Assembly's role in legislating for Brexit has been diminished.

CONCLUSIONS

Conclusion 4. When we consider the change to the devolution settlement, the CLA Committee's view, and our own concerns about how the use of concurrent powers under the European Union (Withdrawal) Act 2018, we conclude that our original concern about the provision of concurrent powers was well founded and still stands in relation to this Bill.

¹⁰ [Wales Act 2017](#) c.4

¹¹ *Ibid*

¹² see paragraph 8, 3rd main bullet point (at foot of page 6 of CLAC's Report [Scrutiny of regulations under the European Union \(Withdrawal\) Act 2018: Progress report](#) of February 2019

3. 3. Parity of powers between UK and Welsh Ministers

25. In our first report, we expressed a concern that the devolved Ministers did not have the same powers as UK Ministers in respect of the modification of retained EU law within devolved areas.

CONCLUSIONS

Conclusion 5. We are pleased to note that amendments that meet this concern have now been made to the Bill, to bring it into line with the European Union (Withdrawal) Act 2018 in this respect.

26. These amendments include the removal of the requirement for Welsh Ministers to obtain the consent of a UK Minister before using the power to make regulations that would come into force before exit day, or that would involve quota arrangements. The amendment instead requires devolved Ministers to consult UK Ministers.

27. However, the amendments would maintain the effect of restricting the Assembly's future competence, because of the consultation requirement (as explained in paragraphs 19 and 20 above).

CONCLUSIONS

Conclusion 6. We draw to the attention of the Assembly the fact that the requirement for Welsh Ministers to consult UK Ministers before making quota arrangements (or pre-exit-day regulations) will restrict future Assembly competence, in that the Assembly will not be able to remove that duty in the future (due to the change to the devolution settlement under the Wales Act 2017, as described previously).

3. 4. Scrutiny of regulations made under the Bill

28. In our first report, we called for certain powers to be subject to strengthened scrutiny procedures.

29. We called for **the clause 1 power to implement the WTO General Agreement on Procurement** to be subject to affirmative procedure in the Assembly.

30. Amendments to the Bill have not addressed our call for strengthened scrutiny arrangements in this regard.

31. We also called for **powers proposed for Welsh Ministers under clause 2 of the Bill** to be subject to an affirmative procedure in the Assembly or to a sifting process there.

32. Amendments to the Bill now subject the clause 2 powers to an affirmative procedure in the Assembly (and in the other UK legislatures too).

CONCLUSIONS

Conclusion 7. Whilst we welcome the strengthening of the scrutiny procedure for the clause 2 powers, we remain of the view that the clause 1 power to implement the WTO General Agreement on Procurement should be subject to affirmative procedure in the Assembly.

3. 5. The clause 2 sunset provision

33. Clause 2 of the Trade Bill limits the time within which powers under that clause can be exercised.

34. Under the amended clause 2, subsection (7)(a) prevents the making of regulations under subsection (1) after the end of the period of three years beginning with exit day.

35. However, subsection (7)(b) allows the extension of this period for a further period. Subsection (8) limits this to an extension of up to three years at a time, but this power can be exercised ad infinitum.

36. Ministers of the Crown can extend the sunset clause if both Houses of Parliament approve draft regulations tabled by Ministers of the Crown.

37. The power to extend the sunset clause is not provided to Devolved Ministers although they would be covered by any extension requested by and granted to UK Ministers.

38. The Assembly would have no formal role in scrutinising the extension of these powers.

39. In our first report, we concluded that:

“The control of powers under the sunset provision of Clause 2 of the Trade Bill granted to Welsh Ministers is more appropriately a question for the Assembly. Consequently, our preference is to see the Trade Bill amended to require the consent of the Assembly before an extension is

made to the five-year period, insofar as it relates to the powers of Welsh Ministers.”¹³

40. Amendments to the Bill have not addressed this conclusion.

41. The Welsh Government, in its Supplementary Memorandum, states that it has received commitments in Parliament that the UK Government will engage with devolved administrations before extending the period during which clause 2 powers can be used under the Bill. These are non-statutory commitments and so not binding in law.

CONCLUSIONS

Conclusion 8. We remain of the view that control, under the sunset provision of Clause 2 of the Trade Bill, of powers granted to Welsh Ministers is more appropriately a question for the Assembly. Consequently, our preference is to see the Trade Bill amended to require the consent of the Assembly before an extension is made to the three-year period, insofar as it relates to the powers of Welsh Ministers.

3. 6. Protecting the Government of Wales Act 2016

42. Our first report included a call for the Bill to be amended so to prohibit the powers it provides to UK Ministers being used to amend the Government of Wales Act 2006.¹⁴

43. No such amendment has been made.

44. It can be noted that a letter from the Parliamentary Under Secretary of State at the Department for Exiting the EU to the Constitutional and Legislative Affairs Committee suggests that only Orders in Council under section 109 of GOWA will normally be used to amend the Assembly’s legislative competence; such Orders require the consent of the Assembly, as a statutory precondition.¹⁵

¹³ EAAL Committee, *The Trade Bill: Report on legislative consent and associated issues*, March 2018

¹⁴ Ibid

¹⁵ Constitutional and Legislative Affairs Committee, *Letter to the Chair from Robin Walker MP, Parliamentary Under Secretary of State for Exiting the EU*, 24 October 2017

CONCLUSIONS

Conclusion 9. Our view remains the same as expressed in our first report i.e. we would like to see the Bill amended to protect the Government of Wales Act 2016 from amendment by UK Ministers utilising powers under this Bill.

4. Amendments that raise new issues for the Assembly

4.1. Amendments to Clause 1 (implementing the World Trade Organisation original and revised Agreements on Government Procurement (GPAs))

45. These amendments create concurrent powers for UK and devolved Ministers to make subordinate legislation to deal with the consequences of changes to the UK's list of government bodies covered by the GPA (i.e. authorities that have to open up their procurement to other WTO members, subject to thresholds and other rules). Where the change is to a devolved Welsh authority, making these consequential changes would almost certainly be within the Assembly's competence and therefore the amended clause requires the legislative consent of the Assembly.

46. The creation of this kind of "tidying-up" power is normal and, in itself, innocuous. However, the fact that it is a concurrent power does have a slight restricting effect on the Assembly's competence because the Assembly would not, in future, be able to remove or modify the power, in so far as exercisable by UK Ministers, without the consent of the UK Government.

47. As with all concurrent powers, any resulting subordinate legislation made by UK Ministers alone would not be subject to formal scrutiny by the Assembly and, as matters stand, would be in English only.

48. We have previously expressed our preference for all powers relating to Welsh devolved competence to be granted solely to the Welsh Ministers.

4.2. Addition of Clause 6 (UK participation in the European medicines regulatory network)

49. This clause originates from an opposition amendment, which was passed by the House of Commons. The Welsh Government consider that this clause is within competence to the extent that it requires Welsh Ministers either to implement any international trade agreement under which the UK would continue to participate in the European medicines regulatory network, or to take whatever steps are necessary, within devolved competence, to enable the UK Government to conclude such an international agreement. Therefore the Welsh Government considers that the Assembly's consent is needed for clause 6.

50. We agree with this analysis, save that we consider that the clause would require Welsh Ministers to do both the things identified; we do not see them as “either/or” alternatives.

51. We also point out that clause 6 will apply only if the international agreement reached meets the definition in the Bill of an “international trade agreement”, i.e. a free trade agreement (defined in terms of the WTO General Agreement on Tariffs and Trade rules) or another “international agreement that mainly relates to trade”. Therefore, clause 6 does not impose any duty on the UK Government to seek to enter into an international agreement focused solely on UK continued participation in the network, or mainly relating to non-trade matters.

5. Our view

52. The legislative consent process does not allow for a nuanced interaction with the legislation under scrutiny. Rather, it offers a blunt and binary choice of granting consent for the provisions as drafted or rejecting them entirely.

53. Our consideration of the Trade Bill illustrates the often unsatisfactory balancing act that is required when considering questions of legislative consent.

54. On the one hand, despite some progress, it is clear that many of the concerns we raised in our first report have not been addressed. In one case at least, our concerns have deepened.

55. On the other hand, we are fully cognisant of the need for legislation of this type if a degree of continuity is to be offered to business, workers and consumers when we leave the EU.

CONCLUSIONS

Conclusion 10. This report provides our assessment of the legislative consent issues associated with the Trade Bill. We report with a view to informing the Assembly's debate on whether it should grant its legislative consent, currently scheduled for 12 March 2019.