

The UK Trade Bill 2020

Legislative consent

September 2020

This report provides a summary of the three areas of the UK Trade Bill that the External Affairs and Additional Legislation Committee (“the Committee”) agreed to explore:

- Clause 1 (relating to the Agreement on Government procurement);
- Clause 2 (specifically extending the period within which clause 2 powers can be used); and
- the Welsh Government’s reliance on Ministerial commitments as a basis for recommending the granting of legislative consent.



Background

1. We reported on the previous version for the Trade Bill on two occasions, in March 2018¹ and again in March 2019², following amendments to the Bill during its passage through the 2017-19 Parliament. Ultimately, this version of the Bill fell with the dissolution of Parliament.
2. The version currently under consideration was introduced to the House of Commons on 19 March 2020.³
3. The Bill is, in architecture and legislative intent, similar to previous iterations of the Bill.
4. Consequently, many of the issues we raised in relation to the previous versions of the Bill remain (insofar as they relate to analogous provisions in the current version of the Bill).
5. The Welsh Government laid a Legislative Consent Memorandum relating to the Bill on 2 April 2020.⁴
6. At our meeting on 4 May 2020, we agreed to focus on three aspects of the Bill and the Welsh Government's approach:
 - Clause 1 (relating to the Agreement on Government procurement);
 - Clause 2 (specifically extending the period within which clause 2 powers can be used); and
 - the Welsh Government's reliance on Ministerial commitments as a basis for recommending the granting of legislative consent.⁵
7. On 7 May 2020, jointly with the Legislation, Justice and Constitution Committee, we wrote to the Minister for International Relations with a range of questions.⁶

¹ *The Trade Bill: report on legislative consent and other issues*, March 2018

² *The Trade Bill: second report on legislative consent and other issues*, March 2019

³ The Trade Bill (HC Bill 120 2019-21)

⁴ Welsh Government, Legislative Consent Memorandum: Trade Bill, 2 April 2020

⁵ EAAL Committee, Minutes of meeting held on 4 May 2020

⁶ Letter from the Chairs of the EAAL and LJC Committees to the Minister for International Relations and the Welsh Language, *Trade Bill: Legislative Consent*, 7 May 2020

8. The Minister responded on 29 May 2020.⁷
9. The Legislation, Justice and Constitution Committee reported on the Bill in July 2020⁸ and it received a Ministerial response to its report on 11 September 2020.⁹
10. This report focuses on the three issues we identified for further exploration and our view is provided in the sections that follow.

Clause 1 (relating to the Agreement on Government procurement)

11. The first area that we have explored relates to the Agreement on Government procurement (“the GPA”), addressed by clause 1 of the Bill.
12. Clause 1 provides a power for the Welsh Ministers to reflect in domestic legislation any changes made to the list of central government entities included in Annex 1 to the UK’s Appendix 1 to the GPA.
13. Any regulations made to update the list of public bodies in Wales that will be subject to the GPA will be subject to the negative procedure.
14. We raised questions with the Minister in relation to:
 - the appropriateness of these regulations being subject to the negative procedure; and
 - details of the Welsh public bodies the Welsh Government is seeking to include in any revised list.¹⁰
15. In relation to the procedure that applies, the Minister stated that “[...] *the decision on procedure was taken by the UK Government [...]*” and that she is “[...] *satisfied that the negative procedure strikes the right balance in this instance [...]*”.¹¹

⁷ Letter from the Minister for International Relations and the Welsh Language to the Chairs of the EAAL and LJC Committees, *Trade Bill: Legislative Consent*, MA-EM-1622-20, 29 May 2020

⁸ Legislation, Justice and Constitution Committee, *The Welsh Government’s Legislative Consent Memorandum on the Trade Bill*, June 2020

⁹ Letter from the Minister for International Relations and the Welsh Language to the Chair of the LJC Committee, *Legislation, Justice and Constitution Committee Report on the Welsh Government’s Legislative Consent Memorandum on the Trade Bill*, 11 September 2020

¹⁰ In the letter sent jointly with the LJC Committee on 7 May 2020

¹¹ Quotations are taken from the Minister’s letter to the Chairs of the EAAL and LJC Committee dated 29 May 2020

16. The Minister, in her response, stated that only technical revisions to the list of public bodies is envisaged at this time. For example, updating the names of public bodies that have changed over time.¹²

OUR VIEW

17. In our reports on the previous iteration of the Bill, we recommended that an affirmative procedure be applied for this power.

18. We stand by this recommendation. It is disappointing that the Welsh Government continues to take a different view.

RECOMMENDATION

We again recommend that an affirmative procedure be applied to the making of regulations to update the list of public bodies in Wales that will be subject to the GPA. Welsh Government reliance on UK Ministerial commitments

19. Paragraph 10 of the Welsh Government’s legislative consent memorandum states:

The UK Government have agreed to restate commitments made during the passage of the 2017-19 Trade Bill, which include:

- That the UK Government will not normally use concurrent powers to legislate in devolved areas without the consent of the Devolved Governments, and never without consulting them.
- That the UK Government will not use the powers to introduce new policies in devolved areas and that administrative efficiency will be the primary driver.
- Engaging with Devolved Governments before extending the period during which clause 2 powers can be used under the Bill.¹³

¹² See the Minister’s letter to the Chairs of the EAAL and LJC Committee dated 29 May 2020

¹³ Welsh Government, Legislative Consent Memorandum: Trade Bill, 2 April 2020

- 20.** We sought clarification from the Minister on the basis on which this agreement has been made e.g. whether by exchange of letters between Ministers or through an oral commitment.
- 21.** Further commitments are mentioned in the Memorandum in relation to the Trade Remedies Authority. As the Minister acknowledges that this is not a matter for legislative consent, we agreed not to pursue this.
- 22.** In her response to our letter dated 7 May, the Minister stated:

I received assurances in an exchange of letters with the then Minister for Trade Policy, Conor Burns MP, that all commitments made to the Welsh Government during the partial passage of the former Trade Bill would be restated during the passage of the current Bill. I have also raised with and written to Greg Hands MP Minister for Trade Policy requesting confirmation that he will honour the assurances given by his predecessor and that he will repeat these commitments at the despatch box during the Commons stages of the Bill.¹⁴

- 23.** During the Bill's Committee Stage in the House of Commons, on 23 June 2020, the UK Minister for Trade Policy, Greg Hands MP, restated the commitments identified by the Welsh Government.¹⁵
- 24.** Whilst the Minister for Trade Policy restated these commitments, he did so in a general sense, referring to the treatment of concurrent powers generally rather than some of the specific powers for which commitments were sought (including the clause 2 sunset provision).
- 25.** The Legislation, Justice and Constitution Committee has requested a more explicit restatement of the commitments requested by the Welsh Government,¹⁶ and the Minister for International Relations and the Welsh Language has written to the Minister of State for Trade Policy seeking such a restatement by a UK Government Minister in the House of Lords.¹⁷

¹⁴ Letter from the Chairs of the EAAL and LJC Committees to the Minister for International Relations and the Welsh Language, *Trade Bill: Legislative Consent*, 7 May 2020

¹⁵ Hansard 23 June 2020 c.241-2

¹⁶ Legislation, Justice and Constitution Committee, *The Welsh Government's Legislative Consent Memorandum on the Trade Bill*, June 2020

¹⁷ Letter from the Minister for International Relations and the Welsh Language to the Minister for Trade Policy, 11 September 2020

OUR VIEW

- 26.** We commend the Minister for ensuring that these commitments have been restated by her UK counterpart, and support her efforts to seek a more explicit restatement before the Bill leaves the House of Lords. We accept the fact that parliamentary arithmetic makes the prospect of any further concession remote in the extreme.
- 27.** Nevertheless, in line with a number of recommendations that we made in our reports on the previous iterations of the Trade Bill, we believe the UK Government should be legally bound to observe these commitments.
- 28.** We intend to monitor the commitments made and the success of the Welsh Government's approach will be judged on the extent to which they are upheld in the future.

Extending the period within which clause 2 powers can be used

- 29.** In relation to the previous version of the Bill, we expressed a view that any extension of the sunset provisions relating to clause 2 should be subject to the Senedd's consent, insofar as they relate to powers granted to Welsh Ministers.
- 30.** The length of the sunset provision is five-years in the Bill. In the previous iteration of the Bill it was five-years on introduction, but reduced to three-years by amendment.
- 31.** On the question of Senedd consent, in response to our 2019 report on the previous iteration of the Bill, the Minister wrote:

I do not disagree with that position as a matter of principle but at the same time not everything we think sensible or appropriate is necessarily worthy of the resources needed to pursue it. Judgments have to be made about where to dedicate resources and the current circumstances did not meet that threshold.¹⁸

- 32.** In response to our question on the analogous provision in the 2020 version of the Bill, the Minister's view has developed:

¹⁸ Letter from the Minister for International Relations and the Welsh Language to the Chair of the EAAL Committee, *UK Trade Bill – Supplementary Legislative Consent Memorandum EAAL Report*, MA/EM/0263/19, 12 March 2019

The Welsh Government took the view that the UK Government's commitments to engage with the executive rather than the legislature were appropriate in this case, given that the issue specifically concerns the exercise of a function conferred on the executive in a narrowly defined set of circumstances.¹⁹

OUR VIEW

33. We remain of the view that powers delegated to Welsh Ministers are best controlled by the Senedd.

34. It is disappointing that the Welsh Government has moved away from agreeing in principle with our position.

Conclusion

OUR VIEW

35. In our March 2019 report on the previous iteration of the Trade Bill, we concluded the following:

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.

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

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.

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.²⁰

¹⁹ Letter from the Minister for International Relations and the Welsh Language to the Chairs of the EAAL and LJC Committees, *Trade Bill: Legislative Consent*, MA-EM-1622-20, 29 May 2020

²⁰ *The Trade Bill: second report on legislative consent and other issues*, March 2019

36. We remain of the same view.

37. In this report, we decided to focus on three of the issues that we had explored previously.

38. We have not received a satisfactory resolution to any of them.