

# The Trade Bill:

## Report on legislative consent and associated issues

March 2018

### Summary

At the time of reporting, the Trade Bill has cleared the Committee Stage of scrutiny in the House of Commons.

This report provides our view on the Welsh Government's Legislative Consent Memorandum ('the memorandum') relating to the UK Government's Trade Bill ('the Bill').

We also draw attention to some additional issues relating to the Bill that have arisen during our scrutiny.

At present, we are unable to recommend that the National Assembly for Wales ('the Assembly') grants its consent to the provisions in the Bill that relate to Wales.

We will reconsider our position and issue a supplementary report should these provisions be amended at a later stage in the UK Parliamentary process.



# 1. Legislative consent

This part of the report focuses on the provisions in the Bill that require the Assembly's legislative consent.

## 1.1. Background

### Introduction

1. The Trade Bill was laid before the House of Commons by the UK Government on 7 November 2017. The Trade Bill completed the Committee Stage in the House of Commons 1 February 2018. A date for the Report stage has not yet been set. The Bill is the third in a series of Brexit related Bills introduced by the UK Government. The Bill closely relates to the Taxation (Cross Border Trade) Bill currently awaiting Report Stage in the Commons and the European Union (Withdrawal) Bill currently awaiting Committee Stage in the House of Lords.

2. Trade is an exclusive competence of the European Union (EU) meaning that the EU conducts all trade negotiations on behalf of its Member States and that Member States are not allowed to pursue individual trade agreements with non-EU countries. The Trade Bill and the Taxation (Cross Border Trade) Bill seek to provide UK Ministers and, in some circumstances, Devolved Ministers with framework powers to establish a standalone UK trading regime after the UK leaves the EU. The UK Government has stated that Legislative Consent is required from the devolved legislatures for the Trade Bill but not for the Taxation (Cross Border Trade) Bill as this relates to powers over customs and excise duties, external quotas and trade remedy investigations.

## Timeline

3. The timeline below charts the progress of the Bill and our consideration to date:

### Timeline

**9 October 2017** - the UK Government published its White Paper *Preparing for our future UK trade policy*.

**7 November 2017** - the Trade Bill received its First Reading in the House of Commons.

**9 November 2017** – the Trade Bill received its Second Reading in the House of Commons

**4 December 2017** – the External Affairs and Additional Legislation Committee held an informal seminar on the implications for Wales of the UK Government's trade policy approach, including the Trade Bill.

**7 December 2017** – the Welsh Government laid a Legislative Consent Memorandum in relation to the Trade Bill before the Assembly.

**18 January 2018** – the Welsh and Scottish Governments published suggested amendments to the Trade Bill.

**23 January 2018 – 1 February 2018** – a Public Bill Committee scrutinised the Bill in the House of Commons. Amendments proposed by the Welsh and Scottish Government were defeated.

**12 February 2018** – the Committee, meeting concurrently with the Constitutional and Legislative Affairs Committee, took evidence from the Cabinet Secretary for Economy and Transport, Ken Skates AM, in relation to the Trade Bill.

## What is the Trade Bill?

4. The Trade Bill is part of the framework being established to allow the UK to enter into trade deals with Third Countries that currently have such deals with the European Union.
5. Whilst this framework enables such an approach, it by no means guarantees that such an approach will be possible as it will be subject to negotiation and agreement between the United Kingdom and the Third Country, with the

backdrop of the EU possibly having to renegotiate its trade deals with these Third Countries at the same time.

**6.** The Explanatory Notes to the Bill state that

“The UK currently enters into commitments in international trade agreements as a member of the European Union (EU). As a member of the EU, the UK has been party to the EU’s trade agreements with third countries. The Government has committed to providing continuity in the UK’s existing trade and investment relationships with these third countries.”

**7.** The Explanatory Notes go on to state:

“[...] the Trade Bill will provide the UK Government with the powers to make any changes to domestic legislation that are necessary to ensure these agreements, once signed by both parties, are fully implemented and can be ratified.”

**8.** The Trade Bill is relatively short and runs to 12 clauses. In summary, it provides:

- Powers for UK Ministers and Devolved Ministers to make changes to domestic law that may be required to implement the World Trade Organisation’s Agreement on Government Procurement;
- Powers for UK Ministers and Devolved Ministers to make changes to domestic law required to implement non-tariff elements of any agreements the UK Government reaches with third party countries who have already signed a trade deal with the EU;
- For the establishment of a Trade Remedies Authority; and
- Powers for HMRC to collect and share additional data and information on UK exporters.

## 1. 2. The Legislative Consent Memorandum

### Introduction

**9.** In the Legislative Consent Memorandum ('the Memorandum'), the Welsh Government outlines its view that the Assembly's consent is required for Part 1 Clauses 1, 2, 3, 4 and Schedules 1, 2 and 3. The UK Government agrees with the Welsh Government that consent is required for these provisions.

### CONCLUSIONS

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**Conclusion 1.** The Welsh Government considers that Part 1 of the Bill and its associated Schedules require the Assembly's consent. This position accords with the UK Government's view of the provisions requiring consent. We agree with this assessment.

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**10.** We note that the Welsh Government, in paragraph 16 of the Memorandum, accepts that a Trade Bill is necessary:

"The Welsh Government agrees that legislation is necessary to provide clarity and certainty for businesses and consumers in relation to trade as we leave the EU."

**11.** The Memorandum concludes that the Welsh Government recommendation as to whether the Assembly should grant its consent to these provisions in the Bill will depend on the UK Government's response to amendments put forward by the Welsh Government:

"We accept there may be instances when it makes sense for the UK Parliament to legislate on devolved areas, but this should only be with the consent of the Devolved Governments and this should be made clear on the face of the Bill. Further, there should be parity between the regulation making powers given to Ministers of the Crown and, with respect to devolved areas, Welsh Ministers. The additional restrictions placed on Welsh Ministers in this regard are not appropriate. Whether or not legislative consent should be given for this Bill will need to be considered in the context of the response to those amendments put down to address those issues."

**12.** Since this LCM was drafted, all of the amendments proposed by the Welsh Government were defeated during the Committee Stage of the Trade Bill's scrutiny in the House of Commons.

## A summary of the provisions requiring consent – Clauses 1, 2 and 3

### Clause 1: The Agreement on Government Procurement

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**13.** This provision confers powers on the Welsh Ministers to implement the Agreement on Government Procurement ('the GPA').

Clause 2: Powers to implement international trade agreements with third countries which already have such agreements with the EU.

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**14.** This clause confers powers on the Welsh Ministers to implement international trade agreements with third countries corresponding to certain kinds of existing EU/third country agreements.

### Clause 3 and Schedules 1, 2 and 3

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**15.** Clause 3 provides for different types of provision that could be made in regulations made under clauses 1 and 2. Clause 3 also gives effect to Schedules 1-3. Schedule 1 places restrictions on the exercise of the Welsh Ministers' powers. Schedule 2 makes provision for the procedure which is to apply to regulations made under clauses 1 and 2. Schedule 3 contains exceptions to restrictions in the devolution settlement.

## Issues raised in relation to the provisions requiring consent

### The Welsh Government's view

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**16.** As we observe above, the Welsh Government identified a range of concerns that it has with the provisions requiring consent.

**17.** A list of amendments and explanatory notes for the amendments were published jointly by the Welsh and Scottish Government on 18 January 2018. The amendments would:

- Require UK Government to seek the consent of Welsh Ministers and Scottish Ministers before using the concurrent powers provided to UK Ministers in the Bill to legislate in devolved areas;

- Remove the restrictions prohibiting the Scottish and Welsh Ministers from modifying directly applicable EU law converted by the EU (Withdrawal) Bill into UK law and;
- Remove the requirement for the Welsh and Scottish Governments to seek the consent of UK Ministers before using the powers provided to them by the Bill to introduce regulations that would come into force before exit day or that involve quota arrangements. Instead, the amendments would require the Welsh and Scottish Governments to consult UK Ministers.

**18.** In addition, the Welsh and Scottish Governments propose amendments to the sunset provision included in Clause 2 of the Bill and to the appointment of a non-executive member to the board of the Trade Remedies Authority created under Part 2 of the Bill.

**19.** We will address the sunset clause and Trade Remedies Authority amendments when considering broader issues relating to the Bill in the second part of this report.

### Our view

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**20.** We share some of the Welsh Government's concerns and have areas of concern not addressed by the Welsh Government's amendments.

**21.** Our first concern relates to **the appropriateness of the powers** proposed.

**22.** As with the EU (Withdrawal) Bill, the powers provided to Ministers are powers to make such provision as they "consider appropriate". This formulation raises the same issues as the principal ministerial powers in the EU (Withdrawal) Bill, and which we sought to address by proposing an amendment to restrict the powers provided to Ministers to make such provision that "is essential" in our letter to Welsh MPs on the EU (Withdrawal) Bill.

**23.** In giving evidence on 12 February 2017, the Cabinet Secretary for Economy and Transport, Mr Ken Skates AM, agreed that the power should be more tightly drawn, though indicated that he preferred the discretion available to be limited to "as necessary".

## CONCLUSIONS

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**Conclusion 2.** 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”.

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**24.** Our second concern relates to the use of **concurrent powers** and aligns to an extent with the view of the Welsh Government.

**25.** The powers proposed for the Welsh Ministers are to be held concurrently with Ministers of the Crown. These concurrent powers could be exercised by a Minister of the Crown without the consent of the Welsh Ministers.

**26.** Whilst the Welsh Government accepts the provision of concurrent powers to UK Ministers in the Bill, it has proposed amendments to require the consent of the Welsh Government before these powers can be used. The Committee questioned the Cabinet Secretary for Economy and Transport, Mr Ken Skates AM, as to why the Welsh Government were only seeking the consent of Welsh Ministers and not the Assembly for the use of concurrent powers by UK Ministers.

**27.** In response, the Cabinet Secretary for Economy and Transport said:

“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”.

**28.** Responding in the House of Commons Public Bill Committee, to the amendments that would require UK Ministers to get the consent of the Scottish and Welsh Governments before using their concurrent powers, the UK Minister of State for International Trade, the Rt Hon Greg Hands MP, stated:

“We will not normally use these powers to amend legislation in devolved areas without the consent of the relevant devolved Administration, and we will certainly never do so without first consulting them. It is crucial to understand that”.

**29.** Further, the Minister stated:

“We made a commitment in the trade White Paper to not normally use these powers in areas of devolved competence without consultation. I repeat that commitment to continuing that consultative process as we go forward. That commitment can be heard loud and clear.”

**30.** The Minister did not agree that this commitment needed to be made on the face of the Bill.

### Our view

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**31.** As we stated in our response to the EU (Withdrawal) Bill, our preference is for such powers to be granted solely to Welsh Ministers. That said, we acknowledge that this view is not shared by either the Welsh or UK Governments.

## CONCLUSIONS

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**Conclusion 3.** 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.

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**32.** Our third concern relates to the **restrictions placed on the use of powers proposed for Welsh Ministers**.

**33.** The restrictions on the use of powers proposed for the Welsh Ministers in Clauses 1 and 2 of the Bill mirror those that were to be placed on them by the EU (Withdrawal) Bill, as introduced.

**34.** As in that Bill (on introduction), there is an express prohibition on the Welsh Ministers using the Clause 1 or 2 powers to modify retained direct EU legislation or other forms of directly-applicable EU law (covered by Clause 4 of the EU (Withdrawal) Bill); this includes a prohibition on making any provision that is inconsistent with the way in which UK Ministers have modified that law.

**35.** Amendments made to Schedule 2 to the EU (Withdrawal) Bill at **Report Stage** in the House of Commons open the possibility of Welsh Ministers being able to modify certain aspects of retained direct EU legislation or other forms of

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directly-applicable EU law that have been 'released back' into Welsh devolved competence through the Order in Council process proposed in that Bill.

## Our view

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**36.** In setting our objectives for improving the EU (Withdrawal) Bill, we have been clear that we believe Welsh Ministers and the Assembly should be responsible for correcting all aspects of retained EU law in devolved areas.

**37.** At the very least, we believe the Trade Bill will need to be amended to reflect amendments already made to the EU (Withdrawal) Bill in this area.

## CONCLUSIONS

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**Conclusion 4.** We hope that the EU (Withdrawal) Bill will be amended to allow Welsh Ministers and the Assembly to play their part in modifying all aspects of retained EU law. In the event that such amendments are made, the Trade Bill should be amended to reflect this.

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**38.** Also consistent with the EU (Withdrawal) Bill are restrictions on Welsh Ministers ability to make regulations under Clause 2 about 'quota arrangements' and restrictions on Welsh Ministers ability to make regulations under Clause 2 prior to exit day; these regulations would require UK Government consent.

**39.** 'Quota arrangements' is defined in the same way as in the EU (Withdrawal) Bill, i.e. arrangements for, or in connection with, the division of responsibility within the UK, or an area including the UK, of an international obligation, or any right or other benefit arising from such an obligation, where the obligation is to achieve a result defined by reference to a quantity, or the benefit is so defined.

**40.** Examples would include obligations not to fish more than a certain quantity of certain species in particular waters, or not to allow more than a certain quantity of a particular chemical to be present in certain bodies of water.

**41.** The amendments proposed by the Welsh Government include an amendment that replaces the duty to seek the consent of Ministers of the Crown with a duty to consult Ministers of the Crown before exercising powers relating to quota arrangements or before making regulations before exit day.

## CONCLUSIONS

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**Conclusion 5.** The Welsh Minister's position is consistent with the principle of our objectives for improving the EU (Withdrawal) Bill and, consequently, we support amending the Bill along the lines proposed by the Welsh Government.

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**42.** Our fourth concern relates to the **scrutiny procedure** prescribed in the Trade Bill.

**43.** The scrutiny procedures for the subordinate legislation made by both UK and Devolved Ministers is set out on the face of the Trade Bill in Schedule 2. All subordinate legislation made by Welsh Ministers under the Bill, will be laid before the Assembly subject to the negative procedure.

**44.** Whilst the Assembly's Constitutional and Legislative Affairs Committee will be considering this in further detail, our view is that it should be for the Assembly to determine the procedure to apply to powers delegated to Welsh Ministers.

**45.** As described earlier in this report, Clause 1 of the Bill would enable Welsh Ministers and UK Ministers to implement any changes in domestic law related to the UK becoming a standalone Member of the World Trade Organisation (WTO) Agreement on Government Procurement. The UK is currently a signatory by virtue of its membership of the EU. This would include the power to implement changes to the UK's schedule of commitments under the Agreement. The current list of Welsh public bodies covered by the Schedules is relatively short compared to other UK countries. Any bodies added would be required to open up additional areas of their procurement activities to international competition.

**46.** Regulations making such changes would only be subject to the negative procedure.

**47.** When questioned on whether this was appropriate, the Cabinet Secretary for Economy and Finance, Mr Ken Skates AM, agreed that these regulations should be subject to an affirmative procedure.

## CONCLUSIONS

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**Conclusion 6.** The power proposed for Welsh Ministers under Clause 1 of the Trade Bill should be subject to an affirmative procedure in the National Assembly for Wales.

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**48.** The UK Government has stated that the aim of Clause 2 of the Bill is to replicate for the UK, the existing trade deals the EU currently has with the rest of the world so that businesses and consumers do not lose access to these markets on exit. Whilst that is the UK Government's intention, the powers given to Ministers in the Bill are not confined to replicating those deals as far as possible; they are simply powers to enter into trade deals with countries with which the EU currently has such deals. This is reinforced in the Explanatory Notes to the Bill, which state that in seeking enter into trade deals it may 'also be necessary to substantively amend the text of previous EU agreements'.

**49.** If agreements are substantively amended then the non-tariff aspects of these amendments could be implemented using regulation-making powers provided by Clause 2 and those regulations would only be subject to the negative procedure.

## CONCLUSIONS

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**Conclusion 7.** We believe that such potentially significant regulations should be made subject to an affirmative procedure, or, if a sifting mechanism for EU Statutory Instruments is established by the Assembly, then regulations under clause 2 should be subject to the sifting process.

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## Our view on granting legislative consent

**50.** Based on our conclusions above, and the position we have taken in relation to the EU (Withdrawal) Bill, we make the following recommendation:

## RECOMMENDATION

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**Recommendation 1.** The Assembly should not grant its legislative consent to the provisions of Trade Bill identified as requiring the Assembly's consent at this time.

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**51.** Should the Trade Bill be amended at a subsequent stage during Parliament's scrutiny process, then we will reconsider this recommendation.

## 2. The Trade Bill: Other issues identified

This part of the report describes some of the issues we identified in areas of the Bill that do not require the legislative consent of the Assembly, but that have a bearing on devolved areas of competence.

### 2.1. The Trade Remedies Authority

**52.** Part 3 of the Trade Bill establishes a Trade Remedies Authority ('the TRA') that would be responsible for providing advice, support and assistance to the Secretary of State on trade disputes and trade remedies.

**53.** The Taxation (Cross Border Trade) Bill provides the TRA with powers to investigate alleged trade disputes, such as the dumping of goods on UK markets, and to make recommendations as to their remedy to the Secretary of State.

**54.** The Welsh and Scottish Governments have sought to amend the Bill to allow the devolved Ministers to appoint non-executive members to the board of the Trade Remedies Authority.

**55.** During the proceedings of the Public Bill Committee in the House of Commons, the Minister for Trade Policy, the Rt Hon Greg Hands MP, stated:

"Amendments 23 and 38 to 41 on the devolved Administrations, industry and other stakeholders risk directly undermining the TRA's independence, impartiality and expertise by allowing appointees who are beholden, or perceived to be beholden, to the groups whose interests they represent. Those appointed members could be at risk of making decisions based on vested interests, rather than on behalf of the whole UK economy. They could undermine the TRA's expertise by allowing its non-executive members to be appointed based on the clout of their stakeholder group, rather than on merit."

**56.** The Cabinet Secretary for Economy and Transport commented on this:

"I don't believe that somebody appointed to the TRA who recognises the challenges of the Welsh economy will necessarily be operating in a way akin to having vested interests. I think it's essential that the TRA has individuals who are knowledgeable about the whole of the UK economy, and that could require people, or should require people, who

are appointed by Welsh Ministers. As I said earlier, that's the case with the BBC board. I don't see, necessarily, why this would be such a radical departure."

## CONCLUSIONS

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**Conclusion 8.** We intend to write to the Minister for Trade Policy to seek clarification of his comment that the proposed appointment of non-executive board members by devolved Ministers would undermine the independence of the TRA.

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## 2. 2. Collection and sharing of data by Her Majesty's Revenue and Customs ('HMRC')

**57.** Clause 7 of the Trade Bill gives HMRC new powers to collect information 'for the purpose of assisting the Secretary of State to identify businesses which export goods and services'. The Treasury is given powers to make regulations in relatively narrow areas of: (a) the type of information that can be requested, and (b) how the request for information is made. As long as the power is used within these areas, the power can be used to do anything an Act of Parliament can do.

**58.** The Explanatory Notes say this new power is necessary to amend the Tax Acts, in order to request information. The affirmative procedure applies if an Act of Parliament is amended using this power. However, if an Assembly Act is amended, the negative procedure applies.

**59.** Clause 8 allows HMRC to share information for limited purposes, including 'for the purpose of facilitating the exercise by bodies of its public functions relating to trade' with 'other bodies'.

## CONCLUSIONS

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**Conclusion 9.** We intend to write to the Minister for Trade Policy to seek clarification on whether the powers under Clause 7 of the Bill could be used to amend devolved tax law. Also to seek clarification on the definition of an "other body" in Clause 8 and whether it includes Welsh Ministers and devolved public authorities, should they require access to this information.

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## 2. 3. Protecting the Government of Wales Act 2006

**60.** The Trade Bill does not contain a prohibition on powers in the Bill being used to amend the Government of Wales Act 2006, which contains retained EU law.

**61.** As a point of constitutional principle, the foundation statutes for devolution in Wales should only be amended by primary legislation or, in limited circumstances, by a Section 109 Order (as provided for in the Government of Wales Act 2006).

### CONCLUSIONS

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**Conclusion 10.** In line with our objective for the EU (Withdrawal) Bill, we believe the Trade Bill should be amended to state that the powers it proposes cannot be used to amend the Government of Wales Act 2006.

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## 2. 4. Definition of “international agreement that mainly relates to trade”

**62.** Clause 2(2) of the Bill sets out which types of agreement between the EU and third countries are covered by the Bill. It states that for the purposes of the Bill an ‘international trade agreement’ means:

- A free trade agreement, or
- An international agreement that mainly relates to trade, other than a free trade agreement.

The definition of a ‘free trade agreement’ is relatively tightly drawn as it is defined in relation to WTO rules. The definition of ‘an international agreement that mainly relates to trade’ is broad in scope.

**63.** The Cabinet Secretary for Economy and Transport accepted this, he said:

“Yes, I think that's fair to say. I said earlier that we need a tighter definition because it is too all encompassing and too vague, too woolly.”

## CONCLUSIONS

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**Conclusion 11.** This definition of “an international agreement that mainly relates to trade” is not clear. It is not clear what type of agreement would be included within the scope of the powers in the Bill, or outside those powers. This is undesirable and greater clarity should be provided at the earliest stage. Citizens should be clear about the scope of executive powers, to enable them to challenge their wrongful or excessive use.

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### 2. 5. The clause 2 sunset provision

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

**65.** Under clause 2, subsection (8)(a) prevents the making of regulations under subsection (1) after the end of the period of five years beginning with exit day.

**66.** However, subsection (8)(b) allows the extension of this period for a further period. Subsection (9) limits this to an extension of up to five years at a time, but this power can be exercised ad infinitum.

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

**68.** 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.

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

**70.** The Welsh and Scottish Governments have proposed an amendment that would require the UK Ministers to obtain their consent before seeking an extension to these powers.

**71.** The Minister for Trade Policy, responded to this amendment in a Public Bill Committee hearing in the House of Commons. In relation to the proposed amendment on the sunset clause he stated:

“[...] I do not think it necessary for us to write that obligation into the Bill. Of course, we would continue to engage should we need to extend the clause beyond its sunset five years after exit day.”

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## CONCLUSIONS

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**Conclusion 12.** 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.

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### 3. The Economy, Infrastructure and Skills Committee

**72.** The Legislative Consent Memorandum relating to the Trade Bill was remitted by the Business Committee to three Assembly Committees: the Constitutional and Legislative Affairs Committee, the Economy, Infrastructure and Skills Committee and our committee: the External Affairs and Additional Legislation Committee.

**73.** The Constitutional and Legislative Affairs Committee intends to report separately.

**74.** The Economy, Infrastructure and Skills Committee noted the legal advice and considered that the main issues within the LCM related to process and constitutional affairs, rather than trade policy. Consequently, committee members agreed to defer to the External Affairs and the Constitutional and Legislative Affairs committees.