

Scrutiny of regulations made under the Trade Bill

October 2018



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About the Committee

The committee was established on 15 June 2016 to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the Assembly or the Welsh Ministers, including the quality of legislation.

Committee Chair:



Mick Antoniw AM

Welsh Labour
Pontypridd

Current Committee membership:



Dawn Bowden AM

Welsh Labour
Merthyr Tydfil and Rhymney



Suzy Davies AM

Welsh Conservative Party
South Wales West



Mandy Jones AM

Independent
North Wales



Dai Lloyd AM

Plaid Cymru
South Wales West



Lee Waters AM

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Contents

Recommendations	5
1. Introduction.....	7
The Committee's remit.....	7
Our work on the European Union (Withdrawal) Bill.....	7
Our terms of reference and approach.....	8
2. Scrutiny of the Trade Bill	10
Passage through the UK Parliament	10
Consideration by the National Assembly	11
3. Our recommendations for change.....	13
The regulation-making powers in the Bill (as far as they relate to devolved areas).....	13
Scrutinising regulations made under the Bill in devolved areas.....	13

Recommendations

Recommendation 1. We recommend that the sifting mechanism included in the European Union (Withdrawal) Act 2018 should apply to regulations that are made under clause 1 of the Trade Bill and are laid before the National Assembly, and that a committee of the National Assembly is responsible for making a recommendation as to the appropriate procedure for the regulations (subject to Recommendation 6, where we make specific recommendations in respect of regulations that amend primary legislation). Page 14

Recommendation 2. We recommend that this Committee—the Constitutional and Legislative Affairs Committee—should be the sifting committee for the National Assembly for the purpose of regulations made under the Trade Bill that are subject to the sift process (see Recommendation 1), and that the National Assembly’s Standing Orders should be amended accordingly. Page 14

Recommendation 3. Should recommendation 1 be actioned, and should the requirement placed on UK Ministers by paragraph 3(7) of Schedule 7 to the 2018 Act be included in the Trade Bill, an equivalent requirement on Welsh Ministers should also be included in the Bill. Page 14

Recommendation 4. Should the requirement placed on UK Ministers by paragraph 3(7) of Schedule 7 to the 2018 Act be included in the Trade Bill in respect of UK Ministers without equivalent requirements being placed on Welsh Ministers, we recommend the National Assembly’s Standing Orders be amended to include provision that mirrors those statutory obligations placed on UK Ministers. Page 14

Recommendation 5. We recommend that the sifting criteria set out in paragraph 35(b) of our report on the [Scrutiny of Regulations made under the EU \(Withdrawal\) Bill](#) are applied to clause 1 regulations that are made under the Trade Bill and are laid before the National Assembly, and that the criteria should be set out in the Standing Orders of the National Assembly. Page 15

Recommendation 6. We recommend that the Trade Bill is amended so that:

- the regulation-making powers in the Bill cannot be used to amend the Government of Wales Act 2006; this would replicate the limit on the use of the power in section 8 of the 2018 Act (dealing with deficiencies arising from withdrawal), which cannot be used to amend the Government of Wales Act 2006. We ask the UK Government to commit

to doing the same in the Trade Bill (and indeed every other Bill, as a matter of constitutional principle);

- the use of clause 1 powers to amend any other primary legislation is subject to the affirmative resolution procedure, at least. Page 16

Recommendation 7. We recommend that the sifting mechanism should apply to all regulations made under clause 1 of the Trade Bill in devolved areas that are laid before the National Assembly. This includes regulations made by:

- the Welsh Ministers acting alone;
- the Welsh Ministers and UK Ministers acting jointly;
- the Welsh Ministers and UK Ministers using their concurrent powers in a single set of composite regulations. Page 16

Recommendation 8. We recommend that the Welsh Government and the UK Government clarify how the principles set out in the Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks apply to the Trade Bill (and future Brexit Bills that impact on devolved areas)..... Page 17

Recommendation 9. We recommend that the duty to prepare reports under clause 5 is extended to include the Welsh Ministers, so that the Welsh Ministers have to lay reports before the National Assembly in the same way that UK Ministers have to lay reports before the UK Parliament. Page 18

1. Introduction

The Committee's remit

1. The remit of the Constitutional and Legislative Affairs Committee (the Committee) is to carry out the functions of the responsible committee set out in Standing Order 21¹ (with the exception of Standing Order 21.8²) and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the National Assembly or the Welsh Ministers, including the quality of legislation.

2. In our scrutiny of Bills introduced in the National Assembly, our approach is to consider:

- matters relating to the competence of the National Assembly, including compatibility with the European Convention on Human Rights (ECHR);
- the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
- whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation; and
- any other matter we consider relevant to the quality of legislation.

Our work on the European Union (Withdrawal) Bill

3. In October 2017, we started an inquiry into the powers contained in the UK Government's European Union (Withdrawal) Bill (the EU (Withdrawal) Bill) to make subordinate legislation³ (delegated powers). The terms of reference for this work were to consider:

- the appropriateness of:

¹ National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, October 2017

² Functions under Standing Order 21.8 are the responsibility of the External Affairs and Additional Legislation Committee

³ Subordinate legislation is often referred to as secondary or delegated legislation

- the scope and nature of delegated powers provided in the EU (Withdrawal) Bill to UK and Welsh Ministers, including the use of Henry VIII powers;
 - the procedures to be used to scrutinise delegated legislation under the EU (Withdrawal) Bill.
-
- the reports of other parliamentary committees across the UK on the delegated powers within the EU (Withdrawal) Bill;
 - any other relevant matter relating to the making of subordinate legislation as a consequence of the EU (Withdrawal) Bill.

4. Our report on the Scrutiny of regulations made under the European Union (Withdrawal) Bill was published on 16 February 2018 and, given the timing of that Bill's passage through the House of Lords, focused predominantly on the amendments we considered were necessary.

5. This work has helped with our inquiry into the Trade Bill.

6. The EU (Withdrawal) Bill received Royal Assent on 26 June 2018, becoming the European Union (Withdrawal) Act 2018 ("the 2018 Act").

Our terms of reference and approach

7. The UK Government's Trade Bill⁴ received its first reading in the House of Commons on 7 November 2017.

8. 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 Trade Bill.⁵

9. 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.⁶

⁴ UK Government, Trade Bill 2017-2019 Bill 122

⁵ Welsh Government, *Legislative Consent Memorandum Trade Bill*, December 2017

⁶ Business Committee, Revised timetable for consideration of the *Legislative Consent Memorandum on the Trade Bill*, March 2018

- 10.** We took evidence from the Cabinet Secretary in a concurrent meeting with the External Affairs and Additional Legislation Committee on 12 February 2018.⁷ Following that meeting, we received correspondence from the Cabinet Secretary on 26 February 2018⁸ and 16 April 2018⁹.
- 11.** On 16 March 2018, we published our report on [the Welsh Government's Legislative Consent Memorandum on the Trade Bill](#) and concluded that it was probable that amendments to the Trade Bill would be necessary before the National Assembly will be in a position to provide its consent. This report followed the publication on 18 December 2017 of the Committee's report on [the Welsh Government's Legislative Consent Memorandum on the European Union \(Withdrawal\) Bill](#).
- 12.** In our report on the Welsh Government's LCM for the Trade Bill, we also confirmed our intention to report separately on the scrutiny of regulations made under the Trade Bill. Although we have not initiated specific evidence gathering on this issue, our extensive and comparable work on the EU (Withdrawal) Bill and our consideration of the LCM in respect of the Trade Bill have highlighted matters that warrant comment. This report sets out our views on the scrutiny procedures for regulations made under the Trade Bill. These views are analogous to the conclusions we made in relation to the scrutiny arrangements for regulations made under the EU (Withdrawal) Bill.
- 13.** Akin to the commitment we gave when reporting on the [Scrutiny of regulations made under the European Union \(Withdrawal\) Bill](#), we may also report on operational matters that relate to the scrutiny of subordinate legislation made under the Trade Bill.

⁷ Constitutional and Legislative Affairs Committee and the External Affairs and Additional Legislation Committee, RoP, 12 February 2018

⁸ [Letter from the Cabinet Secretary for Economy and Transport](#), 26 February 2018

⁹ [Letter from the Cabinet Secretary for Economy and Transport](#), 16 April 2018

2. Scrutiny of the Trade Bill

Passage through the UK Parliament

14. As previously mentioned, on 7 November 2017 the Trade Bill¹⁰ received its first reading in the House of Commons. It makes provision about the implementation of the Agreement on Government Procurement (GPA) and international trade agreements, establishing the Trade Remedies Authority and conferring functions on it, and the collection and disclosure of information relating to trade. The Committee Stage in the House of Commons ended on 1 February 2018. Report Stage and Third Reading in the House of Commons took place on 17 July 2018.

15. Amendments were made to the Bill during the House of Commons Report Stage. Many of those amendments related to devolution provisions and were agreed to without division.¹¹ For example, amendment 63 changed the restrictions on the Welsh Ministers with regards to making regulations under clauses 1 and 2 of the Bill in line with the 2018 Act. Further amendments removed the requirement on the Welsh Ministers to have the consent of a Minister of the Crown before making regulations under clauses 1 and 2, and replaced the requirement with a duty to consult only.

16. The Bill was subsequently re-printed and introduced to the House of Lords on 18 July 2018 (First Reading).¹² Second Reading in the House of Lords took place on 11 September 2018; the date for Committee Stage is yet to be announced.

17. The UK Government has produced a range of documents in support of the Trade Bill¹³ including, and of particular relevance to our inquiry, memorandums explaining the use of delegated powers in the Bill¹⁴.

18. UK Parliamentary committees have produced a range of reports on the UK's withdrawal from the EU; some have undertaken, or are undertaking, work specifically relating to the Trade Bill.

¹⁰ Trade Bill, Bill 122 2017-2019

¹¹ [House of Commons, Supplement to the Votes and Proceedings, Tuesday 17 July 2018, Report Stage Proceedings, Trade Bill](#)

¹² Trade Bill, HL Bill 127

¹³ Bill documents – Trade Bill 2017-19, available on the UK Parliament [website](#).

¹⁴ [Trade Bill Delegated Powers – Memorandum by the Department for International Trade, 7 November 2017](#); [Trade Bill Delegated Powers – Memorandum by the Department for International Trade, 19 July 2018](#)

19. On 29 November 2017, the House of Commons International Trade Committee held a one-off session on the Trade Bill to provide scrutiny and background ahead of the Bill being debated in the House of Commons.¹⁵

20. On 12 September 2018, the House of Lords Delegated Powers and Regulatory Reform Committee published its 33rd Report of the 2017-19 session which commented on the Trade Bill as brought from the House of Commons on 18 July 2018.¹⁶ The DPRR Committee noted that, under the Bill introduced in the House of Commons, most regulations under clause 2 would have been subject only to the negative procedure. The Committee drew to the attention of the House of Lords that, as a result of an amendment in the House of Commons, all regulations made under clause 2(1) must now be made under the affirmative procedure. The DPRR Committee concluded that it welcomed this development.

Consideration by the National Assembly

21. As previously mentioned, we published our report on [the Welsh Government's Legislative Consent Memorandum on the Trade Bill](#) on 16 March 2018.

22. In addition to our report on the LCM in respect of the Trade Bill, the National Assembly's External Affairs and Additional Legislation Committee also reported on the LCM on 9 March 2018, and drew attention to some additional issues relating to the Bill that arose during scrutiny.¹⁷

23. George Hollingbery MP, Minister of State for Trade Policy, [wrote](#) to the EAAL Committee on 10 July 2018, as part of the Committee's ongoing inquiry into the UK's trade policy after leaving the European Union, providing an update on amendments which the UK Government had tabled to the Trade Bill in relation to devolution. The Minister of State for Trade Policy will give evidence to the EAAL Committee on 15 October.

¹⁵ International Trade Committee, [Trade Bill inquiry](#).

¹⁶ Delegated Powers and Regulatory Reform Committee, [33rd Report](#) of Session 2017-19

¹⁷ External Affairs and Additional Legislation Committee, [The Trade Bill: Report on legislative consent and associated issues](#), March 2018

Table: Powers to make regulations in devolved areas under the Bill (as introduced in the House of Lords)¹⁸

Power	Can be exercised by	Clause or Schedule	Laid before	Procedure
To implement the GPA in devolved areas	UKMs acting alone	Clause 1	UKP	Negative resolution procedure
	WMs acting alone	Clause 1 (subject to restrictions in Schedule 1)	NAW	Negative resolution procedure
	UKMs and WMs acting jointly	Clause 1 and Schedule 1 (subject to restrictions in Schedule 1, as far as WMs are concerned)	UKP and NAW	Negative resolution procedure
	UKMs and WMs using concurrent powers in composite regulations	Clause 1 (UKMs) Clause 1 (WMs) (subject to restrictions in Schedule 1)	UKP and NAW	Negative resolution procedure
To implement international trade agreements in devolved areas	UKMs acting alone	Clause 2	UKP	Affirmative resolution procedure Where regulations implement FTA, UKMs must lay report before UKP under clause 5
	WMs acting alone	Clause 2 (subject to restrictions in Schedule 1)	NAW	Affirmative resolution procedure
	UKMs and WMs acting jointly	Clause 2 and Schedule 1 (subject to restrictions in Schedule 1, as far as WMs are concerned)	UKP and NAW	Affirmative resolution procedure Where regulations implement FTA, UKMs must lay report before UKP under clause 5
	UKMs and WMs using concurrent powers in composite regulations	Clause 2 (UKMs) Clause 2 (WMs) (subject to restrictions in Schedule 1)	UKP and NAW	Affirmative resolution procedure Where regulations implement FTA, UKMs must lay report before UKP under clause 5

¹⁸ **Key:** FTA – free trade agreement; NAW = National Assembly for Wales; UKMs = UK Ministers; UKP = UK Parliament; WMs – the Welsh Ministers

3. Our recommendations for change

The regulation-making powers in the Bill (as far as they relate to devolved areas)

24. Clause 1 allows an “appropriate authority” to make regulations, as the authority considers appropriate:

- to implement the 1994 GPA (Agreement on Government Procurement);
- to implement the Revised GPA;
- in consequence of a party joining or leaving the 1994 GPA;
- in consequence of a party joining or leaving the Revised GPA.

25. Clause 2 allows an “appropriate authority” to make regulations, as the authority considers appropriate, to implement international trade agreements to which the UK is a signatory.

26. In respect of Welsh devolved areas, “appropriate authority” means:

- a Minister of the Crown,
- the Welsh Ministers, or
- a Minister of the Crown acting jointly with the Welsh Ministers.

27. As with the 2018 Act, the Trade Bill includes a mix of concurrent and joint regulation-making powers. This report focuses on the scrutiny of regulation-making powers in clauses 1 and 2 of the Trade Bill in a Welsh devolved context.

28. Also in common with the 2018 Act, the Trade Bill contains very broad regulation-making powers. We raised our concerns with the nature of these powers in our report on the [Welsh Government’s Legislative Consent Memorandum on the Trade Bill](#).

Scrutinising regulations made under the Bill in devolved areas

29. We are disappointed that the sifting mechanism set out in the 2018 Act has not been included in the Trade Bill. As we note in our report on the [Scrutiny of Regulations made under the EU \(Withdrawal\) Bill](#), that sifting mechanism “is a positive step towards improving the level of scrutiny”. We reiterate many of the conclusions and recommendations we made in that report, and our subsequent

report Scrutiny of Regulations made under the EU (Withdrawal) Act 2018: operational matters.

Recommendation 1. We recommend that the sifting mechanism included in the European Union (Withdrawal) Act 2018 should apply to regulations that are made under clause 1 of the Trade Bill and are laid before the National Assembly, and that a committee of the National Assembly is responsible for making a recommendation as to the appropriate procedure for the regulations (subject to Recommendation 6, where we make specific recommendations in respect of regulations that amend primary legislation).

Recommendation 2. We recommend that this Committee—the Constitutional and Legislative Affairs Committee—should be the sifting committee for the National Assembly for the purpose of regulations made under the Trade Bill that are subject to the sift process (see Recommendation 1), and that the National Assembly’s Standing Orders should be amended accordingly.

30. While we would have preferred our recommendations on the outcome of our sifting of proposed negative regulations made under the 2018 Act to have been binding on Welsh Ministers, the 2018 Act places no such requirement on either the Welsh Minister or the UK Ministers.

31. As we stated in our report on the Scrutiny of regulations made under the European Union (Withdrawal) Act 2018: operational matters, it would be sensible to ensure parity of approach to scrutiny of proposed negative regulations to ensure that decisions on who should act in devolved areas are based on the merits of the regulations in question, rather than the nature of the scrutiny regime to which they would then be subject.

Recommendation 3. Should recommendation 1 be actioned, and should the requirement placed on UK Ministers by paragraph 3(7) of Schedule 7 to the 2018 Act be included in the Trade Bill, an equivalent requirement on Welsh Ministers should also be included in the Bill.

Recommendation 4. Should the requirement placed on UK Ministers by paragraph 3(7) of Schedule 7 to the 2018 Act be included in the Trade Bill in respect of UK Ministers without equivalent requirements being placed on Welsh Ministers, we recommend the National Assembly’s Standing Orders be amended to include provision that mirrors those statutory obligations placed on UK Ministers.

Recommendation 5. We recommend that the sifting criteria set out in paragraph 35(b) of our report on the **Scrutiny of Regulations made under the EU (Withdrawal) Bill** are applied to clause 1 regulations that are made under the Trade Bill and are laid before the National Assembly, and that the criteria should be set out in the Standing Orders of the National Assembly.

32. For ease of reference, the sifting criteria set out in that paragraph 35(b) are:

(i) whether there is sufficient clarity and transparency in the memorandum as to why the minister is of the opinion that the negative resolution procedure should apply. If the memorandum is not sufficiently clear and transparent as to why the negative resolution procedure should apply, the sifting committee should be cautious about proceeding with the negative resolution procedure. We note that the clarity and transparency of explanatory material is often a hit or miss experience – where there is a hit, the scrutiny process can be efficient and effective, but where there is a miss, the scrutiny process can be slow and, at times, less robust. We see this as an opportunity to raise standards in explanatory material in general;

(ii) whether the memorandum is sufficiently clear and transparent as to the changes that are being made by the regulations. We would expect the memorandum to be clear and transparent as to what is being changed, why it is being changed and the impact that the change will have;

(iii) whether there has been adequate consultation. Again, we would expect the memorandum to be clear and transparent around consultation;

(iv) whether the memorandum is sufficiently clear and transparent about the impact the regulations may have on equality and human rights. Again, a lack of clarity and transparency will naturally raise suspicion of a proposal to follow the negative resolution procedure;

(v) whether the regulations raise matters of public, political or legal importance. This gives the committee a general ability to consider the regulations as a whole and to use its experience and expertise to determine the procedure that should apply.

Recommendation 6. We recommend that the Trade Bill is amended so that:

- the regulation-making powers in the Bill cannot be used to amend the Government of Wales Act 2006; this would replicate the limit on the use of the power in section 8 of the 2018 Act (dealing with deficiencies arising from withdrawal), which cannot be used to amend the Government of Wales Act 2006. We ask the UK Government to commit to doing the same in the Trade Bill (and indeed every other Bill, as a matter of constitutional principle);
- the use of clause 1 powers to amend any other primary legislation is subject to the affirmative resolution procedure, at least.

Recommendation 7. We recommend that the sifting mechanism should apply to all regulations made under clause 1 of the Trade Bill in devolved areas that are laid before the National Assembly. This includes regulations made by:

- the Welsh Ministers acting alone;
- the Welsh Ministers and UK Ministers acting jointly;
- the Welsh Ministers and UK Ministers using their concurrent powers in a single set of composite regulations.

33. As noted in our report on the [Scrutiny of Regulations made under the EU \(Withdrawal\) Bill](#), we recognise that this may lead to at least two sifting committees sifting the same regulations, one committee of the National Assembly and committees of the UK Parliament.

34. In these cases, we remain of the view that it will be vital that the committees work together to come to an agreement as to how scrutiny should operate in practice. We consider this to be the most pragmatic approach.

35. We also repeat our concerns in paragraphs 54 to 58 of our report on the [Scrutiny of Regulations made under the EU \(Withdrawal\) Bill](#). These concerns relate to the breadth of powers given to UK Ministers under the Bill, allowing UK Ministers to make regulations in devolved areas while acting alone. Such regulations would have to be laid before the UK Parliament only, leaving no role for the National Assembly even when the regulations are being made in devolved areas.

36. Paragraphs 55 to 57 of our report on the Scrutiny of Regulations made under the EU (Withdrawal) Bill highlight the particular concern that this could lead to UK Ministers making regulations that affect the legislative competence of the National Assembly. We repeat that the constitutional impropriety of this is clear and we repeat our belief set out in paragraph 58 of that report:

“(…) we believe that the sift committee at the National Assembly should be given some role in the scrutiny of regulations made by UK Ministers in devolved areas that are laid before the UK Parliament only. At the very least, the National Assembly committee should be made aware of any such regulations at the same time as the House of Commons committee is made aware of them. The National Assembly committee can then make representations to, or advise, the House of Commons committee where appropriate.”

37. While the Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks¹⁹ states that the UK Government will not use the regulation-making powers it has under the 2018 Act in devolved areas without the agreement of the Welsh Government, we are not aware of any similar agreement between the two governments in respect of the Trade Bill. We believe clarification is needed on how the Intergovernmental Agreement, which has important constitutional implications, applies to the Trade Bill.

Recommendation 8. We recommend that the Welsh Government and the UK Government clarify how the principles set out in the Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks apply to the Trade Bill (and future Brexit Bills that impact on devolved areas).

38. Finally, we note that the duty to prepare reports under clause 5 of the Trade Bill applies to UK Ministers only. There is no corresponding duty placed on the Welsh Ministers. Clause 5 reports will set out important details about what is changing with regard to free trade agreements. Such details will help the UK Parliament to scrutinise regulations made by UK Ministers.

¹⁹ Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks, as of 24 April 2018

39. We do not understand why clause 5 does not impose a duty on the Welsh Ministers, and we fear that the National Assembly may be placed at a disadvantage by not having access to such reports when the Welsh Ministers make regulations under clause 2(1) of the Trade Bill that implement free trade agreements in devolved areas.

Recommendation 9. We recommend that the duty to prepare reports under clause 5 is extended to include the Welsh Ministers, so that the Welsh Ministers have to lay reports before the National Assembly in the same way that UK Ministers have to lay reports before the UK Parliament.