

Trade Bill Bill Summary

March 2019



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National Assembly for Wales
Senedd Research

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1. Summary of key points

The Assembly will debate whether to give legislative consent to the UK Government's **Trade Bill** in Plenary on 12 March. This Bill was introduced in November 2017, and seeks to provide UK Ministers and, in some circumstances, devolved Ministers with powers to establish the first phase of a standalone UK trading regime after the UK leaves the EU.

Some key powers in the Bill can be used only for trading arrangements with countries with which the EU already has trade agreements. Further Bills will be needed if and when the UK reaches trade agreements with other countries.

The Bill is currently at report stage in the House of Lords. This started on 6 March after the UK Government published its **proposals for making free trade agreements after the UK has left the EU** in response to an amendment in the House of Lords which suspended scrutiny until it had done so. On 6 March, two amendments were made to the Bill following **votes in the House of Lords**. Amendment 12 inserts a new clause to the Bill that would give the UK Parliament considerably more power than at present over the contents of international free trade agreements (FTAs) covered by the Bill (i.e. ones with States with which the EU currently has FTAs) and would also require the 'devolved administrations' to be consulted at two key stages of the process of entering into such agreements.

Amendment 13 mandates the UK Government to "take all necessary steps to implement an international trade agreement which enables the United Kingdom to participate after exit day in a customs union with the European Union."

The UK Government has said that legislative consent is required from the devolved legislatures in respect of the Bill, as parts of it make provision in areas that are within the Assembly's legislative competence. It is the view of the Welsh Government that Part 1 (i.e. clauses 1-8) of the Bill (as introduced in the House of Lords) requires legislative consent, as do its associated schedules, 1 to 3.

While the Welsh Government's initial position was that it could not recommend that the Assembly gave legislative consent to the Bill, it has secured amendments and non-legislative commitments that mean **it has published a supplementary legislative consent memorandum (LCM) recommending that the Assembly does give legislative consent to the Bill**. Section 5.1 of the paper sets out details of these amendments and non-legislative commitments.

The External Affairs and Additional Legislation Committee published its report on the supplementary LCM on 8 March, and **concluded that while some progress has been made in addressing its concerns, many of them remain and in one case its concerns have deepened**. Section 5.2 of the paper outlines developments in relation to these concerns. Section 5.3 of the paper covers the Constitutional and Legislative Affairs Committee's report, published on 11 March, which outlines similar views in some areas.

2. Main elements of the Trade Bill

The Assembly will debate whether to give legislative consent to the UK Government's Trade Bill in Plenary on 12 March.

The UK Government introduced its **Trade Bill** (the Bill) in November 2017. The Bill seeks to provide UK Ministers and, in some circumstances, devolved Ministers with powers to establish the first phase of a standalone UK trading regime after the UK leaves the EU.

The Bill is currently at report stage in the House of Lords. This started on 6 March after the UK Government published its **proposals for making free trade agreements after the UK has left the EU** in response to an amendment in the House of Lords which suspended scrutiny until it had done so.

The UK Government has said that legislative consent is required from the devolved administrations in respect of the Bill, as parts of it make provision in areas that are within the Assembly's legislative competence. The Trade Bill will:

- Allow the UK to implement the Agreement on Government Procurement as an independent member instead of as part of the EU;
- Enable the UK to have continued access to £1.3 trillion worth of government contracts and procurement opportunities in 47 countries;
- Create the necessary powers for the UK to implement trade agreements reached with countries which already have such agreements with the EU (and see below re Amendment 12, which concerns the role of the UK Parliament in the process whereby the UK Government enters into such agreements);
- Establish a new independent UK body, the Trade Remedies Authority (TRA), to assist the UK Government in relation to international trade policy and disputes; the Authority will also have important functions under the Taxation (Cross-Border Trade) Act 2018 to defend UK businesses against unfair trade practices by foreign States or businesses; and
- Ensure the UK Government has the legal ability to gather and share trade information, as evidence to promote UK exporters and design and monitor trade policy, including to support UK businesses against surges in imports and unfair practices, and assist the Trade Remedies Authority in its work.

It is the view of the Welsh Government that Part 1 of the Bill (as introduced in the House of Lords) require legislative consent, as do its associated schedules, 1 to 3. Details of what the individual clauses of the Bill do are set out below, with further details available in [the explanatory memorandum](#) to the Bill.

Part 1 of the Bill covers clauses 1 to 8, and focuses on implementation of the Agreement on Government Procurement, implementing trade agreements with countries with existing agreements with the EU and the European Medicines Agency.

Clause 1 of the Bill covers implementation of the Agreement on Government Procurement. This is a multi-national agreement within the World Trade Organisation framework (but which is not mandatory for WTO members) which opens up government procurement markets. This clause confers powers on the Welsh Government to implement the agreement in relation to Wales.

Clause 2 allows UK and devolved Ministers to implement trade agreements reached with States which already have agreements (whether in force or not) with the EU. In other words, it allows Ministers to change domestic law where necessary to give effect to the terms of the agreement. . The power to negotiate those terms, and enter into such agreements, already lies with the UK Government and so is not conferred by the Bill. However, an amendment to the Bill at Report stage in the House of Lords imposes significant UK Parliamentary control on those powers (see below re Amendment 12).

However, the Bill does not give powers to implement any terms of such agreements that relate to tariffs. Instead, those are dealt with in the Taxation (Cross-Border Trade) Bill.

Clause 2 deals both with free trade agreements, as defined in the Bill, and other international agreements that deal mainly with trade (an expression which is not further defined in the Bill).

The powers created by clause 2 are intended to be temporary: they are subject to a sunset provision under which they will expire after 3 years from the date of the UK's exit from the EU, although this period can be renewed at infinitum by regulations made by the Secretary of State, subject to affirmative procedure in the UK Parliament. This is a shorter period than it was at the time the original LCM was laid; amendments in the House of Commons reduced it from five years to three.

Clause 3 was inserted into the Bill by amendments in the House of Commons, after the original LCM was laid. It requires a Minister of the Crown to lay a report in Parliament prior to ratifying a free trade agreement with one of the EU's pre-exit day free trade agreement partners. The report must give details of significant changes to UK free trade agreements as compared to the EU's pre-exit day agreement with the relevant state, and reasons for those changes.

Clause 4 of the Bill sets out that in exceptional circumstances a Minister may decide that the reporting requirement in clause 3 does not need to be fulfilled before the agreement is ratified. However, the text of the agreement would still need to be laid before Parliament for 21 sitting days before ratification, under the Constitutional Reform and Governance Act 2010, and the House of Commons has the ability, under that procedure, to block ratification.

Clause 5 requires that a Minister of the Crown lays a report in Parliament at least 10 House of Commons sitting days before laying draft regulations, implementing an FTA, under the Clause 2 power. The reports will have to give the same information as is required by clause 3, so, in principle, they will act as a reminder to Parliament of any significant differences in pre- and post-Brexit FTAs.

Clause 6 imposes an objective on a Minister of the Crown or a devolved government to take all necessary steps to implement an international trade agreement enabling UK participation in the European medicines regulatory network partnership between the EU, the European Economic Area and the European Medicines Agency.

Clause 7 provides for different types of provision that could be made by regulations under Clauses 1 and 2 where needed, for example consequential provisions, or transitional or savings provisions. It also provides that regulations modifying retained EU law may be made before exit day, provided they come into force on or after exit day.

Clause 8 defines a number of terms set out in Part 1 of the Bill, for example 'free trade agreement' and 'devolved authority'.

Part 2 of the Bill covers clauses 9 and 10, and relates to the TRA.

Clause 9 of the Bill establishes the TRA as a non-departmental public body, and introduces Schedule 4, which sets out provisions regarding its membership, governance, accountability, and transfers of staff.

Clause 10 creates some functions for the TRA. Its core function - investigating alleged trade disputes such as the dumping of goods on UK markets and making recommendations to the Secretary of State for remedying them - is set out in the Taxation (Cross Border Trade) Bill. The Trade Bill adds to this by setting out the circumstances in which the TRA can apply its expertise more widely in relation to international trade and trade remedies. It provides that, when requested to do so, the TRA must provide the Secretary of State with advice, support and assistance in connection with the conduct of international trade disputes, the Secretary of State's trade-related functions, and the TRA's functions. It also empowers the TRA to provide advice, support and assistance to other persons or bodies, in relation to international trade and trade remedies. Those persons could include the Welsh Ministers.

Part 3 of the Bill covers clauses 11 and 12, and relates to trade information.

Clause 11 of the Bill introduces a new function for HM Revenue and Customs (HMRC) to collect information on behalf of the Government which will assist the Government in identifying companies, partnerships and sole traders which export goods and services.

Clause 12 allows HMRC to share data with bodies such as the Department for International Trade and the TRA in order that they can fulfil their functions, for example producing trade statistics or to impose trade remedies.

Part 4 of the Bill covers **clauses 13 to 16**, and includes information on the territorial extent of the Bill, interpretation of terms used in the Bill, and on its commencement.

There are also five schedules to the Bill. These cover:

- Restrictions on Devolved Authorities making regulations under clauses 1 and 2 of the Bill;
- Scrutiny procedures for Regulations made under Part 1 of the Bill;
- Exceptions to current EU-law restrictions in the devolution settlements;
- Membership, staffing and funding of the TRA; and
- Staff Transfer Schemes relating to the TRA.

In addition, two amendments were **passed by the House of Lords on 6 March** that will introduce new clauses to the Bill.

Amendment 12 inserts a new clause into the Bill that would give the UK Parliament considerably more power over the contents of international free trade agreements than at present and would also require the "devolved administrations" to be consulted at two key stages of the process of entering into such agreements.

The UK Parliament would have a veto over the negotiating mandate for international free trade agreements, and also a veto over ratification of such agreements. Moreover, a Parliamentary Committee would also have a veto over the negotiating mandate, and its opinion as to ratification would be laid before Parliament to inform both Houses' decision.

The Committee would be specifically required to assess the sustainability of the negotiating mandate before approving it. And at the pre-ratification state, the Committee's report, that would be laid before both Houses of Parliament, would have to cover a large number of issues, including what consultation the Committee had had with each devolved government, and an assessment of the qualitative and quantitative impact of the proposed FTA on the economy in each of the 'parts' of the UK and English regions, as well as on the environment, human rights, labour standards and equalities.

As mentioned above, the amendment also requires the UK Government to have consulted "the devolved administrations" before Parliament can decide whether to approve the negotiating mandate and the agreement as negotiated .

No role for the UK Parliament or devolved governments or legislatures is proposed in the negotiations themselves, such as a requirement for approval at an interim stage.

Amendment 13 mandates the UK Government to "take all necessary steps to implement an international trade agreement which enables the United Kingdom to participate after exit day in a customs union with the European Union."

3. Initial Welsh Government and Assembly positions on legislative consent

The Welsh Government laid a **Legislative Consent Memorandum** (LCM) before the Assembly in December 2017. In the memorandum it said it could not recommend that the Assembly gave legislative consent to the Bill. The reasons it gave for this were that:

It is vital any powers given to UK Government Ministers to make secondary legislation in devolved areas must only be used with the prior consent of Welsh Ministers. The Trade White paper suggested such consent from Devolved Governments would be sought and we believe this should be included on the face of the Bill. Further, as currently drafted, there are a number of restrictions placed on devolved Ministers' use of the powers provided for in the Bill which are not placed on UK Ministers. We believe, as a matter of principle, that devolved Ministers should have the same powers in respect of matters falling within devolved competence as UK Ministers are being given.

The Minister for Economy and Transport published a **written statement** in January 2018 setting out details of the amendments the Welsh Government required in order to give legislative consent to the Bill.

The **Assembly's External Affairs and Additional Legislation Committee** (the EAAL Committee) published a report in March 2018, recommending that the Assembly should not give legislative consent to the Bill at this time. However, it also said it would reconsider its position and issue a supplementary report should the provisions in the Bill that require legislative consent be amended at a later stage in the UK Parliamentary process. The EAAL Committee's concerns were based on the powers to be granted to Welsh Ministers, the granting of concurrent powers to UK Ministers in devolved areas, and protecting the devolution settlement. The Committee was opposed to the granting of concurrent powers to UK Ministers in Welsh devolved areas but considered that, if they were to be granted, their use should be dependent on the legislative consent of the Assembly rather than Welsh Ministers.

4. Constitutional and Legislative Affairs Committee reports

In March 2018 the Constitutional and Legislative Affairs Committee (the CLA Committee) published its **report** on the Welsh Government's Legislative Consent Memorandum (LCM) on the UK Trade Bill. The Committee was of the view that it is probable that amendments to the Trade Bill would be necessary before the National Assembly was able to provide its consent.

The CLA Committee did not agree with the Welsh Government's view that the use of concurrent powers by UK Ministers to make regulations that amend primary legislation in Welsh devolved areas should be subject to consent by the Welsh Ministers. Like the EAAL Committee, it considered that consent should be sought from the Assembly.

In common with the EAAL Committee, the CLA Committee considered that the powers for Welsh Ministers to make regulations under the Trade Bill are too broad, and should be amended.

While the CLA Committee accepted that the clause establishing the TRA does not require the consent of the Assembly, it highlighted that there was no duty on the TRA to provide support and advice to Welsh Ministers (merely a power to do so), while there is a duty to do so for the Secretary of State for International Trade.

On a broader constitutional point, the CLA Committee reiterated the importance of respecting the legislative consent process as a central safeguard to the devolution settlement. It pointed out the fundamental role played by the Sewel Convention but also stressed the importance of applying the legislative consent process to subordinate legislation amending primary legislation in devolved policy areas (Assembly Standing Orders already require this and it is also recognised in UK Government guidance on devolution, but the requirement is not statutory).

In October 2018 the CLA Committee **reported separately on the Scrutiny of regulations made under the Trade Bill**. It made a number of recommendations including that regulations made under the Trade Bill should be subject to the same sifting process by the Committee as regulations made under the European Union (Withdrawal) Act 2018 which was **agreed** with the Welsh Government. Relevant **changes to Standing Orders** in relation to regulations under the 2018 Act were made on 3 October 2018.

5. Current Welsh Government and Assembly positions on legislative consent

5.1. Welsh Government supplementary LCM

The Welsh Government laid a **supplementary LCM** before the Assembly on 14 February. **This recommends that the Assembly gives legislative consent to the Bill. The supplementary LCM states that UK Government commitments in three areas have alleviated the Welsh Government's concerns.**

The Welsh Government was concerned that the Bill could see UK Ministers exercise concurrent powers in devolved areas without the consent of Welsh Ministers, and that the sunset provision for clause 2 (see above) could be extended without any engagement with Welsh Ministers. The Welsh Government has now obtained non-legislative commitments in the UK Parliament including that:

- UK Government Ministers will not normally use their powers in devolved areas without Welsh Ministers' consent. This is in line with the approach taken to the use of powers created by the EU (Withdrawal) Act.
- UK Government will not use the powers to introduce new policy in devolved areas and administrative efficiency will be the primary driver for the use of those powers.
- The UK Government will engage with devolved administrations before extending the period during which clause 2 powers can be used under the Bill.

The Welsh Government was also concerned by restrictions on devolved Ministers' use of the implementation powers in Part 1 of the Bill. **Amendments have since been made to the Bill that address their concerns.** These:

- Remove the blanket restrictions prohibiting the Scottish and Welsh Ministers from modifying directly applicable EU law which the Bill incorporates into UK law; and from making provision that is inconsistent with certain kinds of modifications, made to that body of law by the UK Parliament or the UK Government.
- Remove the requirement for Scottish and Welsh Ministers to obtain the consent of a UK Minister before using the power to make implementing 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.

The Welsh Government states that, **while the provisions relating to the Trade Remedies Authority (TRA) are not within competence, it has secured non-legislative commitments from the UK Government** that:

- Devolved administrations will be advised when investigations are being opened, will be able to register their interest with the TRA and to contribute to the investigation by submitting relevant information. They will be informed of any actions taken following the investigation.
- The TRA's annual report will be shared with the devolved administrations once it has been received by the Secretary of State for International Trade, and the administrations will be able to lay it before their legislatures at the same time as the Secretary of State lays it in Parliament.
- The Secretary of State will seek suggestions from devolved administrations on the optimal way of recruiting TRA non-executive members with regional knowledge, skills and experience.

5.2. External Affairs and Additional Legislation Committee report on the supplementary LCM

The EAAL Committee published its report on the supplementary LCM on 8 March, and concluded that:

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.

The EAAL Committee report assesses the extent to which the concerns raised in its March 2018 report have been addressed. The main findings in the report were that:

- Its **concern that powers in the Bill that are proposed for Welsh Ministers are framed too widely**, and should be amended to restrict them to only making provision that "is essential" **had not been addressed.**
- The EAAL Committee's **concern about the provision of concurrent powers still stands in relation to the Bill.** This relates to powers that can be exercised either by Welsh Ministers or by Ministers of the Crown. Under the current devolution settlement, the Assembly is restricted from removing or modifying such UK Ministerial powers. Therefore, every time new concurrent powers are created, the Assembly's legislative competence is restricted.

- In terms of use of the powers, **the UK Government has given a non-legislative commitment to ‘not normally’ use these powers in devolved areas without the consent of Welsh Ministers, and to not use the powers to introduce new policy in devolved areas.** However, the EAAL Committee noted that the CLA Committee had 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.
- The concern that **devolved Ministers did not have the same powers as UK Ministers** in respect of the modification of retained EU law within devolved areas **has been addressed** by amendments to the Bill. However, the amendments will maintain the effect of restricting the Assembly’s future competence as Welsh Ministers will be required to consult UK Ministers before making regulations involving quota arrangements or regulations prior to the day the UK leaves the EU. The Assembly is restricted from removing such consultation requirements in the future.
- The EAAL Committee’s initial report called for the **powers provided to Welsh Ministers by clauses 1 and 2 of the Bill to be subject to strengthened scrutiny procedures by the Assembly.** Clause 1 covers the power to implement the WTO Agreement on Government Procurement. The EAAL Committee requested that this be subject to the affirmative procedure, and consequently approved by the Assembly. **This has not happened.** However, the EAAL Committee 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, **and this recommendation has been met.**
- **Clause 2 of the Bill contains a ‘sunset clause’ which limits the time within which powers under that clause can be exercised.** UK Government Ministers have the ability to extend this, and have given a non-legislative commitment to consult the devolved administrations before doing this. However, the EAAL Committee believes that control of powers granted to Welsh Ministers (such as by clause 2) is more appropriately a question for the Assembly. It consequently **wishes the Bill to be 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.
- **The EAAL Committee’s report in March 2018 called for the Bill to be amended to protect the Government of Wales Act 2016 from amendment by UK Ministers utilising powers under this Bill.** This has **not been addressed** by subsequent amendments to the Bill.

5.3. Constitutional and Legislative Affairs Committee report on the supplementary LCM

The CLA Committee published its **report on the supplementary LCM** on 11 March. The CLA Committee stated that, in relation to the Sewel Convention:

There are widespread concerns about the application of the Sewel Convention as it applies to the consent of devolved legislatures in respect of UK Government Bills. As a result, during the debate on the legislative consent motion related to this LCM, we would welcome clarification from the Minister on whether he envisages any circumstances in which, should the National Assembly refuse consent, the regulations would be made anyway by UK Ministers.

The report also expressed similar concerns in some areas to the EAAL Committee report. The CLA Committee expressed disappointment that the Bill had not been amended to **protect the Government of Wales Act 2006 from amendment by UK Ministers utilising powers under this Bill.** It also stated that the powers for Welsh Ministers in the Bill remain too wide, and called for an update on discussions between the UK and Welsh Governments relating to this.

It also noted the comments of the Welsh Government regarding the exercise of concurrent powers in clauses 1 and 2 of the Trade Bill, and the commitments it has obtained. In the CLA Committee’s view, the commitments seem to correlate with the principles set out in the Intergovernmental Agreement on the **European Union (Withdrawal) Bill and the Establishment of Common Frameworks (Intergovernmental Agreement).** The Committee stated that **it would welcome a commitment from the Minister to either publish a document setting out these commitments in full or to secure an appropriate amendment to the existing Intergovernmental Agreement.**

The CLA Committee also noted its concerns about the lack of clarity on the role of the TRA, how it will operate in Wales, its status and also the impact it will have in devolved policy areas. While non-statutory commitments have been secured by the Welsh Government, their full scope remains unclear, as does the information that the Welsh Government will make available to enable scrutiny of its activities by the National Assembly.

6. Role of the devolved administrations in future trade agreements

On **21 January**, the House of Lords voted by 243-208 to suspend the report stage of its scrutiny until the UK Government presented proposals for a process for making international trade agreements once the United Kingdom is in a position to do so independently of the European Union, including roles for Parliament and the devolved legislatures and administrations in relation to both a negotiating mandate and a final agreement.

On 28 February, the UK Government published **Processes for making free trade agreements after the United Kingdom has left the European Union**. Following the publication of this document, the Bill passed to the report stage of scrutiny, which started on 6 March.

In relation to the devolved administrations, the key points from the UK Government's publication are:

- The UK Government is continuing to discuss the role of devolved administrations in future free trade agreements with a view to agreeing new arrangements in the coming months.
- The UK Government will form a new Ministerial Forum for international trade. This will aim to ensure there is a regular and formal structure to support discussion and engagement between the UK Government and the devolved administrations on trade agreements. The operational arrangements for the frequency and terms of reference for this forum are subject to ongoing discussion with the devolved administrations. Its intention is that the Forum will be a flexible mechanism to enable Ministerial discussion at the key points during trade negotiations.
- There will also continue to be a programme of official-level technical engagement between the Department for International Trade and the devolved administrations to underpin the Ministerial Forum.
- It will be for each devolved legislature to determine how it will scrutinise their respective Governments as part of the ongoing process. Equally, the means by which the UK Parliament works with its devolved counterparts is a matter for the legislatures themselves, in line with their existing interparliamentary ways of working.

- Where appropriate UK Government Ministers may engage directly with the devolved legislatures.

As noted above, since the publication of the UK Government's proposals, an amendment to the Bill (Amendment 12) has been passed, which would give the UK Parliament a strong statutory role in relation to the negotiation mandate for, and ratification of, future FTAs. The new clause and Schedule introduced by the amendment would also create a statutory duty for both the UK Government and a Parliamentary Committee to consult the devolved governments – but not legislatures – on those matters.

7. Scotland's view on legislative consent

The Scottish Government **introduced a Legislative Consent Memorandum** (LCM) on the Bill on 20 December 2017. **The LCM did not recommend that the Scottish Parliament gave legislative consent to the Bill**, as it places constraints on the Scottish Ministers' ability to act on all devolved matters. It has since said that it will not introduce any further LCMs in relation to Brexit-related UK Parliamentary Bills.

The Scottish Parliament's Finance and Constitution Committee (FC Committee) published its report on the **Trade Bill Legislative Consent Motion** on 31 October 2018. The majority of the FC Committee recommended that the Scottish Parliament should not consent to the Trade Bill unless the clauses that constrain the powers of Scottish Ministers in devolved areas are removed, or a voluntary political agreement is reached between the Scottish and UK Governments on these constraints.

It was the majority of the FC Committee's view that, while amendments to Schedule 1 of the Bill made in the House of Commons narrowed the restraint on the Scottish Government's powers to amend retained direct EU legislation, the remaining constraints should be subject to a voluntary political agreement between the UK and Scottish Governments.

The FC Committee also called for the commitment to consult the devolved administrations before extending the 'sunset clause' contained in Clause 2 of the Bill to be placed on the face of the Bill.

The FC Committee expressed concerns that the UK Government could make regulations in devolved areas through Clauses 1 and 2 of the Bill without any statutory requirements to seek the consent of Scottish Ministers or the Scottish Parliament, which it said 'cuts across the devolution settlement'.

The FC Committee also concluded that there is an impasse between the Scottish Government and the UK Government in relation to the Sewel Convention, which needs to be addressed as a matter of urgency, and ideally in advance of the final amending stage of the Bill in the House of Lords.