



The Scottish Parliament
Pàrlamaid na h-Alba

Published 25 September 2020
SP Paper 820
56th Report, 2020 (Session 5)

Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Legislative Consent Memorandum: Trade Bill



Published in Scotland by the Scottish Parliamentary Corporate Body.

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Contents

| | |
|--|----------|
| Introduction | 1 |
| Overview of the Bill | 2 |
| Delegated powers | 3 |
| Part 1 - Powers conferred on Scottish Ministers and Secretary of State in devolved areas | 3 |
| Part 2 - Powers conferred on the Secretary of State alone and exercisable within devolved competence | 7 |

Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meetings on 8 and 15 September 2020, the Committee considered the provisions in the UK Government's [Trade Bill](#) ("the Bill") that confer power to make subordinate legislation in areas of devolved competence.
2. The Bill was introduced by the UK Government in the House of Commons on 19 March 2020. The Bill as amended was introduced in the House of Lords on 21 July 2020.
3. A previous [Trade Bill](#) was introduced by the UK Government in the House of Commons on 7 November 2017 (referred to in this paper as the "original Trade Bill"). The original Trade Bill was intended to set out a number of "measures that are required to build a future trade policy for the UK" in the event of the UK leaving the European Union. It reached its Third reading in the House of Lords on 20 March 2019. The [Committee reported](#) on the delegated powers conferred by the original Trade Bill on Scottish Ministers on 2 October 2018. Due to the dissolution of the UK Parliament on 6 November 2019 the original Trade Bill lapsed.
4. A [Legislative Consent Memorandum \("LCM"\) for the Bill](#) was lodged by the Scottish Government on 18 August 2020. Like the original Trade Bill, most of the provisions of the Bill extend to the whole of the United Kingdom and a number of provisions trigger the requirement for legislative consent to be sought from the Scottish Parliament.
5. Paragraph 6 of Rule 9B.3 of the Standing Orders provides that where the Bill that is the subject of a legislative consent memorandum contains provisions conferring on the Scottish Ministers powers to make subordinate legislation, the Delegated Powers and Law Reform Committee shall consider and may report to the lead committee on those provisions. The lead committee in respect of the LCM is the Finance and Constitution Committee.

Overview of the Bill

6. The [Explanatory Notes](#) accompanying the latest version of the Bill explain that its main purpose is to provide key measures that are required as the UK Government develops its trade policy for the UK now it has left the European Union (EU).
7. Part 1 of the Bill creates a power to allow implementation in UK domestic law of obligations created when the UK accedes to the Agreement on Government Procurement (“GPA”) in its own right, and not as a member state of the EU (and allow the UK to reflect in legislation where parties join or leave the GPA). Part 1 of the Bill also creates a power to allow implementation in UK domestic law of trade agreements that the UK has concluded with countries with which the EU has existing trade agreements as at 31 January 2020, and which the UK was a signatory to through its EU membership.
8. Part 2 of the Bill establishes an independent body, the Trade Remedies Authority (“TRA”), to deliver a new UK trade remedies framework and to enable the TRA to provide advice, support and assistance to the Secretary of State in connection with the conduct of international disputes and other trade related functions.
9. Part 3 of the Bill creates powers for Her Majesty’s Revenue and Customs (“HMRC”) to collect information to confirm the number of exporters of goods and services there are in the UK and allowing them to share data with public or private bodies in order that they can fulfil their public functions as they relate to trade. Part 3 also creates powers for specified public authorities to disclose information for the purpose of facilitating the exercise by a Minister of the Crown of the Minister’s functions related to trade.

Delegated powers

10. The UK Government has published a [delegated powers memorandum](#) for the Bill as introduced (the “UK DPM”). The UK DPM identifies each of the provisions in the Bill that confer powers to make delegated legislation. It explains in each case the purpose of the power, why a delegated power is appropriate, and the parliamentary procedure that has been selected.
11. This report is split into two parts:
 - part 1 - powers delegated to Scottish Ministers which may also be exercised by the Secretary of State in devolved areas; and
 - part 2 - powers delegated solely to the Ministers of the Crown covering devolved areas.

Part 1 - Powers conferred on Scottish Ministers and Secretary of State in devolved areas

Clause 1(1) – implementation of the Government Procurement Agreement

Power conferred on: Scottish Ministers and Secretary of State

Power exercisable by: Regulations

Procedure: Negative

12. Clause 1(1) confers powers on Ministers (UK Ministers, Scottish Ministers, Welsh Ministers and Northern Ireland departments) to:
 - make any provision they consider appropriate for the purposes of implementing the GPA (clause 1(1)(a));
 - make regulations to reflect new parties acceding to the GPA or existing parties withdrawing from GPA (clause 1(1)(b)(i));
 - make regulations enforcing the UK’s rights under the GPA in the event of a dispute between the UK and another GPA party (clause 1(1)(b)(ii));
 - make regulations, where required, which are consequential on other parties making modifications to their market access schedules in their Appendix I to the GPA (clause 1(1)(b)(iii)); and
 - make regulations to reflect the list of central government entities listed in Annex I to the UK’s Appendix I to the GPA (clause 1(1)(b)(iv).
13. Any regulations made under clause 1(1)(a) are not to come into force before the day the United Kingdom accedes to the GPA and, in practice, regulations made under clause 1(1)(b)(ii) will not be made until after accession either.
14. The powers are to be exercised in regulations subject to the negative procedure.

15. Schedule 1 describes the circumstances in which the Scottish Ministers can use the powers conferred by clause 1(1) and clause 2(1). Similar restrictions apply to exercise of the powers by the other devolved authorities.
16. The Scottish Ministers may only make provision within devolved competence. Schedule 1 sets out a bespoke definition of devolved competence for the purpose of the Trade Bill and disapplies the normal restrictions on devolved competence which prevent the Scottish Ministers from legislating in a way which is incompatible with EU law or in breach of potential restrictions relating to retained EU law (introduced under the European Union (Withdrawal) Act 2018).
17. The Scottish Ministers are required to consult the Secretary of State prior to making provision where the regulations are being commenced prior to the end of the transition period.
18. The Scottish Ministers are required to seek consent of a Minister of the Crown when making provision that would otherwise require consent if it were being made under other powers. This requirement for consent will not apply if the Scottish Ministers already have the power to make such provision in secondary legislation without obtaining consent.
19. Where there is an existing requirement to make legislation jointly with the Secretary of State or where there is a requirement to consult with the Secretary of State, the Scottish Ministers are bound by these constraints in exercising this power.

Committee consideration

20. The UK DPM states that delegated powers in respect of clause 1 will enable the making of regulations to ensure the UK fulfils its obligations as an independent member of the GPA and to implement changes to domestic law arising from a limited range of circumstances once the UK is an independent member. These circumstances are restricted to future events where legislative flexibility will be needed to implement changes to domestic law, but which are not sufficiently serious to justify the use of Parliamentary time inherent in primary legislation.
 21. The UK DPM states that clause 1 confers a power to make largely technical changes to existing secondary legislation to implement the GPA once the UK is an independent member. As such, the DPM argues that it is appropriate for regulations made under the power to be subject to the negative procedure.
 22. In its consideration of the previous Trade Bill, the Committee was content in principle with the scope of the powers of Scottish Ministers to make regulations under clause 1.
 23. In terms of the level of parliamentary scrutiny available to Parliament for regulations made by the Scottish Ministers under this power, the Committee was of the view that a choice of the negative or the affirmative procedure for the regulations to be made by the Scottish Ministers under clause 1 should be provided in the Bill, particularly having regard to the scope of the power.
24. As with its consideration of the previous Trade Bill, the Committee finds this power to be acceptable in principle.

25. As it has previously expressed in relation to other legislation arising from EU withdrawal, the Committee also believes that the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
26. The Committee considers that a choice of the negative or the affirmative procedure for the regulations to be made by the Scottish Ministers under clause 1 should be provided in the Bill, having regard to the scope of the powers available in clause 1.
27. The Committee notes that the LCM does not indicate why the Scottish Government considers it appropriate for the power to be exercised by UK Ministers in devolved areas. It also notes that there is no statutory requirement for the UK Government to obtain the Scottish Ministers' consent, although the UK Government has given a commitment that UK Ministers will not normally use the powers conferred by the Bill in devolved areas without Scottish Ministers' consent, and never without consulting them. The LCM does not indicate the circumstances in which the Scottish Government anticipates providing that consent.
28. The Committee notes that, in the event that the power is exercised by UK Ministers, there would be no formal means by which the Scottish Parliament could scrutinise such regulations or be notified that they had been laid before the UK Parliament.
29. The Committee reiterates its view that, as previously expressed in relation to other legislation arising from EU Withdrawal, that the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence. It considers it appropriate, as a minimum, that all consent decisions of the Scottish Ministers in respect of powers in the Bill exercisable in devolved areas are subject to the process set out in the proposed new SI Protocol covering powers exercised by UK Ministers in devolved areas arising from EU withdrawal.

Power to make regulations for the implementation of international trade agreements (clause 2)

Power conferred on: Scottish Ministers and Secretary of State

Power exercisable by: Regulations

Procedure: Affirmative

30. Clause 2(1) confers power on Ministers (UK Ministers, Scottish Ministers, Welsh Ministers and Northern Ireland departments) to make any provision they consider appropriate for the purpose of implementing an international trade agreement which the UK has reached with a third country, provided that there was a corresponding agreement in place between that country and the EU before exit day.
31. The power is subject to a time limit of five years commencing at the end of the transition period, with the UK Government being provided with a power to extend

this period on a rolling basis, (clause 2(7)(b)) for further periods of five years at a time.

32. The powers are to be exercised in regulations subject to the affirmative procedure.
33. The restrictions on devolved competence outlined in paragraphs 18 to 22 apply to the Scottish Ministers when exercising this power.
34. In addition, a further restriction applies to the Scottish Ministers when making provision about any quota arrangements. The Scottish Ministers must consult with a Minister of the Crown prior to making regulations regarding the division of responsibility within the UK for an international obligation or any right of other benefit arising from such an obligation.

Committee consideration

35. The UK DPM explains that the intention is to keep new UK-partner country trade agreements substantively the same or as similar as possible to the current EU-partner agreements, even though those agreements will be legally distinct. The UK DPM acknowledges that there will be textual changes to current agreements but argue that these changes are intended to ensure future operability and potentially, consolidation of agreements. The scope of the power is intentionally wide as to provide the necessary flexibility to implement international agreements. The UK DPM argues that many of the agreements should already form part of UK law in large part as a result of being implemented by the EU, and the power is necessary to address a range of different technical issues that may arise.
 36. While the intent of the power may be to serve a technical function i.e. implementing obligations flowing from “trade continuity agreements” as well as ensuring that trade agreements work in practice following the end of the transition period, it is a broad power and is wide enough to allow for the implementation of substantial amendments to trade policy in the UK and Scotland, including new obligations.
 37. In its consideration of the previous Trade Bill, the Committee was generally satisfied with the scope of clause 2. The Committee considered the width of the powers and offered the view that an expanded definition of “an international agreement that mainly relates to trade” would provide additional clarity of what this includes which may reduce the uncertainty as to the width of the powers.
 38. The Committee noted that the Scottish Parliament, in order to hold Scottish Ministers to account for their choices in agreeing to the UK Government making the subordinate legislation, should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
39. As touched on in the earlier suggested recommendations, the Committee highlights that the implementation of international agreements in areas within devolved competence (e.g. fisheries, agriculture, environment, food standards) is not reserved. Accordingly, the Scottish Parliament has power to legislate in these areas and this is why the Parliament’s legislative consent is being sought for this Bill, and why the power in clause 2 is conferred on Scottish Ministers.

40. However, the Committee notes that the power may equally be exercised by UK Ministers, to implement international agreements within devolved competence.
41. The Committee recognises that while the scope of the power in clause 2(1) is broad and may result in changes to policy in Scotland, the power can only be exercised within the devolved competence of the Scottish Parliament. As such, it is for the Scottish Ministers to exercise the power insofar as to implement international agreements and international policy negotiated by the UK Government.
42. Where the Parliament agrees to delegate its legislative power to the Scottish Ministers, this Committee has an interest in the limits of that delegation, including how long the power is available for.
43. In relation to this power insofar as exercisable by the Scottish Ministers, the Committee finds this power to be acceptable in principle and is content that it is subject to the affirmative procedure.
44. The Committee reiterates its view that due to wide scope of the power, an expanded definition of “an international agreement that mainly relates to trade” would provide additional clarity of what this includes which may reduce the uncertainty as to the width of the power.
45. However, as regard to the exercise of the power for Scotland by the Secretary of State, the recommendations in paragraphs 25 to 29 also apply here.

Part 2 - Powers conferred on the Secretary of State alone and exercisable within devolved competence

Clause 2(7)(b) - Power to extend the power to make regulations to implement international trade agreements

Power conferred on: Secretary of State

Power exercisable by: Regulations

Procedure: Affirmative

46. The power to make regulations under clause 2(1) in relation to implementing international trade agreements would expire, or "sunset", five years after exit day. Clause 2(7)(b) as read with clause 2(8) confers power on UK Ministers to delay that expiry and allow the power to continue in force for further periods of up to 5 years at a time. There is no limit to the number of times the power may be extended in this way.
47. The power is to be exercised in regulations subject to the affirmative procedure.

Committee consideration

48. Clause 2(7)(b) confers power on UK Ministers to allow the powers to continue in force for further periods of up to 5 years at a time but does not extend this power to the Scottish Ministers.
49. The UK DPM does not provide a detailed justification for the scope of this power beyond that it may be necessary to allow for the continued implementation of international trade agreements under clause 2(1). Rather, it relies on the fact that the UK Government will have to justify the continued existence of the power every 5 years in a Parliamentary debate on affirmative regulations to continue it in force.
50. While not on the face of the Bill, the UK Government has undertaken to consult with the devolved administrations before exercising this power. In its consideration of the previous Trade Bill, the Committee, welcomed the commitment to consult, but expressed the view that it may be appropriate that the consultation requirement is contained within in the Bill, as that is required to bind future administrations to consult with the Scottish Ministers. The UK Government has reiterated this commitment in a letter of 19 March 2020 that confirms that “the UK Government will consult the Scottish Government and other devolved administrations before extending the sunset for the power in clause 2 (i.e. before extending the period during which clause 2 powers can be used under the Bill).”
51. The powers conferred on the Scottish Ministers by clause 2(1) are to implement international trade agreements in devolved areas, and as a result the exercise of this power would operate to extend such conferred, devolved powers. In its previous consideration, the Committee identified that the Parliament would therefore have an interest in scrutinising the exercise of the power to extend the sunset period, in these circumstances.
52. In its consideration of the previous Trade Bill, the Committee invited the UK Government to again consider that in principle the power to extend the sunset period, where it would apply to the powers conferred on Scottish Ministers under clause 2, should be jointly exercised by UK Ministers and the Scottish Ministers, and should be jointly scrutinised by means of affirmative procedure at Westminster and in the Parliament.
53. In relation to this Bill, the Committee restates its view, as expressed in relation to other recent LCMs on UK Bills arising from EU withdrawal, that the power should be subject to a requirement for the Scottish Ministers’ consent, rather than consultation alone.
54. The Committee also notes that, given that that the power is exercisable only by UK Ministers, there would be no formal means by which the Scottish Parliament could scrutinise any extension regulations or be notified that they had been laid before the UK Parliament.
55. The Committee therefore considers it to be appropriate, as a minimum, that a decision of the Scottish Ministers to consent to the extension, under clause 2(7)(b), of their powers in clause 2(1) of the Bill is subject to the process set out in the proposed new SI Protocol.

