

The Trade Bill

Briefing Paper

Kenneth A. Armstrong, Professor of European Law, University of Cambridge

By virtue of its EU membership, the United Kingdom benefits from a number of international trade agreements between the EU and non-EU countries. During the transition period, despite having left the EU, the UK continues to be bound by these agreements as if it were a Member State. For the future, the intention of the UK Government is to ‘roll-over’ these agreements into new agreements with the UK. The recent Japan-UK trade agreement is the first of these new agreements. The aim of the Trade Bill is to provide a mechanism for the implementation of these agreements through ministerial regulations, including implementation by Scottish ministers.

Trade Agreements – the Constitutional Context

International trade is a reserved matter. New trade agreements – including agreements to replace or roll-over those agreements from which the UK benefited as a Member State of the European Union – will be negotiated and ratified by the UK Government. The process for parliamentary scrutiny and approval of such agreements prior to ratification will fall to the UK Parliament under the terms of the *Constitutional Reform and Governance Act 2010*.

The implementation of trade agreements may entail new UK primary legislation. To the extent that new UK legislation impacts on devolved competences, legislative consent from the devolved administrations would be applicable.

However, the intention behind the Trade Bill is to facilitate implementation of certain trade agreements without primary legislation and for implementation to be undertaken via regulations adopted by UK and/or devolved ministers.

The Trade Bill will not be used to implement any new UK-EU trade agreement or any new agreements with countries like the USA with which the EU had not concluded a free trade agreement. The implementation of any new ‘customs unions’ falls within the scope of the *Taxation (Cross-Border Trade) Act 2018*.

Scope of the Bill

The Bill creates powers to implement in domestic law:

- Obligations arising from the Government Procurement Agreement (GPA) consequential to the UK becoming a signatory in its own right
- Obligations arising from “international trade agreements” with countries with which the European Union has concluded agreements and which the UK was previously bound as a Member State of the EU.

The concept of “international trade agreements” is defined as:

- “free trade agreements” (FTAs) i.e. agreements falling within that definition under GATT/GATS; and
- International agreements that “mainly relate to trade”.

So in addition to the dozens of trade agreements falling within the definition of a FTA, the scope extends to other trade-related agreements e.g. Mutual Recognition Agreements (MRAs).

MRAs are an agreement under which a good produced in one country e.g. the USA can be sold in the EU by compliance with EU rules and have its “conformity assessment” undertaken in the USA and recognised in the EU. There is no mutual recognition of substantive regulatory requirements i.e. the good can only be sold in the EU because it complies with EU rules. The MRA simplifies matters by allowing testing and certification where the good is produced with the EU recognising those results.

Therefore, there is a potentially very large number of agreements falling within the scope of the implementation powers conferred by the Bill.

The Implementation Power

The Bill empowers an “appropriate authority” to make, by regulations, such provisions as the authority considers appropriate for the implementation of agreements within the scope of the Bill. An “appropriate authority” means a Minister of the Crown or devolved authority (Scottish Ministers).

In terms of implementing trade agreements, the power to implement via regulations expires five years after the end of the transition period. However, the Secretary of State may by regulations extend this period for a period of up to a further five years. The long duration of this power is noteworthy given that the intention that lies behind the implementing power is to secure continuity in legal relations between the UK and relevant trading partners once the transition period ends. It is less clear why the power to implement in this way would need to be exercised for up to a decade.

Rolling Over or Adding in?

A particular point of interest might be in establishing whether material changes in the content of these agreements might occur in the process of ‘rolling over’ the agreements.

In respect of the GPA, signatories propose their own schedule of commitments and entities that they propose to be covered by the Agreement. In its agreement with other GPA signatories, the UK will replicate the existing EU’s schedule of commitments but the Decision accepting the UK as signatory in its own right acknowledges that the UK will make ‘rectifications’ to the Annex of entities covered by the GPA within three months.

As for FTAs within the scope of the Bill, much depends on what changes are made in the course of the negotiations. The UK and Japan have recently agreed a FTA to replace that which applied by virtue of EU membership and this could be one of the first uses of the powers contained in the Bill to implement the agreement. While the agreement with Japan will contain some new elements, the overall package is largely about replicating the status quo and ensuring that a deal is there to replace what already exists. The desire to conclude this agreement quickly may have dictated how much change the UK and Japan would agree. It is possible that future agreements might entail more change.

The Role of UK and Scottish Ministers

The primary function of the Bill is to facilitate the implementation of trade agreement via executive action by UK and/or devolved authorities.

Scottish ministers have authority to use their implementation powers but only in areas within devolved competence. This is defined as:

- Within the legislative competence of the Scottish Parliament to enact an Act of that Parliament (but disapplying the restriction that prevents it from acting contrary to EU law or retained EU law)
- Within the executive competence of Scottish Ministers (but disapplying the restriction which prevents it from acting contrary to EU law, and also disapplying any restriction which applies to the modification of retained EU law made by UK ministers pursuant to section 30A Scotland Act).

It will be recalled that significant objection was taken to the proposed restrictions on the devolved authorities from modifying retained EU law contained in the earlier Trade Bill 2017-19 (such restrictions paralleled the original intentions behind the European Union (Withdrawal) Act 2018). The evolution of these provisions is indicative of an increased recognition of the role of the devolved authorities in implementing international agreements in areas that fall within their competences. However, it should also be recalled that sections 35 and 58 of the Scotland Act 1998 gives UK ministers intervention powers to ensure that devolved institutions do not act incompatibly with UK international obligations.

Exercise of the Implementation Power by Devolved Authorities – Consultation and Consent

Schedule 1 – Consultation, Consent and Joint Decisions

This sets out circumstances in which devolved authorities must **consult** with a Minister or the Crown or must seek the **consent** of a Minister of the Crown or must act jointly with a Minister of the Crown.

In essence, the Bill requires devolved authorities to consult with, seek the consent of, or work jointly with, a Minister of the Crown if the provisions made pursuant to the Bill would require consultation, consent or joint working if made pursuant to another enactment. This is intended to prevent devolved authorities getting round such procedural requirements by using the powers contained in the Bill. Conversely, if the provision could have been contained in an Act of the Scottish Parliament or could have been made by different subordinate legislation that did not require, consultation, consent or joint working, then the requirement to consult, seek consent or joint working do not apply.

There is, however, a specific requirement for consultation with Ministers of the Crown in the case of:

- Regulations are to come into force before the end of the transition period, or
- Make provisions in respect of any quota arrangement or are incompatible with such an arrangement.

In the earlier Trade Bill 2017-19 there was a stronger obligation to obtain consent.

It should also be noted that the power to extend the time period for implementing agreements is a power of UK ministers and is subject to scrutiny by the UK Parliament.

There is no obligation to consult or seek the consent of devolved authorities before exercising this power.

Parliamentary Scrutiny

It should be kept in mind that the Trade Bill's provisions on parliamentary scrutiny relate solely to *implementing* the GPA and relevant trade agreements. This is distinct from the scrutiny which attaches to the trade agreements themselves which is a matter for the UK Parliament under the provisions of the Constitutional Reform and Governance Act 2010 (CRAG). This highlights an anomaly. The provisions of CRAG are there to ensure that the UK Parliament is aware of the contents of an agreement before its formal ratification and to ensure that the UK Parliament will be willing to implement and give effect to such agreements. This does not take into account that responsibilities for implementation may fall within devolved competences. Therefore scrutiny of the implementation of an agreement is more limited to an examination of how the power is being exercised. Of course, if new trade agreements with new trade partners require primary legislation by the UK Parliament, the normal legislative consent conventions will apply to the extent that the legislation impacts on devolved competences. However, if significant modifications are made in the context of rolling over existing agreements, it would appear that scrutiny of these changes would be left to the UK Parliament, notwithstanding that implementing these changes may fall within the scope of devolved powers under the Bill.

Schedule 2 – Scrutiny Procedures

Regulations made to implement the GPA are subject to the annulment procedure (UK) or negative procedure. Regulations to implement an FTA are subject to affirmative procedures.

The Changing Administrative Landscape

The Bill will establish a new corporate body – the Trade Remedies Authority – to provide advice and assistance to the Secretary of State in respect *inter alia* of international trade disputes, the trade responsibilities of the Secretary of State, the effects of trade remedies on producers and exporters in the UK. With the Competition and Markets Authority acquiring new and important responsibilities under the UK Internal Market Bill (in addition to its expanded role in competition law enforcement), it is clear that the administrative landscape is changing at a UK level as a consequence of the UK's withdrawal from the EU. That raises important questions about how these UK-wide institutions – albeit acting at arm's length from government – interact with executive and parliamentary structures at both UK and devolved levels. In other words, it is important to look beyond the formal divisions of rule-making responsibilities to examine how the administrative landscape is evolving as powers flow back to the UK and how these bodies and agencies discharge their responsibilities consistent with the devolution settlement.

Finally, the HMRC is given responsibilities for the collection of information from any person with the purpose of assisting the Secretary of State in determining the number and identity of persons exporting goods and services. The HMRC and other public authorities may disclose information for the purposes of assisting the Secretary of State or other international body of their functions in relation to trade. The Bill also creates offences in relation to the disclosure of information contrary to the Bill.