



Law Society  
of Scotland

# Consultation Response

Response to the Finance and Constitution  
Committee's call for evidence on the Trade Bill

February 2018



## Introduction

---

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

In October 2017 the Department for International Trade (DIT) published its paper on *Preparing for our future UK trade policy*<sup>1</sup> to which the Law Society responded.<sup>2</sup> The Society also welcomed the opportunity to consider and respond to the Trade Bill<sup>3</sup> and submitted comments in a briefing ahead of the Second Reading in the House of Commons. Following this, the Law Society of Scotland gave evidence<sup>4</sup> to the Public Bill Committee on 23 January 2018. We have also published suggested amendments<sup>5</sup> together with reasons and effects<sup>6</sup> ahead of Report Stage. Concurrently, we are considering the Taxation (Cross Border Trade) Bill which deals with the creation of an independent UK system for VAT, customs and excise duties. This intersects with issues considered in the Trade Bill, most particularly in relation to creation of a new Trade Remedies Authority.

We welcome this opportunity to respond to the Finance and Constitution Committee's call for evidence<sup>7</sup> and have the following comments to put forward for consideration.

<sup>1</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/654714/Preparing\\_for\\_our\\_future\\_UK\\_trade\\_policy\\_Report\\_Web\\_Accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/654714/Preparing_for_our_future_UK_trade_policy_Report_Web_Accessible.pdf)

<sup>2</sup> [https://www.lawscot.org.uk/media/359078/lss-response-to-dit\\_preparing-for-future-uk-trade-policy\\_november-2017.pdf](https://www.lawscot.org.uk/media/359078/lss-response-to-dit_preparing-for-future-uk-trade-policy_november-2017.pdf)

<sup>3</sup> <https://services.parliament.uk/bills/2017-19/trade.html>

<sup>4</sup> Written transcript available at: <https://hansard.parliament.uk/pdf/commons/2018-01-23/60ff06a4-8b0c-4d46-852c-56fb43d58623>

<sup>5</sup> <https://www.lawscot.org.uk/media/359740/trade-bill-amendments.pdf>

<sup>6</sup> <https://www.lawscot.org.uk/media/359738/trade-bill-effects-and-reason.pdf>

<sup>7</sup> <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/107476.aspx>

## General Remarks

---

We continue to support an inclusive and transparent trade policy to which extensive engagement with a wide variety of stakeholder groups is important. In our response to DIT's consultation on the future approach to trade policy we welcomed the recognition of the importance of engaging with the devolved administrations and legislatures. We also emphasised that it is important to ensure that a whole of governance approach is extended to trade negotiations.

In particular we consider that trade in services should be firmly embedded in the UK's approach to trade and that free trade agreements should include commitments to facilitate trade in legal services. The legal services sector facilitates trade across all other sectors as well as being an important contributor to the UK economy in its own right.

We note the position of the Scottish Government set out in the Legislative Consent Memorandum<sup>8</sup> which indicates that the "Scottish Government does not currently intend to lodge a legislative consent motion in relation to the Bill."<sup>9</sup> Furthermore, we note the Scottish Government's position as set out in its paper, *A Nation with Ambition: The Government's programme for Scotland 2017-2018*.<sup>10</sup>

## Response to Questions

---

### 1. The appropriateness of the powers proposed in the Bill for UK Ministers and Scottish Ministers

We are concerned by the extensive scope of delegated ministerial powers under the Act, mirroring concerns previously identified in relation to the use of Henry VIII powers in the context of the European Union (Withdrawal) Bill.<sup>11</sup> It is not clear why the Government considers such wide powers to be necessary.

Clause 2(1) provides that an appropriate authority may make such provision as the authority considers appropriate to implement a future agreement. We believe this power should be limited to making regulations which are considered "necessary" to implement the agreement.

<sup>8</sup> <http://www.parliament.scot/SPLCM-S05-12-2017.pdf>

<sup>9</sup> See para 3 on page 1

<sup>10</sup> See <http://www.gov.scot/Resource/0052/00524214.pdf> at p 27

<sup>11</sup> See our response to the Government's White Paper in May 2017 - <https://www.lawscot.org.uk/media/9969/grb-white-paper-response.pdf> at p4

We are concerned that clause 7(1) grants a very wide discretion to HMRC to require information. The scope of this provision should be more clearly defined to give greater certainty as to the extent of information and the anticipated frequency and method of data collection.

Similarly, clause 8(1) could involve disclosure of personal data relating to individuals or sensitive commercial information. Limitations should be enshrined in clause 8 to ensure that their rights are not affected. In addition, any disclosure of information should be subject to the requirements of protecting legal professional privilege.

Changes to take account of these comments are included in our suggested amendments<sup>12</sup> and explained in the accompanying document setting out reasons and effects.<sup>13</sup>

## **2. The restrictions which the Bill seeks to apply to the powers of Scottish Ministers**

At present, free trade agreements negotiated by the EU are classified as exclusive or mixed agreements, depending on whether the matters dealt with are within the exclusive competence of the EU or also apply to areas where competence is shared between the EU and Member States. For mixed agreements – including the recent EU-Singapore FTA and CETA – approval is required from national parliaments, which in the UK means approval by both Houses of Parliament.

Currently international relations and regulation of international trade is reserved to and the UK Government and Parliament.<sup>14</sup> The Scottish Parliament and the Scottish Government (as with the other devolved legislative authorities) have no formal role in negotiations or approval of EU agreements. However, in our response to the consultation on *the Future of UK Trade Policy*, we highlighted the importance of extending a whole of governance approach to trade negotiations. We would urge further consideration of how trade negotiations will be handled where they intersect with the powers of the Scottish Parliament and other devolved legislative authorities where any proposed trade agreement will affect an area of devolved competence.

### *The effect of provisions in the Trade Bill*

Restrictions on the powers of devolved authorities are set out in Schedule 1.

Paragraph 1 imposes no new restriction on the powers of Scottish Ministers as it merely reiterates that regulations cannot be made where they deal with matters outside devolved competence.

<sup>12</sup> <https://www.lawscot.org.uk/media/359740/trade-bill-amendments.pdf>

<sup>13</sup> <https://www.lawscot.org.uk/media/359738/trade-bill-effects-and-reason.pdf>

<sup>14</sup> Scotland Act 1998, Schedule 5 at para 7

Under paragraph 2, a devolved authority cannot modify retained direct EU legislation, or any aspect of EU law retained by virtue of section 4 of the European Union (Withdrawal) Act 2018, nor can it make regulations inconsistent with modifications effected by the European (Withdrawal) Act or with a Minister of the Crown under that Act.

Paragraph 3 sets down a requirement for consent in certain circumstances. There would seem to be a justification for the circumstances prescribed to ensure that all jurisdictions within the UK thereby maintain alignment in terms of EU and other international legal obligations.

Paragraph 4 similarly deals with circumstances where consent of a Minister of the Crown is required. In relation to 4(4) consent is confined to matters where consent would be required as a general rule. In tandem with this, 4(5) confirms that consent is not required where the provision could be contained in an Act of the Scottish Parliament or other subordinated legislation mentioned in 4(4) where consent would not be required. The consent provisions do not, therefore, alter the status quo.

Similarly paragraphs 5 and 6 reaffirm requirements for joint exercise or consultation where these would be required as a matter of course.

#### *Effect of s.2(6)(a)*

We note that clause 2(6)(a) would also affect devolved legislation; the clause relates to regulations which may, among other things, modify primary legislation that is retained EU law. This is subject to the limitations set out in Schedule 1.

#### *Effect of the s.11 of the European Union (Withdrawal) Bill*

Schedule 1 of the Trade Bill, while imposing restrictions on the extent to which Scottish Ministers may modify or amend retained EU law through regulation, places no such restriction on the powers of the Scottish Parliament to enact primary legislation to that effect. However, the Trade Bill must be read in conjunction with the European Union (Withdrawal) Bill (the EU (Withdrawal) Bill).

Under clause 11 of the EU (Withdrawal) Bill, as currently drafted, limitations are placed on the power of the Scottish Parliament to modify, or confer power by subordinate legislation to modify, retained EU law. The terms of this clause are currently subject to negotiation between the UK and Scottish Governments. Ultimately, the scope of devolved powers outlined in the Trade Bill will therefore be subject to the drafting of clause 11 the EU (Withdrawal) Bill.

Further commentary on the interaction between the provisions of the Trade Bill and those contained in the EU (Withdrawal) Bill are set out in our comments on topic 4 below.

### **3. The implications for the operability of the devolution settlement arising from the Bill's provisions**

As referred to above, the ability to conclude international agreements, including trade agreements is reserved to Westminster. In practice, the ability to conclude trade agreements has been largely immaterial since competence for concluding such agreements was transferred to the EU. This will change upon withdrawal.

It is important to note that a trade agreement may deal with matters which fall within devolved competence. The Government may therefore be able to bind the UK to an international agreement which would necessitate changes to domestic law, including in areas of devolved competence.

### **4. The interaction between the provisions of the Trade Bill and those contained in the European Union (Withdrawal) Bill and the implications of this interaction for the devolution settlement**

The meaning of “devolved competence” in the Trade Bill is set out Schedule 1 at paragraphs 7 to 9. The meaning “of devolved competence” in the EU (Withdrawal) Bill is set out in Schedule 2 at paragraphs 9 to 12. In the Scottish context we note that both bills deviate from the meaning of “devolved competence” as set out in s.54 of the Scotland Act 1998.

This would lead to a situation where it might be necessary – depending on the topic under discussion – to look at all three Acts in order to establish what is meant by devolved competence. This is likely to create confusion and cuts across the legal certainty which is a central principle of good law-making. To the extent that amendment to the definition of “devolved competence” requires to be amended to take account of the EU (Withdrawal) Bill and Trade Bill, we suggest that it would be preferable to include those adjustments, and the context in which they would apply, by direct amendment of s.54 of the Scotland Act 1998. This would ensure that the scope of “devolved competence” in a given set of circumstances could be identified by reference to a single piece of legislation, thereby reducing the potential for confusion.

### **5. The implications of the Bill's provisions for any common frameworks that may be agreed between the Scottish and UK governments relating to the repatriation of powers from the EU**

See comments in relation to topics 2 and 4 above and topic 7 below.

## **6. The implications of the Bill's provisions for the operation of public procurement policy in Scotland**

Under clause 1(1), the Bill grants an appropriate authority the power to make regulations which it considers “appropriate” to implement GPA. We consider that if the intention is to ensure implementation of the 1994 GPA then the authorities should be required to make such provisions. In this specific context, it could be helpful to allow the relevant authority discretion, facilitated by the current wording, to make regulations which it considers appropriate to implement the GPA to ensure continued alignment with EU requirements.

We have no further comments on the implications of the Bill's provisions for the operation of public procurement policy in Scotland.

## **7. What mechanisms should be put in place to ensure that there is parliamentary scrutiny of the powers proposed for Scottish and UK Ministers in the Bill**

As noted in our Second Reading briefing on the EU (Withdrawal) Bill,<sup>15</sup> in its Report on The Great Repeal Bill and Delegated Powers (9th Report, Session 2016-17), the House of Lords Select Committee on the Constitution made various recommendations about the content of the Explanatory Memorandum which accompanies each SI amending the retained EU law. Many of these observations which were made in connection with the EU (Withdrawal) bill have validity for the Trade Bill.

For example, the Committee recommended that the Minister making the regulations should sign a declaration stating that “the instrument does no more than necessary to ensure that the relevant aspect of EU law will continue to make sense in the UK following the UK's exit from the EU, or that it does no more than necessary to implement the [withdrawal agreement].” The Explanatory Memorandum should set out clearly what the pre-exit EU law did, what effect the amendments will have on the retained EU law on and after exit day and why the amendments were considered necessary. Accordingly we believe that schedule 7 of the EU (Withdrawal) Bill should be amended. Similar duties could be imposed in the Trade Bill in relation to clauses 1(1) and 2(1) to the extent that we anticipate they will, to a substantial extent, simply replicate existing arrangements.

We note that some of the House of Commons Procedure Committee's recommendations relating to the establishment of the Sifting Committee have, following the Committee's Report Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report (HC386) been given effect to in the bill by amendments to Schedule 7 paragraphs 3 and 13. However, these amendments (welcome though they are) do not implement in full the recommendations of either the Procedure Committee or of the Constitution Committee. In particular the Constitution Committee considered that an instrument which

<sup>15</sup> <https://www.lawscot.org.uk/media/10506/200717-second-reading-briefing-the-european-union-withdrawal-bill.pdf>

"amends EU law in a manner that determines matters of significant interest or principle should undergo a strengthened scrutiny procedure" and that there should be an opportunity for the SI to be revised by the Minister in the light of the parliamentary debate. We echo the recommendations of the House of Lords Constitution Committee report on the European Union (Withdrawal) bill,<sup>16</sup> paragraph 227 which recommends that the Sifting Committee should have power to decide the appropriate scrutiny procedure for an instrument.

The Procedure Committee also highlighted the need for a route for stakeholders to express to the Sift Committee their views on the political importance and/or drafting of the instrument and that there should be provision for the Committee to challenge the Government on the content or the drafting of an instrument and where necessary to recommend amendments. We noted our hope that the Government will respond positively to these recommendations during the passage of the bill. The Procedure Committee made no recommendations regarding the House of Lords, given that it has its own structures for consideration of delegated legislation, but we echo the view that whatever structures are created by the two Houses should work constructively together.

**For further information, please contact:**

Carolyn Thurston Smith

Policy Team

Law Society of Scotland

DD: 0131 476 8205

[carolynthurstonsmith@lawscot.org.uk](mailto:carolynthurstonsmith@lawscot.org.uk)

<sup>16</sup> (9th Report Session 2017 – 2019)