Trade Bill
HL Bill 127 of 2017–19

Summary

The Trade Bill is a government bill which has completed its legislative stages in the House of Commons and was introduced in the House of Lords on 18 July 2018. It is scheduled to have its second reading on 11 September 2018. It would make some of the legislative changes needed to enable the UK to implement an independent trade policy once it has left the EU, including:

- creating the necessary powers for the UK to transition (or roll over) trade agreements that currently exist between the EU and other countries which the UK is party to through EU membership.
- allowing the UK to implement the Agreement on Government Procurement (GPA) independently rather than as an EU member.
- establish a new independent UK body, the Trade Remedies Authority, to defend UK businesses against unfair trade practices.
- ensure the UK Government has the legal ability to gather and share trade information.

The Trade Bill does not make specific provision for the terms of the UK's future trading relationship with the EU or provide for new trade agreements with third countries that do not currently have a trade agreement with the EU. A separate bill, the Taxation (Cross-border Trade) Bill, is intended to make tax-related provisions relating to the UK's future international trade policy.

The Trade Bill would give the devolved authorities powers to make regulations to implement rolled-over EU trade agreements and the GPA in areas of devolved competence, but subject to more restrictions than UK ministers. The Scottish Government recommended against giving legislative consent to the Bill, and the Welsh Government said amendments would be needed before it could recommend legislative consent. Government amendments to the Bill made in the House of Commons reduced the restrictions on devolved ministers' use of the powers, but did not address all the concerns raised by the Scottish and Welsh Governments. The Bill was also amended in the Commons to place further restrictions on the use of delegated powers to implement rolled-over EU trade agreements, although MPs expressed concerns over the level of parliamentary scrutiny of this process and whether other countries would agree to roll these agreements over without substantive changes. The Government was defeated on a cross-party backbench amendment on participation in the European medicines regulatory network after exit day. A backbench amendment which would have required the Government to seek to participate in a customs union with the EU if it could not negotiate a frictionless free trade area with the EU was defeated by a majority of six.

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1. Introduction

The Trade Bill had its first reading in the House of Lords on 18 July 2018 and is due to have its second reading on 11 September 2018.[1] The Bill was first introduced in the House of Commons on 7 November 2017. It completed its parliamentary stages in the House of Commons on 17 July 2018.

Trade policy is an exclusive EU competence, meaning that the EU legislates on trade matters and concludes international trade agreements on behalf of the UK while it is an EU member state. The Government announced in the Queen's Speech in June 2017 that it would introduce a number of bills to make legislative changes to deliver Brexit, including bills on trade and customs to help implement an independent trade policy once the UK has left the EU.[2]

In October 2017, the Government published two white papers on its future trade and customs policy.[3] The trade white paper outlined: the role of trade in the UK and global economies; the basic principles which the Government said would shape its future trading framework; and the Government's developing approach to a future trade policy. The customs white paper set out how the current customs, VAT and excise regimes that operate for cross-border transactions result from the UK's membership of the EU Customs Union and explained how legislation would be needed to accommodate changes resulting from Brexit, with or without a negotiated agreement with the EU.

The Trade Bill and the Taxation (Cross-border Trade) Bill (which had previously been referred to as the Customs Bill) were both introduced to the House of Commons in November 2017. The Government stated that the aims of the Trade Bill were to:

- create the necessary powers for the UK to transition trade agreements that currently exist between the EU and other countries (and which we are party to through our EU membership).
- enable the UK to have continued access to £1.3 trillion worth of government contracts and procurement opportunities in 47 countries.
- allow the UK to implement the Agreement on Government Procurement (GPA) as an independent member instead of as part of the EU.

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[1] The Government has produced Explanatory Notes, a delegated powers memorandum, an impact assessment and a factsheet to accompany the Bill.
[2] Cabinet Office, *Queen's Speech 2017: Background Briefing Notes*, June 2017, p 20.
[3] Department for International Trade, *Preparing for Our Future UK Trade Policy*, October 2017, Cm 9470; and HM Treasury, *Customs Bill: Legislating for the UK's Future Customs, VAT and Excise Regimes*, October 2017, Cm 9502.

- establish a new independent UK body, the Trade Remedies Authority, to defend UK businesses against unfair trade practices.
- ensure the UK Government has the legal ability to gather and share trade information, as evidence to support UK businesses against surges in imports and unfair practices.[4]

Meanwhile, the Taxation (Cross-border Trade Bill) was intended to "give the Government the ability to establish a standalone customs regime, and ensure that VAT and excise legislation operates effectively, following the UK's withdrawal from the EU".[5]

There is a relationship between the provisions of the two bills. For example, the Trade Bill would establish a new statutory Trade Remedies Authority (TRA), but the UK's independent trade remedies framework—which the TRA would be responsible for administering—would be established by the Taxation (Cross-border Trade) Bill. The Trade Bill would allow the UK to implement non-tariff obligations flowing from international trade agreements, whereas tariff measures would be provided for under the Taxation (Cross-border Trade) Bill. The Government has stated that the two Bills "will together ensure that the necessary tools are in place to deliver an independent trading framework for the UK outside the EU".[6] The Taxation (Cross-border Trade) Bill will "impact upon and be impacted by the UK's future international trade policy in so far as this directly relates to the applicable rate of customs duty", whilst the Trade Bill "makes provisions relating to international trade which are not directly tax related".[7]

The Trade Bill does not make specific provision for the terms of the UK's future trading relationship with the EU (although a non-government amendment was added at report stage in the Commons relating to the UK's continued participation in the European medicines regulatory network after Brexit). The Government set out its latest proposals for the future economic relationship with the EU in its white paper published in July 2018.[8]

The Trade Bill also does not provide for new trade agreements that the UK wishes to negotiate with third countries with which the UK does not currently have some kind of trade agreement by virtue of the UK's membership of the EU. In a separate process from the Trade Bill, Liam Fox, Secretary of State for International Trade, launched public consultations on 18 July 2018 on potential future trade deals the UK might seek with the US, Australia and New Zealand, and accessing the Comprehensive and

[4] Department for International Trade, 'Trade Bill', accessed 3 August 2018.
[5] HM Treasury, 'Taxation (Cross-border Trade) Bill', 21 November 2017.
[6] Explanatory Notes to the Taxation (Cross-border Trade) Bill, p 7.
[7] ibid.
[8] HM Government, *The Future Relationship Between the United Kingdom and the European Union*, July 2018, Cm 9593.

Progressive Agreement for Trans-Pacific Partnership (CPTPP).[9]

2. Agreement on Government Procurement (Clause 1)

2.1 Background

The Agreement on Government Procurement (GPA) is a plurilateral agreement within the framework of the World Trade Organisation (WTO).[10] The GPA consists of 19 parties covering 47 WTO members.[11] The EU and its 28 member states, all of which are covered by the GPA, are counted as one party. The WTO explains the purpose of the GPA as follows:

> The fundamental aim of the GPA is to mutually open government procurement markets among its parties. As a result of several rounds of negotiation, the GPA parties have opened procurement activities worth an estimated US$1.7 trillion annually to international competition (ie to suppliers from GPA parties offering goods, services or construction services).
>
> The GPA is composed mainly of two parts: the text of the Agreement and parties' market access schedules of commitments.
>
> The text of the Agreement establishes rules requiring that open, fair and transparent conditions of competition be ensured in government procurement. However, these rules do not automatically apply to all procurement activities of each party. Rather, the coverage schedules play a critical role in determining whether a procurement activity is covered by the Agreement or not. Only those procurement activities that are carried out by covered entities purchasing listed goods, services or construction services of a value exceeding specified threshold values are covered by the Agreement.[12]

The GPA was originally signed in 1994 and came into force in 1996; this is known as the 1994 GPA.[13] A Revised GPA came into force in 2014.

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[9] Department for International Trade, 'New Public Consultations Announced for Future Trade Agreements', 18 July 2018.
[10] World Trade Organisation, 'Agreement on Government Procurement', accessed 1 August 2018. In WTO terms, a plurilateral agreement is one involving some WTO members, whereas a multilateral agreement is one which involves all WTO members.
[11] World Trade Organisation, 'Agreement on Government Procurement: Parties, Observers and Accessions', accessed 1 August 2018. In addition to the EU, the other parties to the GPA are: Armenia, Canada, Hong Kong, Iceland, Israel, Japan, South Korea, Liechtenstein, Moldova, Montenegro, Netherlands with respect to Aruba, New Zealand, Norway, Singapore, Switzerland, Chinese Taipei, Ukraine and the United States.
[12] World Trade Organisation, 'Agreement on Government Procurement', accessed 1 August 2018.
[13] ibid.

Switzerland is party only to the 1994 GPA, but all other parties are covered by both the 1994 GPA and the Revised GPA.[14]

In the October 2017 trade white paper, the Government said it would take specific steps to ensure the UK remained part of the GPA after leaving the EU.[15] The white paper outlined the following benefits of this policy:

> This would allow UK businesses to keep guaranteed non-discriminatory access to a public procurement market estimated to be worth over £1.3 trillion annually. Where we have chosen to open the UK's public procurement market to international competition, the UK benefits from increased choice and value for money.[16]

The UK has already passed domestic legislation to implement EU directives on procurement that enable EU member states to fulfil obligations under the GPA.[17] This domestic legislation will become part of retained EU law on exit day (29 March 2019) by virtue of section 2 of the European Union (Withdrawal) Act 2018. The European Union (Withdrawal) Act 2018 contains regulation-making powers to 'correct' any deficiencies that arise in retained EU law as a result of the UK's departure from the EU and to implement a withdrawal agreement, but these powers do not cover the making of the legislative changes needed to reflect the UK becoming a member of the GPA in its own right.[18] The trade white paper explained that the Government intended to legislate to enable the UK to make any changes required in domestic legislation before acceding to the GPA, and to have the power to make changes in future, for example to reflect new countries joining the GPA.[19]

The Government said that parliamentary approval for ratifying the UK's independent membership of the GPA would be sought separately.[20] Greg Hands, then Minister of State at the Department for International Trade, said in June 2018 that the UK had begun the process to accede

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[14] World Trade Organisation, 'Agreement on Government Procurement: Parties, Observers and Accessions', accessed 1 August 2018.
[15] Department for International Trade, *Preparing for Our Future UK Trade Policy*, October 2017, Cm 9470, pp 25–6.
[16] ibid, p 26.
[17] The Public Contracts Regulations 2015, the Utilities Contracts Regulations 2015 and the Concessions Contracts Regulations 2016 implement the relevant EU directives in England, Wales and Northern Ireland. The Public Contracts (Scotland) Regulations 2015, the Utilities Contracts (Scotland) Regulations 2016 and the Concessions Contracts (Scotland) Regulations 2016 implement the relevant EU directives in Scotland. The relevant EU directives are: 2014/24/EU, 2014/25/EU and 2014/23/EU (Explanatory Notes, p 7).
[18] Explanatory Notes, p 7.
[19] Department for International Trade, *Preparing for Our Future UK Trade Policy*, October 2017, Cm 9470, p 26.
[20] ibid. See House of Commons Library, *Parliament's Role in Ratifying Treaties* (17 February 2017) for an explanation of this process.

independently to the GPA by formally submitting a market access offer.[21]

2.2 Provisions in the Bill

Clause 1(1) of the Trade Bill would enable the UK Government and the devolved authorities to make regulations they considered appropriate for the following purposes:

- To implement the 1994 GPA or the Revised GPA. Under clause 1(2) these regulations could not come into force before the UK had become an independent member of the GPA.
- To reflect other parties joining or withdrawing from the 1994 GPA or the Revised GPA. Under clause 1(2) these regulations could not come into force before the other party had joined or left.
- To reflect changes to the list of central government entities in Annex 1 to the UK's Appendix 1 to both the 1994 GPA and the Revised GPA. This list sets out which central government entities' procurement activities are covered by the GPA.[22] This purpose was added to the list of purposes in clause 1(1) by a government amendment agreed to without division at report stage (amendment 32).[23] Under clause 1(2) these regulations could not come into force before any modifications to the list had become effective under the terms of the GPA.

Clause 1(3) specifies that regulations under clause 1(1) may modify retained direct EU legislation. 'Retained direct EU legislation' is defined by section 3 of the European Union (Withdrawal) Act 2018. It essentially consists of EU regulations, EU decisions and EU tertiary legislation that will be incorporated into domestic law on exit day by section 3 of that Act.

Section 7 of the European Union (Withdrawal) Act 2018 places restrictions on how retained direct EU legislation can be modified.[24] Sections 7(2)(c)(iv) and 7(3)(c)(iv) specify that retained direct EU legislation can be modified by subordinate legislation if:

- the subordinate legislation is made under a power in primary legislation made after the passing of the European Union (Withdrawal) Act 2018; and

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[21] House of Commons, 'Written Question: World Trade Organisation', 14 June 2018, 151212.
[22] The current list of which UK central government entities are covered by the GPA is contained within the EU's Annex I to Appendix I of the 1994 GPA and Annex I to Appendix I of the Revised GPA.
[23] HC *Hansard*, 17 July 2018, cols 355–6.
[24] See section 5.3 of House of Commons Library, *The Status of Retained EU Law* (31 July 2018) for a fuller explanation of these restrictions.

- the primary legislation permits the subordinate legislation to be used to modify retained direct EU legislation.

Clause 1(3) was added by a government amendment at report stage, agreed to without division (amendment 34).[25] The Government said that this amendment made clear that the power in clause 1(1) could be exercised to modify retained direct EU legislation.[26]

Paragraph 2 of schedule 2 provides that regulations made under clause 1(1) would be subject to the negative procedure.

3. Implementation of International Trade Agreements (Clauses 2 to 5)

3.1 Background

The UK currently enters into trade agreements as a member of the EU. Trade policy is an exclusive EU competence, meaning that the EU and not member states legislates on trade matters and concludes international agreements.[27] If an agreement covers both topics where the EU has exclusive competence and where member states have competence (a mixed agreement) the EU can conclude the agreement only after ratification by all member states.

The Government estimate that the UK is currently party to around 40 EU trade agreements which cover more than 80 third countries (non-EU member states).[28] These are a mixture of:

- Traditional FTAs [free trade agreements]—these tend to be the broadest and the most detailed in trade terms;
- Economic Partnership Agreements (EPAs)—these are the most development focused FTAs that aim to provide long-term, predictable frameworks to help increase trade and investment, and support sustainable growth and poverty reduction. EPAs are asymmetric in their degree and pace of market liberalisation; and
- Association Agreements—these are usually much broader agreements in general terms (eg covering political cooperation, energy, etc) but with a notable trade component.[29]

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[25] HC *Hansard*, 17 July 2018, col 356.
[26] ibid (explanatory statement accompanying amendment 34).
[27] Council of the European Union, 'EU Trade Policy', 14 March 2018.
[28] Department for International Trade, *Impact Assessment: Trade Bill (Existing International Trade (and Other Related) Agreements)*, 8 September 2017, p 6. The House of Commons Library briefing on *UK Adoption of EU External Agreements after Brexit* (24 July 2018) explores some of the difficulties in counting the exact number of EU external agreements that are of current relevance to the UK.
[29] Department for International Trade, *Impact Assessment: Trade Bill (Existing International Trade (and Other Related) Agreements)*, 8 September 2017, p 6.

In her Lancaster House speech in January 2017, the Prime Minister, Theresa May, outlined her negotiating objectives for Brexit, one of which was that the UK should be free to negotiate its own trade agreements.[30] In his foreword to the October 2017 trade white paper, Liam Fox, the Secretary of State for International Trade, wrote that leaving the EU meant that "for the first time in over forty years, the UK will have its own independent trade policy".[31] However, the Government is also seeking continuity in the trade agreements with non-EU countries that the UK is currently party to through its EU membership. The trade white paper explained:

> As we prepare to leave the EU, we will seek to transition all existing EU trade agreements and other EU preferential arrangements. This will ensure that the UK maintains the greatest amount of certainty, continuity and stability in our trade and investment relationships for our businesses, citizens and trading partners.[32]

The white paper said that this would include "introducing measures through legislation which will allow the Government to fully implement any EU third country and other EU preferential arrangements which we transition".[33]

As explored below, the Government intends to ensure continuity by:

- effectively remaining part of the existing EU agreements during the transition period; and
- concluding new agreements with the EU's existing trade partners to replicate the existing EU agreements after the transition period, at least for the short term. This is sometimes referred to as 'rolling over' or 'grandfathering' the existing EU agreements.

A transition period (or implementation period as the UK Government calls it) is provided for in the draft withdrawal agreement published by the UK and the EU in March 2018. This would provide that from exit day (29 March 2019) to the end of December 2020, the UK would not be a member of the EU but would continue to abide by EU law.[34] Article 124 of the draft withdrawal agreement provides that during the transition period, the UK would continue to be bound by the obligations stemming from the EU's international agreements. A footnote to Article 124 says that the EU will notify the other parties to these agreements that during the transition period, the UK is to be treated as an EU member state for the purposes of

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[30] Prime Minister's Office, 'The Government's Negotiating Objectives for Exiting the EU: PM Speech', 17 January 2017.
[31] Department for International Trade, *Preparing for Our Future UK Trade Policy*, October 2017, Cm 9470, p 4.
[32] ibid, p 27.
[33] ibid, p 28.
[34] HM Government and European Commission, *Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, 19 March 2018.

these agreements. Michel Barnier, the EU's chief negotiator, has cautioned that although the UK will remain bound by its obligations under the EU's existing international agreements, the EU "cannot ensure in the Article 50 [withdrawal] agreement that the UK keeps the benefits from these international agreements". He said that "partners around the world may have their own views, for instance the 70 countries covered by trade deals".[35]

Article 122(4) of the draft withdrawal agreement would allow the UK to negotiate, sign and ratify international agreements in areas of EU competence as long as they do not enter into force or apply during the transition period without the EU's agreement. This would allow the UK to use the transition period to negotiate agreements with the EU's existing partners to replicate the existing EU agreements, so that they could come into force after the end of the transition period.

George Hollingbery, Minister of State for Trade Policy, said in July 2018 that many of the UK's trading partners had issued public statements in support of the approach of continuing to treat the UK as an EU member state during the transition period.[36] He explained that in parallel to this, the Government was continuing to "work towards bilateral agreements that will ensure continuity beyond the implementation period". He said the Government had had "positive discussions" with the UK's trading partners on these agreements and was "confident of securing a smooth transition".

The Government has described its discussions with the UK's existing partner countries as "a programme of 'trade agreements continuity'", which is district from preparatory work to reach post-Brexit trade deals with countries that do not currently have a trade agreement with the EU.[37] It has stated that work to roll over existing EU agreements needs to be completed before the UK leaves the EU to ensure continuity, should the UK not reach a deal with the EU which would allow for a transition period. Its intention is that the Trade Bill will provide the Government and the devolved authorities with the power to make any changes to domestic legislation that are necessary to ensure the rolled over agreements with the EU's existing partners can be implemented domestically.

The European Union (Withdrawal) Act 2018 will preserve EU law in UK domestic law on exit day, creating a new legal category of 'retained EU law'. The Government expects that most obligations within the rolled over agreements that would need to be implemented in domestic law will already be covered by provisions in retained EU law.[38] However, it has identified

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[35] European Commission, 'Press Statement by Michel Barnier following the General Affairs Council (Article 50) on the Adoption of Negotiating Directives on Transitional Guidelines', 29 January 2018.
[36] House of Commons, 'Written Question: Trade Agreements', 11 July 2018, 161054.
[37] Explanatory Notes, p 4.
[38] ibid, p 10.

some scenarios where this would not be the case, and where new powers would be required to implement international obligations in domestic law:[39]

- If obligations in an existing EU trade agreement had not been fully implemented by the EU in EU law (or by the UK implementing EU obligations into domestic law) before exit day, retained EU law would not contain the necessary provisions after exit day.
- If the agreement reached between the UK and an existing EU partner country was different from the original EU agreement, changes might be needed in domestic law to implement the new agreement. The Government has said that it may be necessary to "substantively amend the text of the previous EU legal agreement, for example so that the new agreements can work in a UK legal context".[40]
- Changes might be needed after exit day to ensure the agreement remained "operable and up to date".

The House of Commons International Trade Committee concluded that the Government was "right to seek to ensure the continuation after Brexit of the effects of the EU's trade and other trade-related agreements, at least in the short term".[41] However, it cautioned that there was "a disturbing lack of clarity about the legal mechanism" for rolling over the existing EU trade agreements.[42] It warned the Government would "risk appearing naïve if it assumed that assent-in-principle to roll over an agreement constitutes a guarantee that roll-over is actually certain to occur at the point of Brexit".[43] The Committee also noted that the evidence it had taken "strongly suggests that substantive changes will be necessary when EU trade agreements are rolled over".[44] It called on the Government to set out provisions for more extensive parliamentary scrutiny and enhanced involvement by the devolved administrations when such changes occurred.

3.2 Provisions in the Bill

Clause 2(1) would enable the UK Government and the devolved authorities to make regulations they considered appropriate to implement a free trade agreement or international trade agreement to which the UK was a signatory. This power would be subject to some restrictions:

- It would apply only to agreements with countries that have a free

[39] Explanatory Notes, p 10.
[40] ibid, p 11.
[41] House of Commons International Trade Committee, *Continuing Application of EU Trade Agreements after Brexit*, 7 March 2018, HC 520 of session 2017–19, p 31.
[42] ibid.
[43] ibid, p 33.
[44] ibid, p 34.

trade agreement or an international trade agreement with the EU before exit day (clauses 2(2) and 2(3)). This would include countries with which the EU currently has such an agreement, and countries which do not currently have such an agreement with the EU, but sign one before exit day. Clause 8 provides definitions of a 'free trade agreement' and an 'international trade agreement'.

- The regulations could only be used to implement non-tariff provisions of a free trade agreement or international trade agreement. Clause 2(4) specifically prohibits the making of regulations that could be made under clause 9 of the Taxation (Cross-border Trade) Bill, which would allow preferential customs duties to be charged on imports from countries with which the UK has an agreement. Non-tariff provisions are those which do not relate to taxes or duties. They might cover matters such as manufacturing regulations, rules of origin or quotas.[45]

Clause 2(5) specifies that the power could be used to modify retained direct EU legislation or primary legislation that is retained EU law. This means that it would be a Henry VIII power (but only with respect to primary legislation that fell within the category of retained EU law). It could also be used to delegate functions or to create penalties for failing to comply with the regulations, although the delegated powers memorandum states that this does not allow for the creation of new criminal offences, the extension of existing criminal offences or for the charging of fees.[46]

Clauses 2(7) and (8) are sunset provisions. They would provide that regulations could not be made after the period of three years beginning with exit day, although this initial three-year period could be extended by up to three years with the agreement of both Houses of Parliament under the affirmative procedure.[47] The length of the sunset provision was reduced by a group of government amendments (44 to 47) made without division at report stage.[48] Previously the sunset period was five years, extendable by up to five years.

Regulations under clause 2(1) would also be subject to the affirmative procedure (clause 2(1), clause 2(6) and paragraph 4 of schedule 2). This was a change made by a group of government amendments (4, 36 to 39, 42 and 71 to 75) made without division at report stage.[49] In the Bill as originally

[45] Institute for Government, 'Non-tariff Barriers', accessed 2 August 2018.
[46] Department for International Trade, *Trade Bill—Delegated Powers Memorandum*, 19 July 2018, p 16.
[47] Under the affirmative procedure, regulations are laid before Parliament in draft and cannot come into force until they have been approved by both Houses. Under the negative procedure, regulations are made by the minister without any need for prior debate. They can subsequently be annulled by a resolution of either House.
[48] HC *Hansard*, 17 July 2018, col 356.
[49] ibid, cols 294–5 and 300–1.

drafted, this power was exercisable by the negative procedure. George Hollingbery, Minister of State for Trade Policy, said this change would "further enhance parliamentary scrutiny".[50]

Bill Esterson, Shadow Minister for International Trade, welcomed making these regulations subject to the affirmative procedure, but questioned why regulations under clause 1(1) relating to the GPA still remained subject to the negative procedure.[51] Wera Hobhouse (Liberal Democrat MP for Bath) welcomed these amendments as she said they demonstrated "that the Government have recognised that Parliament needs some say in the matter".[52] However, in her view, implementing new agreements by making changes through affirmative instruments did not give Parliament a sufficient role in negotiating new agreements. She said it would amount to "a take-it-or-leave-it vote" that was "not amendable" and "not meaningful".

The Bill does not make provision about negotiating or ratifying the rolled-over trade agreements. The Government has stated that where they need ratifying, they will be subject to separate parliamentary scrutiny.[53] Parliament currently has powers to scrutinise the making of EU external agreements, including trade agreements, in ways that go beyond its powers in respect of treaties or international agreements negotiated by the UK. This has led to calls for Parliament to be given a greater role in scrutinising trade agreements once the UK can negotiate them for itself.[54]

Clauses 3, 4 and 5 would require a minister to report to Parliament on any significant differences between a new UK free trade agreement with a third country and the existing agreement between the third country and the EU:

- before ratifying the agreement, if the agreement is subject to ratification (clause 3);
- exceptionally, as soon as practicable after the agreement is ratified, if the minister is of the opinion that it should be ratified before the report can be laid before Parliament (clause 4); or
- at least ten Commons sitting days before regulations implementing the new agreement are laid in draft under clause 2(1) (clause 5).

A report would not need be laid under clause 5 if one had been laid under clause 3 and vice versa.

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[50] HC *Hansard*, 17 July 2018, col 266.
[51] ibid, col 268.
[52] ibid, col 283. Ms Hobhouse tabled amendment 4, one of the amendments in this group, to which Liam Fox then put his name in order to indicate the Government's support.
[53] Explanatory Notes, p 11. See House of Commons Library, *Parliament's Role in Ratifying Treaties* (17 February 2017) for an explanation of this process.
[54] This issue is explored further in section 6 of the House of Commons Library briefing on *The Trade Bill* (2 July 2018).

These clauses were added to the Bill at report stage in the Commons by government new clauses 12, 13 and 14, which were agreed to without division.[55] George Hollingbery said the Government wanted these reports "to be as helpful as possible", so they would "signpost any significant changes being made, to ensure that existing trade agreements can function effectively in the UK-only context".[56] Bill Esterson, Shadow Minister for International Trade, said that Labour would support new clause 12 (now clause 3), but argued that the Government should withdraw new clause 13 (now clause 4), as it would "allow them to sidestep the obligation to lay […] a report".[57] He remained critical of the level of scrutiny that Parliament would have of new agreements to replace those the UK was currently party to through its EU membership, arguing that the procedures under the Bill were not equivalent to the current scrutiny powers of the European Parliament and the UK Parliament for trade agreements negotiated by the EU.[58]

Greg Hands (Conservative MP for Chelsea and Fulham)—who was a Minister of State at the Department for International Trade until June 2018—argued that such scrutiny powers were not necessary because the Bill dealt with existing EU agreements that had already been scrutinised in both Houses of Parliament and that may have been in effect for "a long time—in some cases, decades".[59] However, Mr Esterson maintained that the agreements the UK entered into to replace the existing EU trade agreements would not "just be roll-overs", but could "introduce wholly new terms of trade" between the UK and its trading partners.

Chris Leslie (Labour MP for Nottingham East) also expressed scepticism about the possibility of simply rolling over EU trade agreements.[60] He said that many of the countries with which the UK currently has free trade agreements through its EU membership, such as South Africa and South Korea, were asking for "significant changes" in the terms of trade with the UK post-Brexit.[61] He also questioned how the trade deal with Turkey could be rolled over, since it created a customs union between the EU and Turkey—the Government's policy is not to remain in a customs union with the EU.

[55] HC *Hansard*, 17 July 2018, cols 284–5.
[56] ibid, col 266.
[57] ibid, col 267.
[58] ibid, col 266.
[59] ibid.
[60] ibid, col 280.
[61] ibid, col 281.

4. Powers of Devolved Authorities (Clauses 1, 2, 7, 8 and Schedule 1)

4.1 Background

The Bill would give the devolved authorities in Scotland, Wales and Northern Ireland powers to make regulations under clause 1(1) and clause 2(1).

The UK Parliament does not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly without the consent of the legislature concerned—this is commonly referred to as the Sewel Convention. Furthermore, it is the UK Government's practice to seek the consent of the devolved legislatures for provisions which would alter the competence of those legislatures or of the devolved administrations in Scotland and Northern Ireland.[62] The Government has stated its intention to seek legislative consent for the provisions in the Trade Bill relating to the power to implement the GPA (clause 1) and the power to implement qualifying international trade agreements (clause 2).[63]

In order to understand the background to the way the powers of the devolved authorities are framed in the Trade Bill, and the issues relating to the granting of legislative consent to the Bill by the Scottish Parliament and Welsh Assembly, it is necessary to understand how devolved powers and legislative consent were dealt with in the European Union (Withdrawal) Act 2018.

The Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006 currently prevent the devolved legislatures from legislating in a way that is incompatible with EU law. When the European Union (Withdrawal) Bill was first introduced to Parliament, it was drafted so that it would have amended the three devolution acts to prevent the devolved legislatures from legislating incompatibly with 'retained EU law'.[64] The Government intended to make Orders in Council to release policy areas returning from the EU that fell within devolved competence from this legislative restriction.

However, the Government has argued that once the UK is no longer bound by common EU policy frameworks, it may still be necessary to operate UK-wide frameworks across some areas of devolved competence.[65] The Joint Ministerial Council on EU Negotiations agreed in October 2017 that

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[62] Explanatory Notes, p 5.
[63] ibid.
[64] For a detailed account, see: House of Lords Library, *European Union (Withdrawal) Bill: Lords Report Stage*, 14 May 2018, pp 89–90.
[65] Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union*, March 2017, Cm 9446, p 27.

common frameworks between the UK Government and the devolved governments should be established where necessary to (among other things) enable the functioning of the UK internal market, ensure compliance with international obligations and to ensure the UK can negotiate, enter into and implement new trade agreements and international treaties.[66]

While they accepted the need for common frameworks, Nicola Sturgeon, First Minister of Scotland, and Carwyn Jones, First Minister of Wales, described the original version of the European Union (Withdrawal) Bill as "a naked power grab, an attack on the founding principles of devolution".[67] They objected to its approach that the devolved authorities could not modify retained EU law in areas of devolved competence until or unless the policy area had been 'released' by Westminster. The Scottish and Welsh governments recommended that their respective legislatures withhold legislative consent for the Bill. The Scottish Parliament and National Assembly for Wales both passed 'continuity bills' to incorporate elements of EU law that operate in devolved areas into Scottish and Welsh domestic law.

Government amendments to the devolution provisions of the European Union (Withdrawal) Bill were made at report stage in the Lords.[68] The effect of these amendments is that all devolved powers currently within the competence of the EU would return to the devolved administrations by default, with the exception of any areas ringfenced by the UK Government in regulations.[69] As passed, section 12 of the European Union (Withdrawal) Act 2018 removes the requirement from the devolution acts not to legislate incompatibly with EU law, and instead creates a new regime whereby:

- The devolved legislatures retain competence to make any provision they could have made immediately before exit day.
- The devolved legislatures cannot modify retained EU law in areas specified by a Minister of the Crown in regulations.
- Before such regulations could be made by the UK Parliament, the relevant devolved legislature would have 40 days in which to make a 'consent decision'. This does not mean that the devolved legislature would have to consent to the regulations being made: it could decide not to agree a motion consenting to the regulations being laid before the UK Parliament, or to agree a motion refusing to consent to the regulations being laid before the UK Parliament—both of these would count as a 'consent

[66] Joint Ministerial Committee (EU Negotiations), *Joint Ministerial Committee (EU Negotiations) Communique*, 16 October 2017.
[67] Welsh Government, 'Joint Statement from First Ministers of Wales and Scotland in Reaction to the EU (Withdrawal) Bill', 13 July 2017.
[68] For a detailed account, see: House of Lords Library, *European Union (Withdrawal) Bill: Lords Report Stage*, 14 May 2018.
[69] The policy areas the Government expects are likely to be subject to such ringfencing regulations are set out in Annex A of Cabinet Office, *Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks* (24 April 2018).

decision'. If 40 days elapsed with no consent decision being made, the regulations could be laid before the UK Parliament.

- The power for the UK Government to make such 'ringfencing' regulations would expire two years from exit day; the regulations themselves would expire at the latest five years after coming into force.

The Welsh Government reached agreement with the UK Government on these provisions in April 2018.[70] As a result, the Welsh Government agreed to take steps to repeal its continuity bill.[71] The Scottish Government stated that it was unable to support the Government's amendments.[72]
On 15 May 2018, the Welsh Assembly voted in favour of granting legislative consent to the European Union (Withdrawal) Bill by 46 votes to 9, and the Scottish Parliament withheld consent by 93 votes to 30.[73] The UK Government has referred the Scottish continuity bill to the Supreme Court for a decision as to whether it was within the legislative powers of the Scottish Parliament to pass such legislation.[74] Hearings were held on 24 and 25 July 2018. A judgment is expected in the autumn.[75]

4.2 Provisions in the Bill

Clause 8 of the Trade Bill specifies that the devolved authorities—Scottish ministers, Welsh ministers and Northern Ireland departments—are 'appropriate authorities' that can make regulations under clause 1(1) to implement the GPA and under clause 2(1) to implement a qualifying international trade agreement.[76] When making such regulations, the devolved authorities would be subject to the same restrictions as UK ministers as described earlier in this Briefing, but would also be subject to additional restrictions as outlined in schedule 1. Clause 7 of the Bill gives effect to schedule 1.

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[70] Cabinet Office, 'European Union (Withdrawal) Bill: Agreement between the UK and Welsh Governments', 25 April 2018.
[71] Cabinet Office, *Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks*, 24 April 2018, para 10. The Welsh Government laid draft regulations repealing the Law Derived from the European Union (Wales) Act 2018 before the National Assembly for Wales on 8 June 2018; they are due to be debated in October (National Assembly for Wales, Plenary, 3 July 2018, para 263).
[72] Scottish Government, 'Withdrawal Bill Amendments 'Undermine Devolution', Says Minister', 25 April 2018.
[73] House of Commons Library, *Legislative Consent and the European Union (Withdrawal) Bill*, 23 May 2018, p 41.
[74] Supreme Court, 'The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill—A Reference by the Attorney General and Advocate General for Scotland', accessed 31 July 2018.
[75] Libby Brooks, 'Scotland's Brexit Bill is 'Perfectly Practical', Supreme Court Told', *Guardian,* 25 July 2018.
[76] For the purposes of schedule 1, a Northern Ireland devolved authority is defined in paragraph 10 of schedule 1 as: the First Minister and deputy First Minister in Northern Ireland acting jointly, a Northern Ireland minister or a Northern Ireland department.

Paragraph 1 of schedule 1 provides that the devolved authorities could only make regulations that fall within their devolved competence. Paragraphs 7 to 9 set out a definition of devolved competence for each devolved authority.

Paragraphs 2(1) to (3) provide that the devolved authorities could not modify retained EU law that was:

- retained direct EU legislation (essentially, EU regulations, EU decisions and EU tertiary legislation incorporated into domestic law by section 3 of the European Union (Withdrawal) Act 2018); or
- retained by virtue of section 4 of the European Union (Withdrawal) Act 2018 (for example, directly effective rights contained within the EU Treaties)

if this would breach restrictions provided for in regulations made by a Minister of the Crown as referred to in section 12 of the European Union (Withdrawal) Act 2018[77]—the 'ringfencing' regulations described above.

Paragraph 2(4) would prohibit the devolved authorities from using the power in ways that would create inconsistencies with any modifications to retained direct EU legislation and retained EU law (retained by virtue of section 4 of the European Union (Withdrawal) Act 2018) which the Government had made, but only where the provision could not be made by the devolved authority under paragraphs 2(1) to (3).[78]

Paragraph 2 was amended by a government amendment (amendment 63), agreed to without division at report stage in the Commons.[79] In the Bill as introduced, the devolved authorities would have been prevented from making any changes at all to retained direct EU legislation or to retained EU law retained by virtue of section 4 of the European Union (Withdrawal) Act 2018. Under the Trade Bill as amended, they could make changes to those types of retained EU law so long as any modifications (a) fell within devolved competence and (b) were not in policy areas 'ringfenced' by the Government.

Paragraph 3 of schedule 1 would require the devolved authorities to consult with a Minister of the Crown before making any regulations under clauses 1 or 2 that would:

- come into force before exit day; or
- make provision about quota arrangements (arrangements to

[77] Explanatory Notes, p 16.
[78] ibid.
[79] HC *Hansard*, 17 July 2018, col 323.

> divide up between different areas of the UK any rights/benefits arising from international obligations) or would be incompatible with quota arrangements.

Again, this represents a change introduced by government amendments (amendments 64 to 67) agreed to without division at report stage.[80] In the original version of the Bill, the devolved authorities would have been required to obtain the consent of the UK Government before making such regulations, rather than simply having to consult.

The remainder of schedule 1 specifies that, when making a provision under clause 1 or 2, if the devolved authority would normally have to:

- obtain consent from the UK Government (paragraph 4)
- legislate jointly with the UK Government (paragraph 5)
- consult with the UK Government (paragraph 6)

when making the provision under other powers, those requirements would continue to apply.

4.3 Legislative Consent

The Scottish and Welsh Governments have both produced legislative consent memorandums on the Trade Bill. It should be noted that these were written before the UK Government's amendments on restrictions on the devolved authorities' powers were made at report stage. In its memorandum, the Welsh Government suggested that whether it would recommend granting legislative consent depended on changes being made to the Trade Bill's devolution provisions:

> We accept there may be instances when it makes sense for the UK Parliament to legislate on devolved areas, but this should only be with the consent of the devolved governments and this should be made clear on the face of the Bill. Further, there should be parity between the regulation-making powers given to Ministers of the Crown and, with respect to devolved areas, Welsh ministers. The additional restrictions placed on the Welsh ministers in this regard are not appropriate. Whether or not legislative consent should be given for this Bill will need to be considered in the context of the response to amendments put down to address these issues.[81]

The Scottish Government stated in its memorandum that it could not recommend giving consent to the Bill as initially drafted.[82] It set out its

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[80] HC *Hansard*, 17 July 2018, col 324.
[81] Welsh Government, *Legislative Consent Memorandum: Trade Bill*, December 2017, p 4.
[82] Scottish Government, *Legislative Consent Memorandum: Trade Bill*, December 2017, p 5.

objections as follows:

> The Trade Bill places constraints on the Scottish ministers' ability to act on all devolved matters, by placing restrictions on how they can exercise powers in clauses 1 and 2 to make regulations. In particular, schedule 1 provides that they cannot use their powers in the Trade Bill to modify any retained direct EU legislation, such as EU regulations, or to make regulations that would create inconsistencies with any modifications to retained law that the UK Government has made, even in devolved areas (schedule 1, paragraph 2). Schedule 1 also sets out scenarios where the consent of the UK Government is required in certain circumstances before making regulations under clause 1 or 2 (there is no requirement for the UK Government to obtain the consent of Scottish ministers in exercising its powers in devolved areas) […]
>
> The powers provided in clause 2 of the Bill are sunsetted to five years [now amended to three years] after the date of withdrawal. However, that can be extended by the UK Government under review, with the approval of both Houses of Parliament, for further periods of not more than five years [now amended to three years] at a time. There is no requirement for the UK Government to consult the Scottish Government in altering the powers of the Scottish Government in this way.[83]

The government amendments made to the Trade Bill at report stage addressed some, but not all, of the issues to which the Scottish and Welsh governments raised objections in their legislative consent memorandums. Speaking at report stage, George Hollingbery, Minister of State for Trade Policy, said:

> Our intention is to carry on negotiating with the devolved authorities to find a way forward to get the signatures on the legislative consent motions that we wish to sign, and that we believe we are in a position to sign with those administrations if we continue to cooperate with them and to negotiate properly.[84]

Several Labour and Scottish National Party (SNP) amendments addressing the role of the devolved authorities were defeated on division at report stage in the Commons—see section 9.4 of this Briefing for further details.

[83] Scottish Government, *Legislative Consent Memorandum: Trade Bill*, December 2017, p 5.
[84] HC *Hansard*, 17 July 2018, col 313.

5. European Medicines Regulatory Network (Clause 6)

5.1 Background

The European Medicines Agency (EMA) is a decentralised agency of the EU whose mission is to "foster scientific excellence in the evaluation and supervision of medicines, for the benefit of public and animal health" in the member states of the EU and the European Economic Area (EEA) by ensuring that all medicines available on the European market are "safe, effective and of high quality".[85] To fulfil its mission, the EMA works closely with the medicines regulatory authorities in the member states in a partnership known as the European medicines regulatory network. The network consists of around 50 regulatory authorities from the 31 EEA countries (28 EU member states plus Iceland, Liechtenstein and Norway), the European Commission and the EMA.[86]

Before a medicine can be sold or prescribed in the UK, it must usually receive a marketing authorisation from either the EMA or from the UK regulator, the Medicines and Healthcare Products Regulatory Agency. Pharmaceutical companies may choose to license a medicine in only one EU member state, but they are likely to opt for one of the EU procedures (the centralised procedure or the mutual recognition procedure) for obtaining a marketing authorisation that then allows the medicine to be marketed throughout the EU and the EEA.[87]

In its white paper on the future relationship with the EU published in July 2018, the Government proposed maintaining a common rulebook with the EU for manufactured goods and expressed its belief that manufacturers should only need to undergo one series of tests in either market (UK or EU) in order to place products in both markets.[88] It said that this should be supported by arrangements covering all relevant compliance activity and supplemented by continued UK participation in agencies for highly regulated sectors, including medicines. The Government said that the UK would seek continued participation in the EMA "as an active participant, albeit without voting rights, which would involve making an appropriate financial contribution".[89] The Government wanted to ensure that:

> […] all the current routes to market for human and animal medicine remain available, with UK regulators still able to conduct technical work, including acting as a 'leading authority' for the assessment of

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[85] European Parliament Research Service, *European Medicines Agency: A Look at its Activities and Way Ahead*, July 2017, p 2.
[86] European Medicines Agency, *The European Regulatory System for Medicines*, 2014, p 2.
[87] House of Commons Library, *Brexit and Medicines Regulation*, 20 November 2017, pp 3 and 6.
[88] HM Government, *The Future Relationship Between the United Kingdom and the European Union*, 12 July 2018, Cm 9593, p 20.
[89] ibid, p 22.

> medicines, and participating in other activities like ongoing safety monitoring and the incoming clinical trials framework.[90]

The House of Commons Health and Social Care Committee and Business, Energy and Industrial Strategy Committee have both endorsed the idea that the UK should continue to participate in the EMA after Brexit.[91]

5.2 Provisions in the Bill

Clause 6 of the Bill imposes an objective on the Government and devolved authorities to take all necessary steps to implement an international trade agreement which enables the UK to fully participate after exit day in the European medicines regulatory network.

This clause was not in the Bill as originally drafted. It was added by a cross-party backbench amendment (new clause 17) at report stage in the House of Commons, tabled by four doctors—Paul Williams (Labour MP for Stockton South), Philip Lee (Conservative MP for Bracknell), Sarah Wollaston (Conservative MP for Totnes) and Philippa Whitford (SNP MP for Central Ayrshire).

Philip Lee—former Parliamentary Under Secretary at the Ministry of Justice who resigned on 12 June 2018 as a result of "the Brexit process and the Government's wish to limit Parliament's role in contributing to the final outcome"[92]—argued that the new clause supported the Government's intentions as set out in the white paper, but that it was important to "go further and enshrine them in law".[93] He said that this was "vital" because there could otherwise be delays in drugs reaching the UK market:

> The European medicines regulatory partnership makes the process of accessing life-saving new medicines and moving medicines quick and easy. If we leave that partnership, the NHS would get ground-breaking new drugs like those for cancer, dementia and diabetes long after other parts of the world. That is because pharmaceutical companies will apply for licences in the much larger American, European and Asian markets before they come to the UK.[94]

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[90] HM Government, *The Future Relationship Between the United Kingdom and the European Union*, 12 July 2018, Cm 9593, p 22.
[91] House of Commons Health and Social Care Committee, *Brexit: Medicines, Medical Devices and Substances of Human Origin*, 21 March 2018, HC 392 of session 2017–19, p 30; and House of Commons Business, Energy and Industrial Strategy Committee, *The Impact of Brexit on the Pharmaceutical Sector*, 17 May 2018, HC 382 of session 2017–19, p 22.
[92] Philip Lee (personal website), 'Ministerial Resignation Statement', 12 June 2018.
[93] HC *Hansard*, 17 July 2018, col 337.
[94] ibid, col 336.

The House voted by 305 votes to 301 in favour of the new clause, a majority of four.[95]

Lord Callanan, Minister of State at the Department for Exiting the European Union, later said that the Government had opposed this amendment because although it wanted the UK to be part of the EMA network, it had to "be on the right terms and meet the objective set out in the white paper of our being an active participant and making an appropriate financial contribution".[96] He said the Government would "revisit" the amendment when the Bill came to the Lords.

6. Trade Remedies Authority (Clauses 9 and 10 and Schedules 4 and 5)

6.1 Background

Trade remedies are measures designed to protect domestic industries against injury caused by unfair trading practices such as dumping or subsidies, or from unforeseen surges in imports.[97] The Explanatory Notes to the Taxation (Cross-border Trade) Bill explain that trade remedies rules for the UK are currently operated at an EU level by the European Commission, and are provided for through EU regulations 2016/1036 (anti-dumping), 2016/1037 (anti-subsidy) and 2015/478 (safeguards), and that trade remedies include:

- Imposition of anti-dumping duty as permitted by Article VI of the General Agreement on Tariffs and Trade (GATT) 1994;
- Anti-subsidy measures as outlined in the World Trade Organisation (WTO) Agreement on Subsidies and Countervailing Measures;
- Safeguards measures as outlined in the WTO Safeguards Agreement.[98]

When the UK withdraws from the EU it will need to establish its own means of executing trade remedies. Clauses 9 and 10 of the Trade Bill, along with their associated schedules 4 and 5, relate to the establishment of a new Trade Remedies Authority (TRA) which would carry out these functions. The statutory framework under which the TRA will carry out trade remedies investigations would be provided for by the Taxation (Cross-border Trade) Bill (commonly referred to as the 'Customs Bill').[99]

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[95] HC *Hansard*, 17 July 2018, col 336.
[96] HL *Hansard*, 23 July 2018, col 1589.
[97] Explanatory Notes to the Trade Bill, p 4.
[98] Explanatory Notes to the Taxation (Cross-border Trade) Bill, p 9.
[99] For further information on the Taxation (Cross-border Trade) Bill please see: House of Commons Library, *The Taxation (Cross-border Trade) Bill*, 6 July 2018; and House of Lords Library, *Taxation (Cross-border Trade) Bill*, 30 August 2018.

The two bills are therefore linked through the functions of the TRA, for example, paragraph 28(4) of schedule 4 of the Trade Bill states that: "In this schedule [4] 'trade remedies investigation' means an investigation by the TRA under provision made by or under Part 1 of the Taxation (Cross-border Trade) Act 2018".

The Explanatory Notes to the Trade Bill state that these provisions have been included in separate legislation because "the implementation of trade remedies measures impacts upon the financial privilege of the House of Commons".[100] The Taxation (Cross-border Trade) Bill is a supply bill. The *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* (2017) explains that the House of Lords is unable to amend such bills:

> Supply bills, or bills of aids and supplies, such as Consolidated Fund Bills and Finance Bills, may be passed or rejected by the Lords but, since the supply is granted by the House of Commons, the Lords are debarred from offering any amendment […][101]

The House of Lords is scheduled to consider all of the Lords stages of the Taxation (Cross-border Trade) Bill on 4 September 2018.

On 29 March 2018, Liam Fox, Secretary of State for International Trade, wrote in reply to a letter from Antonia Romeo, Permanent Secretary at the Department for International Trade, directing her to authorise spending on setting up the TRA to the sum of £8.9 million.[102] The Secretary of State wrote that:

> I understand that a direction is necessary to ensure the Department is afforded the time it needs to make vital preparations for EU Exit, and that delaying spend until after royal assent of the Trade Bill would hinder our ability to deliver a priority body, equipped to perform its statutory functions.[103]

6.2 Provisions in the Bill

Clause 9 of the Trade Bill would establish the TRA as a non-departmental public body and would give effect to schedules 4 and 5.[104] Provisions in schedule 4 include provisions related to the establishment of the TRA and to its running. Schedule 5 would provide for a staff transfer scheme from the Secretary of State to the TRA.

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[100] Explanatory Notes, p 4.
[101] House of Lords, *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords*, 2017, para 8.197.
[102] Secretary of State for International Trade, 'Letter to the Permanent Secretary at the Department for International Trade: Ministerial Direction', 29 March 2018.
[103] ibid.
[104] Explanatory Notes, p 14.

Schedule 4 includes provisions in the following areas:

- The membership and composition of the TRA
- Terms of appointment and tenure of its members
- Remuneration of members
- The appointment of a chief executive
- Staffing of the TRA, including the ability to appoint employees
- The establishment of committees within the TRA
- Powers to enable the TRA to determine its own procedures
- The delegation of the TRA's functions to a member, an authorised employee or other member of staff or a TRA committee
- Funding of the TRA
- The keeping of accounts and the audit of these accounts
- The production of an annual report

On the membership and composition of the TRA, paragraph 2 of schedule 4 requires that the TRA is to consist of:

(a) a chair appointed by the Secretary of State,
(b) other non-executive members appointed by the Secretary of State,
(c) a chief executive appointed by the chair with the approval of the Secretary of State or, if the first chair has not been appointed, by the Secretary of State, and
(d) other executive members appointed by the chair.

Under paragraph 2(2), the total number of members would be restricted to nine. The Secretary of State would have to consult the chair before appointing the other non-executive members. Both the Secretary of State and the chair would have to ensure "so far as practicable" that the number of non-executive members was, at all times, greater than the number of executive members (paragraph 2(4)).

Paragraphs 3 to 10 include provisions on the appointment and tenure of members of the TRA and would allow the Secretary of State to set terms and conditions of appointment within the provisions of the schedule. These would include, among other things, the period of appointment, the person's eligibility for reappointment and the circumstances under which a person's membership could be suspended (paragraph 6). Paragraph 9 would allow the Secretary of State to remove from their office as a non-executive member a person who, in the opinion of the Secretary of State, is "unable or unfit to carry out the functions of the office". Similar powers would be granted to the chair as regards executive members (paragraph 10).

Paragraphs 11 to 16 make provisions for the remuneration of members. This would include the TRA paying, or the making of provision for paying, executive and non-executive members sums in respect of pensions, allowances, expenses and gratuities. In the case of non-executive members these would be determined by the Secretary of State and in the case of executive members by the chair, but with the approval of the Secretary of State (paragraphs 14 and 15). Paragraphs 15 and 16 would provide for the paying of compensation to non-executive and executive members on the ceasing of their appointments, in certain circumstances.

Other provisions include a requirement that the TRA must have regard to guidance published by the Secretary of State in exercising its functions (paragraph 34). The Secretary of State must consult the TRA and have regard to its expertise before publishing such guidance. Regard must also be taken of the need to protect the TRA's operational independence and its ability to make impartial assessments when performing its functions and the Secretary of State could not publish guidance in relation to a specific trade remedies investigation. Paragraph 37 would amend part 2 of schedule 1 to the House of Commons Disqualification Act 1975, adding the TRA as a body which MPs would be barred from being members of. Paragraph 38 would amend part 2 of schedule 1 to the Northern Ireland Assembly Disqualification Act 1975 (bodies of which members are disqualified), adding the TRA as a body which Members of the Legislative Assembly would be barred from being members of.

Schedule 5 was added to the Bill during report stage in the House of Commons. It would provide for a scheme to transfer staff from the Secretary of State to the TRA. The Explanatory Notes explain that these provisions would provide for a scheme which is "the same as, or similar to, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE Regulations)", which would enable the TRA to be fully staffed and operational in time for the UK's withdrawal from the EU.[105]

At report stage in the House of Commons, George Hollingbery, Minister of State for Trade Policy, stated that the Government had started recruiting staff into the Department for International Trade with a view to training them before transferring them to the TRA once it becomes fully operational.[106] Mr Hollingbery said the Government had tabled new schedule 1 (schedule 5 in the Lords version of the Bill) and government amendment 58 to create provision for this transfer.[107] Judith Cummins, Shadow Minister for International Trade, said that Labour supported new schedule 1 (now schedule 5).[108] New schedule 1 (now schedule 5) was added to the Bill and amendment 58 was made without division.[109]

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[105] Explanatory Notes, p 18.
[106] HC *Hansard*, 17 July 2018, col 331.
[107] ibid.
[108] ibid, col 333.
[109] ibid, col 341.

Clause 10 contains provisions on the providing of advice, support and assistance by the TRA. The Bill's Explanatory Notes explain that these provisions set out "the circumstances in which the TRA can apply its expertise more widely in relation to international trade and trade remedies".[110]

On request from the Secretary of State, the TRA would have to provide such advice, support and assistance as requested in connection with:

(a) the conduct of an international trade dispute,
(b) functions of the Secretary of State relating to trade, and
(c) functions of the TRA.[111]

Clause 10(2) provides the following examples of the kinds of advice and support the TRA might be asked to provide to the Secretary of State:

(a) analysis of trade remedy measures imposed in countries or territories other than the United Kingdom, and
(b) analysis of the impact of such measures on producers and exporters in the United Kingdom.

However, before making a request under clause 10(1), the Secretary of State would have to consult the TRA and have regard to its expertise (clause 10(3)). Regard would also have to be taken of the need to protect the TRA's operational independence and its ability to make impartial assessments when performing its functions. Otherwise, the TRA could provide such advice, support and assistance as it considered appropriate in relation to international trade and trade remedies (clause 10(4)).

6.3 House of Commons International Trade Committee Inquiry

On 10 May 2018, the House of Commons International Trade Committee published its *UK Trade Remedies Authority* inquiry report.[112] The Government's response was published on 17 July 2018.[113]

In its report, the Committee discussed issues related to both the establishment of the TRA itself, in the Trade Bill, and its operation through the provisions of Taxation (Cross-border Trade) Bill. The Committee reached a number of conclusions and made 17 recommendations. This section of the Briefing focuses primarily on those related to provisions

[110] Explanatory Notes, p 14.
[111] Clause 10(1).
[112] House of Commons International Trade Committee, *UK Trade Remedies Authority*, 10 May 2018, HC 743 of session 2017–19.
[113] House of Commons International Trade Committee, *UK Trade Remedies Authority: Government Response to the Committee's Third Report*, 17 July 2018, HC 1424 of session 2017–19.

within the Trade Bill. In summary, these included the following:

- The Committee argued it was crucial that the TRA be operational by 29 March 2019. It said that it required "urgent assurance" that it would be because "if the UK does not reach a deal with the EU, the UK must have a trade defence regime in place as of March 2019 or risk UK businesses being damaged".[114]
- The Committee said that witnesses queried the role of the Secretary of State in appointing the TRA's board and whether this could lead to the TRA "becoming ideologically stacked".[115] The Committee agreed with some witnesses that the appointment of the chair and chief executive should be subject to the approval of the Committee. It recommended that the Trade Bill be amended to this effect.
- Whilst the Committee welcomed an announcement that the Secretary of State intended to appoint the first chair of the TRA as soon as possible, it stated that he "would be doing so without the statutory authority that would be conferred upon him by the Trade Bill because it is not yet law".[116] The Committee argued that Parliament should have a say "and there is a particularly strong argument for the appointment to be conditional on a resolution of this Committee that it approves the appointment".[117]
- The Committee expressed concern as to the operational independence of the TRA. Under the Bill, the Secretary of State can publish guidance as to how the TRA performs its functions, on the condition that the Secretary of State has regard to the operational independence of the TRA. The Committee said that it agreed with evidence it heard that legally the phrase 'to have regard to' was difficult "to pin down".[118] It recommended that when issuing a direction to the TRA or publishing guidance, the Secretary of State should publish a written summary outlining how he or she took into account the TRA's operational independence and that this requirement should be reflected on the face of the Trade Bill.[119]
- The Committee believed that nine was a large number of members for the TRA and said that this could make decision making "expensive or cumbersome".[120] It also said there was an argument that particular TRA members should be appointed who represented, or had expertise in, the interests of certain

[114] House of Commons International Trade Committee, *UK Trade Remedies Authority*, 10 May 2018, HC 743 of session 2017–19, p 37.
[115] ibid, p 4.
[116] ibid, p 38.
[117] ibid.
[118] ibid, p 39.
[119] ibid.
[120] ibid, p 4.

groups, giving the example of consumers or trade unions.

- The Committee recommended that the Trade Bill and/or the Taxation (Cross-border) Trade Bill be amended to include provision for a right to appeal decisions of the TRA and Secretary of State to a specialist tribunal in regard to decisions to impose trade defence measures.[121]

In its response to the Committee, the Government stated that there had been significant progress on the UK's trade remedies policies and on the implementation of the TRA and that the Government had been writing to the Committee to keep them updated.[122] In its letter of 11 June 2018, the Government said that it had commenced recruitment of the "the TRA's senior leadership and staff, finalising the location of the TRA and agreeing the appeals process for trade remedies decisions".[123]

The Government said it agreed with the Committee on making sure that the process of public appointments to the TRA safeguarded its independence:

> We agree with the Committee on the importance of ensuring that public appointments are conducted in a way that ensures successful candidates are able to lead an independent TRA. We know that the best way to achieve this is through ensuring a defined public appointments process is followed and regulated effectively.[124]

The Government argued that provisions in the Trade Bill would help achieve this:

> [T]he appointment of TRA Board members is not within the sole discretion of the Secretary of State. As set out in schedule 4 to the Trade Bill, the chair of the TRA will be responsible for appointing executive members of the TRA Board. While the Secretary of State has responsibility for appointing non-executive members, the Trade Bill requires that he or she must consult with the TRA chair before doing so.

The Government said that all public appointments to the TRA would be regulated by the Commissioner for Public Appointments.[125] It expressed the view that it would not be appropriate for the House of Commons International Trade Committee to exercise a statutory power to approve the appointment of the chair of the TRA's board. The Government argued

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[121] House of Commons International Trade Committee, *UK Trade Remedies Authority*, 10 May 2018, HC 743 of session 2017–19, p 40.
[122] House of Commons International Trade Committee, *UK Trade Remedies Authority: Government Response to the Committee's Third Report*, 17 July 2018, HC 1424 of session 2017–19, p 1.
[123] ibid.
[124] ibid, p 6.
[125] ibid.

this was because:

- The TRA chair is a standard ministerial appointment. The Cabinet Office Public Bodies Handbook explicitly states that "Ministers normally appoint the chair and all non-executive members" for non-departmental public bodies […] We are therefore following standard procedure, which states that final decisions on public appointments rest with ministers.[126]
- Decisions on public appointments are for ministers, who are accountable to Parliament and the public for those decisions. If the legislature were to have effectively appointed an individual, this would undermine its ability to scrutinise robustly and independently the actions of the executive.[127]
- [T]he Trade Bill makes clear that the TRA chief executive will be employed by the TRA and will be a public servant—they will not be a public appointee. As such, it would not be standard practice—nor appropriate—to involve the Committee in their recruitment.[128]

The Government said that it had made clear in its advertisement for the role of chair of the TRA that the role would not initially be made on a permanent basis and that when made on such a basis it would be under the powers of the Trade Bill:

> [The advert] made clear that we are initially appointing a 'TRA chair designate' to the Department on a fixed-term basis until the Trade Bill receives royal assent and the TRA is legally established, subject to the will of Parliament. At this point, the fixed-term appointment will terminate and the Secretary of State will be responsible for formally appointing the TRA chair in accordance with his powers under the Trade Bill.[129]

In regard to the operational independence of the TRA, the Government argued that the phrase 'to have regard' was a common approach found in other legislation and that the Secretary of State would have to meet this requirement:

> Such statutory requirements cannot be ignored, and any perceived violation can be held to account through the usual methods. Likewise, the Secretary of State is required to explicitly have regard to the TRA's expertise and the need to protect the TRA's independence,

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[126] House of Commons International Trade Committee, *UK Trade Remedies Authority: Government Response to the Committee's Third Report*, 17 July 2018, HC 1424 of session 2017–19, pp 6–7.
[127] ibid, p 7.
[128] ibid.
[129] ibid.

> impartiality and expertise when publishing guidance or seeking its assistance.[130]

The Government argued that it had "therefore placed clear statutory limits on the Secretary of State's ability to issue guidance to the TRA or seek its assistance".[131] The Government stated that the Trade Bill "already contain[ed] clear requirements outlining the operational independence of the TRA".[132]

On the composition of the TRA, the Government disagreed with the Committee that there was an argument for including members appointed to represent particular groups (such as consumers and trade unions). It argued that:

> The TRA Board is not meant to represent the interests of particular groups. Requiring some TRA Board members to be appointed to represent the interests of particular groups could undermine the TRA's independence and politicise its board.[133]

However, it said it had "held a number of roundtables, bilaterals and technical meetings with stakeholders on trade remedies framework development to ensure they were consulted".[134] The composition of the TRA was the subject of a Labour amendment at the Trade Bill's report stage in the House of Commons, but it was defeated on division. This is discussed further in section 9.4 of this Briefing.

The Government responded to the Committee's recommendation that an appeals process be added to Trade Bill and/or the Taxation (Cross-border) Trade Bill by stating that there would be an appeals process in accordance with WTO rules requiring members to provide a route of appeal in relation to trade remedies decisions[135] and that:

> The Ministry of Justice has confirmed that the appropriate destination for trade remedies appeals will be the Upper Tribunal (Tax and Chancery Chamber), but the final decision as to where such appeals are allocated for hearing is ultimately a matter for the Senior President of Tribunals. Nonetheless, appellants can be confident that their case will be dealt with in an expert, independent and impartial manner.
>
> The Taxation (Cross-border Trade) Bill provides for a power for the

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[130] House of Commons International Trade Committee, *UK Trade Remedies Authority: Government Response to the Committee's Third Report*, 17 July 2018, HC 1424 of session 2017–19, p 10.
[131] ibid.
[132] ibid.
[133] ibid, p 8.
[134] ibid.
[135] ibid, p 12.

> details of the appeals process on trade remedies decisions to be set out in secondary legislation, which will be laid before Parliament as part of the usual scrutiny process.[136]

7. Trade Information (Clauses 11 and 12)

Clause 11 would enable Her Majesty's Revenue and Customs (HMRC) to collect information about UK exporters. Clause 11(1) would allow HMRC to request any person to provide information to assist the Government in establishing the number and identity of those exporting goods and services from the UK in the course of a business, trade or profession. The Government has suggested that it could use this information for trade promotion purposes.[137] The Bill makes no provision to compel people to provide this information and would not impose any penalties for failing to do so. The Explanatory Notes state that "compliance with such a request would be entirely voluntary".[138]

Clause 11(3) would enable the Treasury to make regulations to specify the types of information that could be requested, and how the information should be provided. Clause 11(4) provides that this power could be used to modify primary legislation, making it a Henry VIII power. The Government has stated that this is necessary so that amendments could be made to the Tax Acts to allow corporation and personal tax returns to be amended to include the request for exporter information.[139] Clauses 11(5) and (6) provide that regulations made under clause 11(3) would be subject to the affirmative procedure if they amended or repealed an Act of Parliament, but would otherwise be subject to the negative procedure.

Clause 12 sets out circumstances in which HMRC could lawfully share information with other bodies. The Explanatory Notes to the Bill set out why this provision is needed:

> After leaving the EU, several bodies will need to have access to HMRC data to enable them to carry out functions relating to trade which are currently fulfilled by the European Commission. For example, information will be required by the Department for International Trade and the TRA to conduct trade disputes on behalf of the UK or impose trade remedies. Access to the information will also be required in order to produce trade statistics and for trade research and analysis purposes which can both information the development of evidence-based trade policy and be used to monitor and evaluate its effectiveness […]

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[136] House of Commons International Trade Committee, *UK Trade Remedies Authority: Government Response to the Committee's Third Report*, 17 July 2018, HC 1424 of session 2017–19, p 13.
[137] Explanatory Notes, p 14.
[138] ibid.
[139] ibid.

> This provision is needed in addition to the disclosure of information power in clause 25 of the Taxation (Cross-border Trade) Bill because that power is limited to matters related to customs duty purposes, which does not cover the full scope of the Government's activities.[140]

Clause 12(1) would allow HMRC to share information with public or private bodies in order to facilitate their public functions relating to trade. This would include sharing information with international organisations. Clause 12(2) provides that anyone receiving such information could only use it for the purposes set out in clause 12(1), and could not further disclose the information without permission from HMRC. If information was passed on without authorisation in such a way that allowed an individual to be identified, section 19 of the Commissioners for Revenue and Customs Act 2005, which deals with the offence of wrongful disclosure, would apply (clause 12(3)). This provides for a maximum penalty of two years' imprisonment for such an offence.

8. General Provisions (Clauses 7, 8 and 13 to 16)

Clause 7 provides that regulations under clause 1(1) or clause 2(1) could make different provision for different purposes or areas; make specific or general provision; and could make incidental, supplementary, consequential, transitional, transitory or saving provision. It also provides that regulations under clause 1(1) or clause 2(1) that modified retained EU law could not come into force before exit day, although they could be made before exit day.

Clauses 8 and 13 contain definitions of terms used in the Bill. Clause 14 provides that the Bill would extend to England and Wales, Scotland and Northern Ireland. Clause 15 would enable all the other clauses to be brought into force by commencement regulations. Different days could be appointed for different purposes. Clause 16 sets out the Bill's short title.

9. Commons Stages

9.1 Second Reading

The Bill's second reading took place on 9 January 2018. An Opposition amendment to the second reading motion, criticising the Bill for failing to give Parliament sufficient powers in relation to trade agreements, was defeated by 313 votes to 281, a majority of 32.[141] The Bill was given its second reading by 313 votes to 280, a majority of 33.[142]

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[140] Explanatory Notes, p 15.
[141] HC *Hansard*, 9 January 2018, col 284.
[142] ibid, col 288. A summary of the committee stage debate is available in the House of Commons Library briefing, *The Trade Bill* (2 July 2018).

9.2 Committee Stage

A Public Bill Committee on the Bill sat eight times between 23 January and 1 February 2018. No amendments were made to the Bill during these sessions. The main issues discussed during the committee stage were parliamentary scrutiny, Henry VIII powers, the role of the devolved administrations and the composition of the Trade Remedies Authority.[143]

9.3 Report Stage: Amendments Made

Government Amendments

Report stage took place on 17 July 2018. Government amendments were agreed without division to:

- Add three new clauses to the Bill (now clauses 3, 4 and 5) requiring the Government to report to Parliament on any significant differences between a new UK trade agreement with a third country and the existing trade agreement between the third country and the EU (see section 3.2 of this Briefing).
- Make regulations under clause 2(1) subject to the affirmative procedure (see section 3.2 of this Briefing).
- Shorten the sunset period in clause 2 from five years to three years, renewable by up to three years, instead of by up to five years (see section 3.2 of this Briefing).
- Allow the devolved authorities to modify retained direct EU legislation or retained EU law retained by virtue of section 4 of the European Union (Withdrawal) Act 2018 so long as any modifications (a) fell within devolved competence and (b) were not in policy areas 'ringfenced' by the Government (see section 4.2 of this Briefing).
- Require the devolved authorities to consult with, rather than have to seek the consent of, the UK Government before making regulations under clause 1 or 2 that would come into force before exit day or make provision about quota arrangements (see section 4.2 of this Briefing).
- Allow staff to be transferred from the Department for International Trade to the Trade Remedies Authority (see section 6.2 of this Briefing).
- Clarify the scope of certain powers; to update references to other legislation; or to clarify drafting (see the Appendix to this Briefing for a summary table).

[143] A summary of the committee stage debate is available in the House of Commons Library briefing, *The Trade Bill* (2 July 2018).

George Hollingbery, Minister of State for Trade Policy, said the Government had tabled the amendments to the provisions on implementing trade agreements in recognition of the fact MPs were seeking reassurance the Government would be "transparent about the content of these transitioned agreements and about what might need to change to deliver this continuity".[144] He said these amendments created "what is undeniably a good and robust scrutiny arrangement", "hugely improved" the Bill and gave the House "adequate and deep opportunity to challenge the Government's proposals on any transitioned free trade agreement".[145]

Jonathan Djanogly (Conservative MP for Huntingdon) said the Government's amendments created "a sensible compromise scrutiny system".[146] As a result, he did not move the new clause (new clause 6) he had tabled which would have established a sifting system for regulations implementing trade agreements that were different from the EU trade agreements they replaced. However, he suggested that the detail of the dozens of government amendments and the way that the Trade Bill interacted with the Taxation (Cross-border Trade) Bill "deserve a review" in the House of Lords.[147]

George Hollingbery stated the Government's amendments on the powers of devolved authorities would "reduce restrictions on the powers conferred on devolved ministers" and bring "greater parity" between the powers of UK ministers and devolved ministers.[148] He said that they demonstrated "significant progress" in the Government's discussions with the devolved administrations, and the Government would "continue to engage actively" with them to achieve the agreement of a legislative consent memorandum.[149] Stewart Hosie, SNP Spokesperson for Trade, recognised that the Government had made some concessions, but said they were in a "limited" number of areas and did "not address all the problems" in the Bill.[150]

Non-Government Amendment: European Medicines Regulatory Network Partnership (New Clause 17)

One cross-party backbench amendment was made to the Trade Bill at report stage—new clause 17 (now clause 6 in the Lords version of the Bill) was added. This would make it an objective for the UK to seek to implement an international trade agreement that would allow it to fully participate after exit day in the European medicines regulatory network partnership between the EU, the European Economic Area (EEA) and the European Medicines Agency (EMA). See section 5.2 of this Briefing for further details about this amendment.

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[144] HC *Hansard*, 17 July 2018, col 265.
[145] ibid, col 283.
[146] ibid, col 272.
[147] ibid, col 275.
[148] ibid, col 314.
[149] ibid, col 315.
[150] ibid, col 309.

9.4 Report Stage: Amendments Defeated

Consultation on Trade Agreements (Amendment 19)

Bill Esterson, Shadow Minister for International Trade, moved amendment 19, which would have prevented the Government from making regulations under clause 2(1) to implement an international trade agreement unless the text of the agreement had been subject to consultation with the devolved administrations, representatives of businesses and trade unions and other stakeholders before the agreement was ratified. He noted that the previous day, Liam Fox, the Secretary of State for International Trade, had made a statement setting out the consultation process that would apply to new trade deals the UK planned to negotiate with countries that do not have trade agreements with the EU.[151] Mr Fox had emphasised that this consultation process would not apply to agreements covered by the Trade Bill (ie those with countries that already have a trade agreement with the EU). Mr Esterson argued it was "important" to provide for "proper consultation on any substantive new elements in the 40 trade agreements that we need to replace the EU's existing trade deals".[152]

Amendment 19 was defeated by 315 votes to 285, a majority of 30.[153]

Parliamentary Scrutiny and Approval of Trade Agreements (New Clause 3)

Caroline Lucas (Green MP for Brighton, Pavilion) moved new clause 3, which she said was intended to "remedy the Bill's failure to provide for a proper role for parliamentarians in the scrutiny and approval of trade agreements".[154] It would have required the Government, before beginning negotiations for a free trade agreement, to produce a sustainability impact assessment and to obtain parliamentary approval of a negotiating mandate. It would also have required the Government to publish its negotiating text at each round of negotiations and to make all negotiating documents available to parliamentary committees for scrutiny. The Government would not have been able to sign a free trade agreement without parliamentary approval of the text. The free trade agreement would have had to contain provision for a review of its operation and impact within ten years of signature.

Ms Lucas said the package of measures set out by Liam Fox in his statement on 16 July 2018 relating to consultation on new trade agreements fell "well short of what is required", because it did not cover the replacement deals covered by the Trade Bill and because it "fail[ed] to give Parliament

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[151] HC *Hansard*, 17 July 2018, col 268. Liam Fox's statement is at: HC *Hansard*, 16 July 2018, cols 41–3.
[152] HC *Hansard*, 17 July 2018, col 268.
[153] ibid, col 295.
[154] ibid, col 270.

meaningful oversight of new trade deals".[155] In her view, the process for parliamentary approval of the ratification of treaties set out in the Constitutional Reform and Governance Act 2010 was "an utterly inadequate rubber stamp". She said that her new clause simply "put in place the kind of scrutiny and approval framework that should be required for an accountable trade policy in a modern democratic country".

Bill Esterson said the Labour Party supported new clause 3, which replicated amendments it had tabled at committee stage.[156] Richard Graham (Conservative MP for Gloucester) argued that the requirements of new clause 3 would mean "micromanagement" by parliamentary committees would "run riot" and it would become impossible to conclude any trade deals at all.[157]

New clause 3 was defeated by 314 votes to 284, a majority of 30.[158]

Role and Powers of Devolved Authorities (New Clause 20, New Clause 4 and Amendment 25)

Stewart Hosie, SNP Spokesperson for Trade, spoke to a number of new clauses tabled by the SNP which he said were intended to "ensure that the devolved nations are respected, consulted and fully engaged in trade deals", which he argued was important because "the domestic impact of many trade agreements extends beyond the competence of Westminster".[159] The first of these, new clause 20, would have prevented trade negotiations taking place until a negotiating mandate had been approved by a joint ministerial committee on trade including representatives from the devolved administrations, and by the devolved legislatures. He argued that this would not amount to giving devolved authorities a veto, but would reflect "responsibility for the areas that the devolved governments have responsibility for".[160] He maintained it was "common sense" for the devolved administrations to have a statutory role in trade negotiations.[161]

In response, George Hollingbery said the Department for International Trade was committed to working with the devolved administrations on its approach to the implementation of trade agreements signed after the UK's departure from the EU.[162] He pointed out that Liam Fox had given reassurances the previous day about the devolved authorities' participation in shaping the UK's future trade negotiations. Mr Fox had said the Government would "work closely with the devolved administrations on an

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[155] HC *Hansard*, 17 July 2018, col 271.
[156] ibid, col 267.
[157] ibid, cols 278–9.
[158] ibid, col 286.
[159] ibid, cols 275–6.
[160] ibid, col 276.
[161] ibid, col 277.
[162] ibid, col 284.

ongoing basis to deliver an approach that works for the whole of the UK", including "collaborative policy roundtables", input during the 14-week consultation period for each potential new trade agreement and "subsequent engagement throughout the entire negotiation process".[163]

New clause 20 was defeated by 316 votes to 37, a majority of 279.[164]

Barry Gardiner, Shadow Secretary of State for International Trade, moved new clause 4, which would have required ministers normally to obtain consent from the relevant devolved minister before making regulations under clause 1(1) or clause 2(1) that contained provisions within devolved competence. Mr Gardiner said that the "extent to which the Bill encroaches on matters of devolved competence and undermines the power of devolved authorities is of particular concern".[165] He pointed out that modern trade agreements were "so complex and so extensive" that matters of trade competence crossed over into matters that would normally fall under devolved competence, for example: food standards, animal welfare standards, access to fishing waters, determination of regulatory and oversight bodies and so on. He believed that devolved authorities were "entirely right" to consider that their consent must be sought prior to regulations being made by the UK Government on such matters using the powers under the Bill.[166]

Mr Gardiner argued that Labour's proposed new clause "absolutely and even-handedly respects the devolution settlements and the Sewel Convention".[167] By specifying that ministers would "normally" require the consent of the devolved administrations, he said new clause 4 would "in exceptional circumstances" allow the Government to implement regulations without devolved consent to ensure that the UK complied with its obligations under international trade agreements.[168] In contrast, he said the SNP's new clause 20 and other SNP amendments:

> erred […] by failing to respect the boundaries of the devolution settlement and seeking a power of veto and co-decision in matters that were always reserved to the United Kingdom sovereign Parliament.[169]

In response, Stewart Hosie again refuted the suggestion that the SNP was seeking a veto.[170] He reminded the House that the Government had referred the Scottish continuity bill to the Supreme Court for a ruling on whether it was in the competence of the Scottish Parliament to pass such

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[163] HC *Hansard*, 16 July 2018, cols 41–3.
[164] HC *Hansard*, 17 July 2018, col 292.
[165] ibid, col 304.
[166] ibid, col 305.
[167] ibid, col 304.
[168] ibid, col 305.
[169] ibid, col 304.
[170] ibid, col 305.

legislation. He described this as an "attempt to undermine a democratic decision of the Scottish Parliament" and asserted that to make the principles of devolution work, "there must now be formal arrangements and consent must be sought", rather than a reliance "on the formulation of the UK Government not normally doing x, y or z".[171]

George Hollingbery, Minister of State for Trade Policy, said that new clause 4 was unnecessary as the Sewel Convention was "well established" and the Government had "publicly and repeatedly committed to not normally use the powers in the Bill" to amend legislation in devolved areas without the consent of the relevant devolved administrations.[172] Barry Gardiner accepted Mr Hollingbery was making this commitment "in good faith", but argued that it did not "equate […] with having the security of that commitment in the Bill".[173]

New clause 4 was defeated by 315 votes to 248, a majority of 67.[174]

Stewart Hosie spoke to amendments 25 and 26 which would have prevented the Government making regulations under clause 1(1) or clause 2(1) without the consent of Scottish and Welsh ministers if the regulations fell within devolved competence. He said it was a problem that those powers were "exercisable without any devolved consent being required".[175] He repeated that the SNP was "not seeking a veto", but wanted "the same rights and responsibilities over devolved matters that UK ministers are giving themselves".

Amendment 25 was defeated by 318 votes to 37, a majority of 281.[176] Amendment 26 was not pressed to a division.

Non-Executive Members of the Trade Remedies Authority (Amendment 80)

The Labour Party tabled amendment 80 which sought to provide that non-executive members of the TRA would include representatives of producers, trade unions and each one of the devolved administrations.[177] Amendment 80 was defeated on division by 314 votes to 295, a majority of 19.[178]

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[171] HC *Hansard*, 17 July 2018, col 307.
[172] ibid, col 313.
[173] ibid.
[174] ibid, col 315.
[175] ibid, col 308.
[176] ibid, col 320.
[177] ibid, col 326.
[178] ibid, cols 342–6

Labour's explanatory statement on the amendment described these as "representatives of key stakeholder bodies".[179] Judith Cummins, Shadow Minister for International Trade, argued that the Government had "got it wrong" on the setting up of the TRA and referred to amendments Labour had tabled at committee stage to "establish robust procedures" for appointing non-executive members of the TRA and making it answerable to Parliament. On the sixth day of the Bill's committee stage, Bill Esterson (also Labour Shadow Minister for International Trade) expressed concern that the Government only wanted to champion consumer interests which was why Labour believed that it was important for the TRA to include representatives of producers, trade unions and the devolved administrations.[180] Mr Esterson also argued that there needed to be "an in-built system of checks and balances so that all interests are taken into consideration and all voices are heard".[181] He said Labour believed that these were key stakeholders who would be affected by unfair trading practices and that they should therefore be represented "around the table where decisions are being made that affect the survival of their industries and jobs, and the wellbeing of their communities".[182]

Responding during the committee stage, Greg Hands, then Minister of State at the Department for International Trade, said he wanted to stress that the Government did recognise the importance of these stakeholders in the UK's future trade policy, and it looked forward to ensuring "their views and interests are taken into account where appropriate" during the establishment of the TRA.[183] However, Mr Hands did not believe the amendment was appropriate "to the creation of that new function".[184]

Customs Union (New Clause 18)

An amendment on the possibility of staying in a customs union with the EU, signed by backbench Conservative and Labour MPs, was defeated at report stage. New clause 18 would have made it an objective for the Government to seek to participate in a customs union with the EU if the Government had not managed to reach agreement with the EU by 21 January 2019 on establishing a frictionless free trade area for goods—the Government's proposed model for the UK's future relationship with the EU as set out in the July white paper.

The previous day, Anna Soubry (Conservative MP for Broxtowe) had decided not to move two amendments to the Taxation (Cross-border Trade) Bill that would have imposed a negotiating objective on the Government to remain in the EU Customs Union (new clause 1) or to

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[179] House of Commons, *Consideration of Bill (Report Stage)*, 17 July 2018, p 29.
[180] Public Bill Committee, *Trade Bill*, 30 January 2018, session 2017–19, 6th sitting, col 234.
[181] ibid.
[182] ibid, col 236.
[183] ibid, col 240.
[184] ibid.

remain in a customs union with the EU after Brexit (new clause 12).[185] She said she had made this decision because she wanted to support the Government's July white paper and give the Prime Minister a chance to negotiate with the EU on the basis of the proposals it contained. However, she expressed "profound disappointment" that the Government had decided to accept four amendments to the Taxation (Cross-border Trade) Bill supported by members of the European Research Group (ERG), a group of backbench Conservative MPs.[186] She suggested that two of these amendments "clearly seek to undermine, if not wreck, the great advances made in the white paper".[187] Other MPs also expressed doubts about whether all the ERG proposals were compatible with the white paper, although the Government maintained that they were.[188] All four ERG amendments were subsequently added to the Bill, two of them without division, and two in divisions that the Government won with a majority of three. These amendments are explored in further detail in the House of Lords Library Briefing, *Taxation (Cross-border Trade) Bill* (30 August 2018).

It was in this context that the debate on the proposed new clause 18 to the Trade Bill took place the following day. Moving the amendment, Stephen Hammond (Conservative MP for Wimbledon) said that it was "absolutely in line with the white paper".[189] George Hollingbery, Minister of State for Trade Policy, intervened to say the Government would bring forward an amendment in the House of Lords that "takes in the essence of new clause 18 but removes the defective element relating to the customs union".[190] He said it would instead "restate our intention to establish a customs arrangement with the EU".

Mr Hammond said he was "tempted to accept" the Minister's offer, but suggested instead that the Government should accept new clause 18 and then amend it in the Lords to refer to a customs arrangement instead of a customs union.[191] Referring to the ERG amendments to the Taxation (Cross-border Trade) Bill, he said "we were told [they] did not undermine the Bill, and this does not undermine the Bill either". Mr Hollingbery said the Government could not accept the amendment as it was the Government's policy not to remain part of a customs union.[192]

Nicky Morgan (Conservative MP for Loughborough), another signatory to new clause 18, suggested that the previous day, "some Government

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[185] HC *Hansard*, 16 July 2018, col 85.
[186] ibid.
[187] ibid, col 80.
[188] For further information about the proposals in the white paper and the ERG amendments to the Taxation (Cross-border Trade) Bill, see: House of Lords Library, *Brexit Preparations and Negotiations*, 18 July 2018; and House of Lords Library Briefing, *Taxation (Cross-border Trade) Bill*, 30 August 2018.
[189] HC *Hansard*, 17 July 2018, col 334.
[190] ibid.
[191] ibid.
[192] ibid, col 335.

members chose to try to scupper" the white paper proposals.[193] She argued that new clause 18 was "eminently sensible" and would give the Prime Minister "space for the negotiations".

Judith Cummins, Shadow Minister for International Trade, said Labour supported new clause 18, although the Party believed that the Government "should not waste time on the facilitated customs arrangement", a key proposal in the white paper, which Labour thought was "unnegotiable, undeliverable and unworkable".[194]

New clause 18 was defeated by 307 votes to 301, a majority of six.[195] According to press reports, Conservative whips had suggested that if the Government had lost this vote, it could have triggered a confidence vote in the Government.[196]

9.5 Third Reading

At third reading in the House of Commons, Liam Fox, Secretary of State for International Trade, said this was "an important Bill" that represented the "confident first step that the UK takes towards establishing itself as an independent trading nation for the first time in over 40 years".[197] He described continuity as a key principle of the Bill:

> Despite many misleading claims to the contrary, the Government will not use measures in the Bill to implement substantially different agreements with existing partner countries. Our policy has always been, and remains, one of security continuity first and seeking new opportunities second. We have been clear with our trading partners that continuity remains our primary objective.[198]

He reiterated the Government's commitment that it would not normally use the powers in the Bill in areas of devolved competence without the consent of the devolved administrations.[199]

The Bill was given its third reading by 317 votes to 286, a majority of 31.[200]

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[193] HC *Hansard*, 17 July 2018, col 340.
[194] ibid, col 332.
[195] ibid, col 351.
[196] Steven Swinford, 'The Arm-twisting, 'Dirty Tricks' and Gambles That Helped Theresa May Avert Brexit Defeat', *Telegraph* (£), 18 July 2018.
[197] HC *Hansard*, 17 July 2018, cols 358–9.
[198] ibid, col 360.
[199] ibid, col 361.
[200] ibid, col 362.

Appendix: Further Government Amendments

Section 9.3 of this Briefing covers the government amendments made to the Trade Bill at report stage in the House of Commons that attracted some comment or debate. A number of other government amendments were made at report stage without division and without substantive debate. George Hollingbery, Minister of State for Trade Policy said that many of these were to clarify the scope of certain powers, to update references to other legislation or to clarify drafting.[201]

These amendments are summarised in the table below, which shows the amendment number; which clause or schedule the amendment modified in the Commons version of the Bill (HC Bill 122); in which clause or schedule the amendment is to be found in the Lords version of the Bill (HL Bill 127); and a description of the purpose of the amendment, as set out by the Government in the explanatory statement made when the amendment was tabled.[202] The amendments are listed in the order they were made in the Commons.[203]

No.	To clause or schedule number		Member's explanatory statement
	Commons Bill HC Bill 122	Lords Bill HL Bill 127	
49	Clause 4	Clause 8	This amendment is consequential on amendment 50.
50	Clause 4	Clause 8	This amendment makes clear that a Minister of the Crown and a devolved authority cannot make regulations under clause 1 or clause 2 jointly (except as required by paragraph 5 of schedule 1).
61	Schedule 1	Schedule 1	This amendment makes clear that the usual rule on ultra vires provisions in devolved SIs applies: if one provision is ultra vires it does not follow that the entire instrument is ultra vires.
62	Schedule 1	Schedule 1	See the explanatory statement for amendment 61.
68	Schedule 1	Schedule 1	This amendment removes an unnecessary reference to subsection (5) of section 57 of the Scotland Act 1998.
69	Schedule 1	Schedule 1	This amendment removes an unnecessary reference to subsection (4) of section 24 of the Northern Ireland 1998.

[201] HC *Hansard*, 17 July 2018, col 332.
[202] House of Commons, *Consideration of Bill Amendments as at 17 July 2018*, 17 July 2018.
[203] HC *Hansard*, 17 July 2018, cols 322–5 and 355–8.

76	Schedule 3	Schedule 3	This amendment updates the numbering of the inserted text, following changes to text added by the European Union (Withdrawal) Act 2018.
77	Schedule 3	Schedule 3	See the explanatory statement for amendment 76.
78	Schedule 3	Schedule 3	See the explanatory statement for amendment 76.
31	Clause 1	Clause 1	This amendment is consequential on amendment 32.
32	Clause 1	Clause 1	This amendment provides that the power in clause 1 can be exercised to reflect updates to the list of UK government entities covered by Annex 1 to the UK's Appendix 1 to the 1994 GPA and the Revised GPA.
33	Clause 1	Clause 1	This amendment provides that regulations implementing a modification of Annex 1 can only come into force on or after the day that the modification becomes effective.
34	Clause 1	Clause 1	This amendment makes clear that the power in clause 1 can be exercised to modify retained direct EU legislation. "Retained direct EU legislation" is defined in the Interpretation Act 1978.
35	Clause 2	Clause 2	This amendment is consequential on amendment 53.
40	Clause 2	Clause 2	This amendment makes clear that the power in clause 2 can be exercised to modify retained direct EU legislation. "Retained direct EU legislation" is defined in the Interpretation Act 1978.
41	Clause 2	Clause 2	This amendment makes clear that the power in clause 2 cannot be exercised to confer a power to make subordinate legislation. Amendment 55 includes a definition of subordinate legislation.
43	Clause 2	Clause 2	This amendment is consequential on amendment 52.
48	Clause 3	Clause 7	This amendment puts beyond doubt that amendments purporting to modify retained EU law (which, under the European Union (Withdrawal) Act 2018, will come into being on exit day) can be made before exit day, so long as they come into force on or after exit day.

51	Clause 4	Clause 8	This amendment omits the definition of 'exit day', which is no longer needed now the relevant amendments to the Interpretation Act 1978 made by the European Union (Withdrawal) Act 2018 are in force.
52	Clause 4	Clause 8	This amendment defines "free trade agreement" for the purposes of Part 1. The definition is in the same terms as the current definition in clause 2(7).
53	Clause 4	Clause 8	This amendment defines "international trade agreement" for the purposes of Part 1. The definition is in the same terms as the current definition in clause 2(2).
54	Clause 4	Clause 8	This amendment omits the definition of 'retained EU law', which is no longer needed now the relevant amendments to the Interpretation Act 1978 made by the European Union (Withdrawal) Act 2018 are in force.
55	Clause 4	Clause 8	This amendment defines 'subordinate legislation' for amendment 41.
56	Clause 4	Clause 8	This amendment provides for references in Part 1 to being a 'signatory' to an international trade agreement to be read as covering doing anything that would amount to a consent to be bound by the agreement as a matter of international law. It also provides for references to 'ratifying' an agreement to be read as doing an act that establishes consent to be bound as a matter of international law.
57	Clause 4	Clause 8	This amendment provides for references in Part 1 to anything which retained EU law by virtue of section 4 of the European Union (Withdrawal) Act 2018 (directly effective Treaty rights etc) to catch modifications of the rights etc concerned, as well as the rights etc themselves.
59	Clause 8	Clause 12	This amendment and amendment 60 reflect the fact that the Data Protection Act 2018 has now replaced the Data Protection Act 1998.
60	Clause 8	Clause 12	See the explanatory statement for amendment 59.
79	Title	Title	This amendment is consequential on NC12 [inserts the word "ratification" in the Bill's long title]