



Department for
International Trade

Baroness Fairhead

Department for International Trade
King Charles Street
Whitehall
London
SW1A 2AH

T +44 (0) 20 7215 5000

E fairhead.correspondence@trade.gov.uk

W www.gov.uk

The Rt Hon Baroness Taylor of Bolton
Chair
House of Lords Select Committee on the Constitution
House of Lords
London
SW1A 0PW

Dear Baroness Taylor of Bolton, ^{22nd} January 2019

Trade Bill: Select Committee on the Constitution – 13th Report of Session 2017-19

Thank you for the Report your Committee published on the 15 October 2018 regarding the Trade Bill, which is currently proceeding through the House of Lords.

Your Committee undertakes important work to improve the quality of legislation passed by Parliament, and I am extremely thankful for the consideration that your Committee has given to the Trade Bill. I set out below the Government's response to each of the recommendations that your Committee has made:

Recommendation 1: We recommend the Government include in the Trade Bill the definitions of "retained direct principal EU legislation" and "retained direct minor EU legislation" used in the European Union (Withdrawal) Act 2018.

The Government is thankful for the recommendation made by the Committee to include within the Trade Bill the definitions of "retained direct principal EU legislation" and "retained direct minor EU legislation".

We note that paragraph 22 of Schedule 8 to the EU (Withdrawal) Act amended the Interpretation Act 1978 with the result that all references to "retained direct principal EU legislation" and "retained direct minor EU legislation" in other enactments will now have the same meaning as in the EU (Withdrawal) Act itself.

To bring greater clarity to the Trade Bill, we will bring forward amendments at Report Stage so that the existing references in clauses 1 and 2 to "retained direct EU legislation" are appropriately updated to references to "retained direct principal EU legislation". There are no references in the Bill to "retained direct minor EU legislation".

Recommendation 2: We recommend the Government set out the process for parliamentary consideration of future GPA membership.

The Government agrees with the Committee that it is important that the process for parliamentary consideration of the UK's accession to the GPA as an independent member (rather than participation through its membership of the EU) should be clearly outlined.

The Government has previously made the commitments that it will comply with its legal obligation, under the Constitutional Reform and Governance Act 2010, to offer Parliament the opportunity to scrutinise the UK's accession to the GPA.

We will then use regulations made under the powers sought in clause 1 of the Trade Bill to implement the UK's independent accession to the GPA to make the necessary amendments to domestic procurement regulations.

Recommendation 3: We recommend that the Government introduces an amendment to include in the Trade Bill the restrictions on the use of the clause 2 power set out in the explanatory notes.

The Government notes the concerns of the Committee in relation to the EU (Withdrawal) Act 2018 and the additional safeguards that were added to that legislation to prevent the delegated powers being used, among other things, to impose or increase taxation and fees, to create a relevant criminal offence or to establish a public authority.

However, unlike the EU (Withdrawal) Act 2018, the delegated power within clause 2 of the Trade Bill is drafted in a way so that the presumption is that the power cannot be used to do certain things – such as impose taxes, create new criminal offences or establish new public bodies – unless there is an express provision allowing it to do so.

As a result, the Government feels that it is not necessary, or desirable, to exclude expressly the ability to do so. If accepted, such an amendment would have wider implications for drafting practices and would increase uncertainty when interpreting other laws that do not list such exemptions.

That is why we believe that the explanatory notes to the Bill, which explain the purpose of the provisions contained in the legislation, is the most suitable document to outline the restrictions to the use of the clause 2 power. The Government has been clear, throughout the passage of the Trade Bill through Parliament, about the restrictions around the clause 2 power. The explanatory notes can be used by the Courts to assist in the interpretation of the law. I refer in particular to Lord Steyn, in the case of *Westminster City Council v National Asylum Support Service* [2002] UKHL38, who stated:

*“If exceptionally there is found in Explanatory Notes a clear assurance by the executive to Parliament about the meaning of a clause, or the circumstances in which a power will or will not be used, that assurance may in principle be admitted against the executive in proceedings in which the executive places a contrary contention before a court. This reflects the actual decision in *Pepper v Hart* [1993] AC 593.”*

Recommendation 4: While we recognise the pressing timescales and uncertainties concerning Brexit, in constitutional terms, creating and empowering an important body [the Trade Remedies Authority] in such a manner is inappropriate.

The Trade Bill seeks to establish legally the Trade Remedies Authority (TRA) as an independent body and to set out its governance structures. The detail on the functions and powers of the TRA in relation to the trade remedies framework, which it will operate is found in the Taxation (Cross-Border Trade) Act 2018.

It may help the Committee if I outline the rationale for the approach taken. Trade remedy measures result in additional amounts of import duty being applied to specific goods at the border and form part of the customs duty regime. The trade remedies elements of the Taxation (Cross-border Trade) Act 2018 therefore consist of provisions that relate to taxation. That is why they were included separately in that Act, which was classified by Speaker of the House of Commons as an 'aids and supply' bill. This is consistent with established precedent and follows the practice of the UK prior to entering into the European Economic Community. For example, the Safeguarding of Industries Act 1921, the Customs Duties (Dumping and Subsidies) Act 1957 and the Customs Duties (Dumping and Subsidies) Act 1968 all followed this practice.

However, the establishment of a new public body such as the TRA does not exclusively concern taxation. That is why it is being legislated for separately by the Trade Bill, rather than being included in the Taxation (Cross-Border Trade) Act 2018.

The provisions that establish the TRA in the Trade Bill are consistent with equivalent pieces of legislation that establish a public body. In particular, the TRA is being established directly by primary legislation and the TRA's constitution is provided for by the bill itself. Whilst the Secretary of State would be able to appoint certain members, that is not unusual in the case of a public body and is not a delegation of legislative power.

Public appointments to the TRA will be subject to the Governance Code for Public Appointments and regulated by the Commissioner for Public Appointments.

Recommendation 5: We urge the UK Government and the devolved governments to engage in constructive dialogue to achieve legislative consent on the Trade Bill.

Constructive discussions between the Devolved Administrations and the UK Government on legislative consent for the Trade Bill are ongoing. Legislative Consent Memoranda published by the Governments in Scotland and Wales made a number of recommendations to which the UK Government has responded, and which have been reflected in amendments made at the Bill's House of Commons Report stage and in Ministerial commitments made on the floor of the House. The Government is committed to ensuring that this Bill works for all of the UK and that the essential legal structures that will enable the UK to operate an independent trade policy are in place.


Recommendation 6: We recommend that the Government state whether the existing arrangements of the Joint Ministerial Committee (Europe) for involving the devolved administrations in the negotiation of agreements with the EU will be replicated for trade agreements under the Bill. The Government should also set out how inter-governmental mechanisms will be adjusted to involve the devolved administrations in international relations and treaty-making after Brexit.

The Trade Bill helps to deliver continuity in the UK's trade relationship as we leave the EU. The benefits of our existing trade relationships have been enjoyed across all parts of the UK. Consequently, the Government seeks to maintain their positive benefits across all parts of the UK. The Bill is clear that its provisions can only be used to ensure continuity of trade agreements that already exist before EU exit. As the Bill is concerned with continuity, we do not consider that a Joint Ministerial Committee specifically for these agreements would be appropriate or necessary.

On future trade agreements, we have committed to ensuring that the Devolved Administrations are able to inform the government's approach to negotiations. The Department for International Trade is currently reviewing the appropriate structures and mechanisms by which to achieve this.

The Government is aware of activity in both Houses on this issue, including the Constitution Committee's inquiry into parliamentary scrutiny of treaties. The House of Commons International Trade Committee released a report on 28 December which made detailed recommendations on the role Parliament should have. We are considering their recommendations seriously and will return to the House with further detail on this.

More widely, the UK Government recognises the need to review the existing inter-governmental structures, including the Memorandum of Understanding, to ensure they are fit for purpose in light of the UK's exit from the EU. UK Government officials are working closely with counterparts in the Devolved Administrations to take this work forward.

Yours sincerely


Baroness Fairhead

Minister of State for Trade and Export Promotion

Department for International Trade