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The Civil Society Brexit Project: *Information*

BREXIT AND THE TRADE BILL

About the Civil Society Brexit Project

The Civil Society Brexit Project is a collaboration between the **Scottish Universities Legal Network on Europe (SULNE)** and the **Human Rights Consortium Scotland**, funded by the **Legal Education Foundation**. We give information, insight and independent advice to make sure that organisations in Scotland are able to influence Brexit as much as possible. The Project will also help organisations to prepare for Brexit consequences for themselves or their beneficiaries.

www.hrcscotland.org/brexit

Who is this Civil Society Brexit Project: *Information* for?

This briefing is written for civil society organisations working in Scotland. For more information, contact hrcscotland@gmail.com

The Trade Bill

As a Member of the EU customs union and of the single market, the UK does not have an independent trade policy. Instead, this is “largely determined by the EU.” By dint of its membership of the EU, the UK is party to a large number of trade agreements and is represented at the World Trade Organisation (WTO) by the EU. Upon the exit of the UK from the EU, responsibility for trade agreements and policy will return to the UK.

As part of the process of preparing for exit from the EU and in respect of matters relating to trade, the government introduced a Trade Bill in November 2017. The Bill aims to ensure continuity of its existing trade relationships with countries with which the EU has an existing trade agreement. The Trade Bill does not, however, deal with new trade agreements or with future UK-EU relations. The Trade Bill has cleared the House of Commons and will be debated by the House of Lords in September 2018.

What are the aims and functions of the Trade Bill?

The ‘roll over’ of provisions of existing trade agreements of which the UK is already a party through its membership of the EU.

- The EU is currently party to around 65 trade agreements. The UK will cease to be a party to these agreements when it leaves the EU (though see Article 124 (1) of the draft Withdrawal Agreement between the UK and the EU).
- **The UK Government’s aim is to ensure continuity in its existing trade agreements.** This will require replication, as far as possible, of the existing terms of trade agreements to which the UK is currently a party through its membership of the EU. While these agreements will be similar to the current EU-third country agreements, “they will, nevertheless, be legally distinct.”
- Clause 2 (1) of the Trade Bill enables secondary legislation to be used to secure the implementation of trade agreements, provided they were signed before exit day. According to the Delegated Powers Memorandum, “The power is broad enough to allow implementation of substantial amendments, including new obligations.”

BREXIT AND THE TRADE BILL

- The Clause 2 power will be used where changes are needed to a trade agreement or it has not been fully implemented prior to exit day. It is anticipated that certain existing trade partners may ask for changes to be made to existing agreements. In any case, in respect of free trade agreements, rules of origin will need amended. Clearly, a simple ‘copy and paste’ of existing agreements is unlikely.
- The type of trade agreement covered by the Trade Bill includes not only free trade agreements (as defined under WTO law) but also “an international agreement that mainly relates to trade, other than a free trade agreement” (Clause 8 (1)). This definition is undoubtedly vague, and indeed somewhat broad, but it is clear from the Explanatory Notes that it includes ancillary agreements such as mutual recognition agreements. **The expansiveness of this definition is potentially problematic as a large number of agreements could potentially fall within its scope.**
- Parliament needs to be informed where these Clause 2 (1) powers are exercised to implement the provisions of a free trade agreement. A report detailing any significant differences – as well as the reasons for such differences – between the trade-related provisions of the existing free trade agreement and the trade-related provisions of the agreement to be implemented must be laid before Parliament at least 10 Commons sitting days before the draft of the statutory instrument is introduced (Clause 5 though see Clause 3 (3)). This reporting obligation is quite narrow; it applies only in respect of the “trade-related provisions” of the proposed agreement (Clause 5 (2)). A similar reporting obligation exists under Clause 3 where a proposed free trade agreement with an existing pre-exit day partner needs to be ratified. This reporting requirement does not apply in exceptional cases (Clause 4).
- The reporting obligation outlined above does not, however, require the sort of ‘explanatory statements’ on appropriateness and equalities applicable to certain delegated legislation enacted under the European Union (Withdrawal) Act (Schedule 7, para 28). **Accordingly, as it currently**

stands, delegated legislation enacted under the Trade Bill would potentially be subject to a different and less rigorous procedure than that applicable under the European Union (Withdrawal) Act 2018.

- Of note is that the powers set out under Clause 2 (1) of the Trade Bill only apply to non-tariff measures (Clause 2 (4)). Tariffs and related measures will be dealt with by the Taxation (Cross-Border Trade) Bill (the so-called Customs Bill).
- While it was initially expected that the UK would aim to transition existing trade agreements to take effect on exit day, the draft Withdrawal Agreement between the UK and the EU anticipates that the UK will be treated as if it were an EU Member State for the purposes of trade agreements during the transition period (Article 124 (1)). Such an arrangement is, however, reliant upon the final terms of the Withdrawal Agreement being agreed between the UK and the EU. In any case, the time limit for regulations to be enacted under Clause 2 (1) is three years from exit day though this period may be extended for periods of up to three years (see Clause 2 (7) and (8)).

Membership of the WTO Government Procurement Agreement

- Clause 1 of the Trade Bill provides powers for the UK to make the legislative changes necessary to enable it to become a member of the WTO Government Procurement Agreement (GPA) in its own right. The GPA is a WTO agreement between the EU and 18 other countries which aims to, ‘mutually open government procurement markets among its parties.’ The UK is currently a member of the GPA through its membership of the EU and so requires to, in effect ‘re-join’ as an independent member.
- This aspect of the Trade Bill is only subject to negative procedure -that is, it is not given full parliamentary scrutiny and debate.

Establishment of the Trade Remedies Authority

- The Bill seeks to establish a Trade Remedies Authority (TRA). Trade remedies may be employed by countries to counteract unfair trade practices

such as dumped or subsidised imports. After Brexit, the UK will require to conduct its own investigations so as to implement trade remedies such as countervailing duties and anti-dumping duties.

- The Trade Bill, which should be read in conjunction with the Customs Bill, provides detail on the composition and function of the TRA.

A system for the collection and disclosure of trade information by HMRC

- The Trade Bill would also permit the HMRC to collect and share trade information in certain circumstances (Clause 11 and Clause 12).

What concerns, if any, have been raised regarding the Trade Bill?

Numerous concerns have been expressed regarding the Trade Bill. These concerns very much echo the wider debate regarding the UK's trade policy post-Brexit. Question marks remain, for example, surrounding the use of delegated powers, the involvement of Parliament in the development of trade policy, as well as the role of devolved administrations and civil society more generally in shaping such policy.

Extent of powers

- There is considerable concern about the extent to which secondary legislation could be used to modify retained direct EU law as well as primary legislation that is retained EU law (see Clause 2 (5) (a)). This could include key areas of social policy. As noted by the [Equality and Human Rights Commission](#), primary legislation could be amended that, “contain(s) many fundamental rights, among which are likely to be: worker’s rights, rights concerning information privacy and data protection, equality and non-discrimination, rights and responsibilities to act in the best interests of children, rights of older people, the inclusion of disabled people, access to health, education and social protection, consumer rights, environmental protection and rights to protection against trafficking, slavery and forced labour.”

Parliamentary scrutiny

- The Trade Bill has been the subject of extensive criticism regarding the proposed lack of parliamentary scrutiny. For example, it was initially proposed that secondary legislation on changes to trade agreements would only be subject to negative procedure. Under the negative procedure, a statutory instrument will become law without debate and will only cease to be law if there is an objection from a House within a specified time. Use of this scrutiny-light procedure was justified on the basis that existing trade agreements had already been subject to extensive scrutiny. However, this flew in the face of the acknowledgement that the Clause 2 (1) powers were “broad enough to allow implementation of substantial amendments, including new obligations.” An amendment was therefore introduced and accepted at the Commons to ensure regulations are subject to greater scrutiny through use of the affirmative procedure, whereby both Houses have to actively agree to the regulations.
- **The introduction of the affirmative procedure does not, however, remedy the fact that parliamentary scrutiny comes at the end – rather than the beginning – of the negotiating process.** There is nothing within the Trade Bill on Parliament’s role in respect of setting negotiating mandates. The Trade Bill is also silent on scrutiny throughout the negotiating process of relevant agreements. As a response to such concerns, a new Clause 3 to the Bill was proposed by Caroline Lucas MP. This would have required a sustainability impact assessment to be conducted in respect of all free trade agreements. The significance of this proposal stems from the fact that modern trade agreements cut across areas such as labour law and environmental law. Accordingly, existing protections in these areas may potentially be at risk to the extent that concessions are sought from existing trade partners. The proposed amendment would also have provided a much more substantial role for Parliament in the scrutiny of negotiations of agreements and in giving consent to such agreements. This amendment was, however, defeated in the Commons.

Devolution aspects

- Similar to above, there is also nothing in the Trade Bill about the Scottish Parliament's role or contribution in respect of setting negotiating mandates or scrutinising throughout the negotiating process. Treaty making and trade are by and large reserved areas, though many aspects impact upon devolved competencies.
- As with the European Union (Withdrawal) Act, the Trade Bill also raises complex and sensitive issues of devolved competence. In that regard, the restrictions to legislative competence introduced by the European Union (Withdrawal) Act are largely mirrored in the Trade Bill – you can read more in the Civil Society Brexit Project briefing on this Act here. The legislative competence of the devolved authorities under the Trade Bill is also significantly narrower than that of UK Government Ministers. The Scottish Government has recommended that Parliament withhold legislative consent in respect of the Bill (as it was originally introduced).

What happens next?

The Trade Bill has cleared the House of Commons and will be debated by the House of Lords in September 2018. A number of amendments which were not considered during the Commons stage will likely be considered by the Lords. Devolution issues and parliamentary scrutiny are likely to be to the fore of debate in the Lords.

The Scottish Parliament Finance and Constitution Committee has also taken evidence on a legislative consent motion for the Trade Bill and is expected to publish their conclusions in Autumn 2018.

Stephanie Switzer



WHERE CAN I GET MORE INFORMATION?

If there is any aspect of the briefing or a particular issue around Brexit where you would like more detailed advice or information, we are happy to help! Please get in touch with us at hrcscotland@gmail.com

There is also information available online at www.hrcscotland.org/brexit