

# The Trade Bill

## Constitutional implications and recommendations

- Modern trade deals cover vast areas of public policy that would normally be reserved for Parliament – from food standards to working conditions to the provision of healthcare. They can undermine policy space, at home and in developing countries.
- Up until now, most of the scrutiny and ratification powers over trade deals have been held by the EU institutions. After leaving the EU these powers will be returned to the UK. However, the Trade Bill does not transfer these powers to MPs and Peers who are accountable to the electorate, but rather retains them for Whitehall, creating a democratic deficit.
- The Trade Bill allows Whitehall sweeping powers to amend retained primary legislation in the name of implementing trade deals without due scrutiny.
- While the Bill focuses on replacing EU deals, these will be legally distinct and in practice will be new unscrutinised deals. What's more, entirely new negotiations will be de facto covered by these procedures and no further legislation has been promised.
- We are calling for the Trade Bill to be amended to give Parliament the powers to scrutinise and approve trade deals, as is common in most of our major trade partners.

### Introduction

The Trade Bill will shortly be entering the House of Lords. A broad range of civil society organisations are deeply concerned that, as it stands, this Bill gives the executive vast powers over trade policy. This concerns us because modern trade deals cover broad swathes of public policy which should clearly fall under Parliament's constitutional remit. The Trade Bill would leave the British Parliament with substantially less power over trade policy than currently applies to the EU Parliament and other potential trading partners including the US Congress.

### Trade deals impinge on Parliament's remit...

Modern trade agreements affect many aspects of life, from jobs and environmental protection to public service provision and food safety standards, both in the UK and across the world. They are no longer simply about the level of tariffs charged on goods crossing borders, although these are still significant for some sectors and countries. Trade deals nowadays entail many areas of domestic public policy which would usually be subject to parliamentary scrutiny and debate. Comprehensive trade deals such as the recently abandoned Transatlantic Trade & Investment Partnership (TTIP – EU-US), include very broad areas of public policy including: public services and

government procurement liberalisation, regulatory changes on food, chemicals and medical safety, intellectual property and regulation of international businesses operating in the UK.

Trade deals are legally binding instruments and can subject the government to supra-national arbitration mechanisms. They can also directly impact on many areas of public policy, including industrial, environmental, health, food safety, international development, employment, energy and beyond. This can involve encroaching into areas of devolved responsibility, and may affect wider governance norms. The precautionary principle requires products to be proved safe before being sold, rather than allowing them to be sold until any harm is found. This is one example of an important norm which could be overturned not as a result of democratic debate and parliamentary decision, but as the result of a trade rule negotiated behind closed doors by ministerial decree.

In other words, trade deals can cover many areas of public policy normally reserved for Parliament. Given this, parliamentary sovereignty demands that parliamentarians have oversight of trade policy.

### **... but Parliament lacks the power to scrutinise, amend or stop trade deals**

Under existing UK rules, trade deals are entirely negotiated under the royal prerogative. Using its prerogative powers, Whitehall is able to decide when and who to start negotiations with, decide its own priorities and objectives, conduct negotiations, usually in great secrecy, and conclude and sign the eventual deal.

There is no requirement to consult the public and civil society and no role for Parliament until after the deal is signed.

At the very end Parliament is asked to ratify the deal in a procedure dating from the 1920s which is codified in the Constitutional Reform and Governance Act 2010. However this is merely a negative procedure, and there is no clear mechanism for Parliament to pass a motion against ratification within the required 21 sitting days – it would need to be done in either government or opposition time and there may well be no opposition day debates scheduled within the time

limit.<sup>1</sup> Even if a motion against ratification can be passed, the government then just has to explain why they nevertheless wish to go ahead, and the process repeats. Thus Parliament cannot outright reject a trade deal, but can only delay it for a short while – and only if debating time can be secured.

In the meantime, the deal may be being provisionally implemented in advance of ratification. This is the case currently with CETA (Comprehensive Economic & Trade Agreement) between the EU and Canada.

Some provisions of trade deals can require the passage of additional pieces of implementing legislation. This has traditionally been seen as a checks and balances mechanism providing Parliament with a role in debating and approving trade deals. However many provisions of trade deals, including some of the most far-reaching and contentious ones, do not require any implementing legislation. For instance, one of the most controversial aspects of trade deals like the TTIP and CETA is the inclusion of investor protection mechanisms that allow foreign investor to sue governments for ‘unfair’ practices outside of the national legal system. These mechanisms do not require legislation, which means that under current procedures they can be put into effect without parliamentary debate or approval, binding future governments.

### **What needs to change post-Brexit?**

As part of the EU, Parliament delegated most of its scrutiny power for trade policy to the European institutions. When the Trade Bill was first announced, there was an expectation that these powers would be returned to Parliament, as outlined in the Prime Minister’s Florence speech. The Trade Bill was supposed to put in place the “essential and necessary legislative framework to allow the UK to operate its own independent trade policy.”<sup>2</sup> A vital part of this is the development of appropriate accountability and scrutiny mechanisms that give Parliament adequate power to oversee something as far-reaching as modern trade policy. However, instead power over trade policy is being placed solely in the hands of ministers.

As part of the scrutiny framework within the EU, the European Commission is required to do scoping of potential negotiations and get a mandate for negotiations from the European Council. During negotiations the European Parliament has a right to be kept informed of developments in sufficient time for their views to be taken into account and the Commission has gradually committed to increased transparency. At the end of negotiations, the European Parliament's consent to signing the deal is required through an affirmative vote. For some trade deals, all 40 recognised parliaments in EU member states must also ratify the deal.

The EU framework has many limitations, but it at least provides a minimum level of scrutiny that should be maintained post-Brexit. Unfortunately the Trade Bill fails to do that, and leaves Parliament with essentially no powers over the renegotiation of EU trade deals or the negotiation of trade agreements with new trade partners.

Even the scrutiny power that Britain did retain for Parliament (which falls short of that which other EU member states' parliaments exercise) will be lost - that of the EU Scrutiny Committee.

In effect, powers within the EU framework are being concentrated in the hands of Whitehall officials. Parliament is left only with procedures for trade policy that have not been updated in the decades since we joined the EU. These are entirely inadequate for oversight of what trade deals have become in that time.

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The government suggests that the Trade Bill sidesteps these constitutional issues by claiming only to be concerned with already ratified EU-based trade deals. The claim is that 'translating' these deals into UK deals post-Brexit is a technical exercise akin to the regulatory continuity attempted by the EU Withdrawal Bill. Therefore, Parliament's role is unimportant in this process because scrutiny has already taken place, both at EU level and via the EU Scrutiny Committee. The reality is more complex, and, as with the EU Withdrawal Bill, the powers which the executive accrues to itself should be challenged.

Of equal concern is the sweeping authority that the Trade Bill gives to Whitehall, under clause 2, to amend primary retained law for the purpose of implementing an international trade agreement. This could include fundamental rights and consumer protections impacting across society.

We believe these constitutional issues around parliamentary scrutiny and accountability need to be tackled now, in this Trade Bill, for four key reasons:

- 1) **The government has not committed to any future comprehensive legislation on trade** that would put in place such a scrutiny framework. There has been mention of vehicles for individual future deals and proposals for consultation but not of overarching legislation. This bill is the only place to introduce this.
- 2) **Replacement EU trade deals will in effect be new deals** and will not be like for like. The government's own explanatory notes for the Trade Bill (para 53) acknowledge that replacement deals will be legally distinct and may be substantively amended.<sup>3</sup> At the time of writing, three countries have been publicly reported as saying they want to renegotiate – South Korea, Chile and South Africa. The changes require scrutiny – and if a particular deal does end up being directly equivalent, then the process does not need to be onerous.
- 3) In addition, **some of the most recent EU deals have not completed the scrutiny and ratification processes**, while others such as Economic Partnership Agreements (EPAs) have been controversial and contested.
- 4) **The government is already preparing potential trade deals** with additional countries. The US is the highest profile of these and at the time of writing two meetings of the working group between the US and UK have taken place. As things stand parliamentarians have no right to know any details of these meetings, or of government priorities. What's more the government has not laid out any framework or principles for conducting these working groups.

If passed unamended, the Trade Bill will set no guidelines for the conduct of trade policy or the principles or norms by which government positions must abide.



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## Constitutional implications and recommendations

### What are we calling for?

We are calling on Parliament to amend the Trade Bill to ensure that all future trade deals negotiated by the UK are subject to:

- The right of Parliament to set a thorough mandate to govern each trade negotiation, with a remit for the devolved administrations
- The right of the public to be consulted as part of setting that mandate
- Full transparency in negotiations
- The right of Parliament to amend and to reject trade deals, with full debates and scrutiny guaranteed and a remit for the devolved administrations
- The right of Parliament to review trade deals and withdraw from them in a timely manner

### What do other countries do?

Most developed countries incorporate many of these elements into their trade negotiation process. Elements of the EU's framework are outlined above. The US Government must undertake meaningful public consultations before negotiating, release all negotiating texts to a large representative panel and subject deals to an affirmative vote by Congress. Congress is also entitled to amend deals, unless it waives this right.

We would be happy to share our wider comparative study: [https://www.tjm.org.uk/documents/reports/TJM\\_SecuringDemocracyInUKTradePolicy\\_2017\\_web.pdf](https://www.tjm.org.uk/documents/reports/TJM_SecuringDemocracyInUKTradePolicy_2017_web.pdf)

### References

- <sup>1</sup> House of Commons Library, *Parliament's role in ratifying treaties*. Briefing paper 5855, 2017, pp12-13, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05855>
- <sup>2</sup> *The Queen's speech and associated background briefing on the occasion of the opening of Parliament on Wednesday 21 June 2017*. p12, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/620838/Queens\\_speech\\_2017\\_background\\_notes.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/620838/Queens_speech_2017_background_notes.pdf)
- <sup>3</sup> *Trade Bill: explanatory notes*. House of Commons, 2017, p10 <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0122/en/18122ennew.pdf>



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