



BRIEFING PAPER

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The Taxation (Cross-border Trade) Bill

By Dominic Webb,
Lorna Booth, Jack
Simson Caird,
Richard Kelly and
Antony Seely

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Summary

Introduction

This Commons Library briefing analyses the [Taxation \(Cross-border Trade\) Bill](#) which was published on 20 November 2017. The Bill is sometimes referred to as “the Customs Bill”. The Bill is one of a series of “Brexit Bills” intended to adjust UK legislation for Brexit, in addition to the [European Union \(Withdrawal\) Act \(EUW Act\)](#). Together with the [Trade Bill](#), this Bill is intended to allow the UK to continue its existing trade policy as far as possible immediately after Brexit.

The purpose of the Bill is to allow the Government to create a functioning customs, VAT and excise regime for the UK after Brexit. The Bill also contains trade defence measures to protect UK industry from unfair competition from abroad and provisions on trade preferences which allow imports from developing countries to benefit from reduced customs duties. The Bill follows publication of a [Customs White Paper](#) in October 2017 and a [Future Partnership Paper](#) on customs in August 2017.

The founding resolutions for the Bill were debated on 20 November 2017. The Bill received its Second Reading in the House of Commons on 8 January 2018 and its Committee Stage between 23 January and 1 February. The Bill was not amended at Committee Stage. The remaining Commons stages of the Bill will take place on Monday 16 July 2018. A number of amendments have been put forward for Report Stage, including some on the issue of the customs union. There is further information on the customs union issues in a separate Library Briefing Paper, [Brexit: Customs and Regulatory Arrangements](#).

Customs duties

Customs duties are taxes on imports. They are sometimes referred to as tariffs or import duties. As an EU Member State and part of the EU Customs Union, the UK’s customs duties are set by the EU. There are no customs duties on trade between EU Member States and EU Member States operate a common external tariff on imports from outside the EU. Customs policy is an exclusive competence of the EU.

The Government has set out two options for future customs arrangements with the EU: a ‘customs partnership’ and a ‘highly streamlined customs arrangement’. Under the customs partnership, the UK would apply the EU’s tariffs on goods imported into the UK but intended for onward shipment to the EU. The UK would set its own tariffs on imports intended for the UK market. The highly streamlined customs arrangement or ‘maximum-facilitation’ (‘max-fac’) option relies on technological solutions and ‘trusted trader’ schemes to make trade with the EU smoother. At the time of writing (early July 2018), the Cabinet was considering a third customs plan. A Brexit White Paper is expected to be published very soon.

There is relatively little domestic UK law on customs. Most of the rules are in EU law which is directly applicable in the UK. The Customs White Paper explained that “the powers in the *EUW Act* to deal with deficiencies arising from withdrawal and to implement the withdrawal agreement cannot be used to impose or increase taxation, which includes customs duties, excise or VAT.” New primary legislation is required.¹

¹ HM Treasury, [Customs Bill: legislating for the UK’s future customs, VAT and excise regimes](#), Cm 9502, October 2017, para 3.1

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The Bill will allow the Government to create a standalone UK customs regime by ensuring that the UK can, for example, charge customs duty on goods, define how goods will be classified to determine the amount of duty to be paid and set rates of customs duty.

The Bill is being presented before the outcome of the negotiations with the EU is known. It is therefore designed to be flexible enough to accommodate a range of negotiated outcomes, including an implementation or transitional period, but also a “no deal” scenario.

The Government’s intention is that the new UK customs regime should operate in a similar fashion to the current EU system, in order to provide continuity. The Government is aiming for trade with the EU to be as frictionless as possible. This will, however, depend on the outcome of negotiations with the EU. Depending on the outcome of these negotiations, businesses which currently trade only with the EU may face customs duties and related customs procedures for the first time. The Bill will allow for divergence from EU law where the Government believes this is necessary or there is an economic benefit.

Trade defence

Trade defence measures (sometimes referred to as trade remedies) allow a country to take steps against unfair competition from dumped or subsidised imports. Trade remedies often take the form of additional tariffs, over and above the standard tariff, imposed on the dumped or subsidised goods. These are referred to as anti-dumping and anti-subsidy (or countervailing) duties.

The trade remedies regime is currently implemented at EU level. The EU has over 100 measures in place and has taken action against imports of steel from China, for example.²

The Bill puts in place a UK trade remedies system to carry out investigations into allegations of dumping and subsidy and to propose remedies. This new UK system will replace the EU system and will be implemented by new public body, the Trade Remedies Authority (TRA). The *Trade Bill* establishes the TRA.

The Government’s approach to trade remedies was set out in the Trade White Paper. This said that the Government was a supporter of free and fair trade. It noted that trade remedy measures “form an important part of a rounded trade policy” and can be used to ensure fair trade.³ The White Paper also said that the trade remedies regime would need to take into account the interests of both the domestic industry affected by any dumped or subsidised imports and the users of these products whose costs would be increased by trade remedy measures.

Some industry groups have criticised the Bill. For example, UK Steel, which represents an industry which has been particularly affected by dumping, said that the Bill “as currently drafted falls seriously short of what the steel industry, and many other UK industries, are seeking.” Concerns have also been expressed about the lack of detail in the Bill and whether it will offer the same protection as the EU regime. There is also the issue of whether current EU trade defence measures will continue to apply to the UK after Brexit. The Government wishes to continue those which matter to UK businesses and has issued a call for evidence. There are differing views on the ease of “grandfathering” the EU trade defence measures.

² European Commission, [Anti-dumping, Anti-subsidy and Safeguard statistics covering the first month of 2018](#), 16 February 2018

³ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, p34

The International Trade Committee published a report on the TRA in May 2018. This said that the Bill (and the *Trade Bill*) lacked detail. The Committee also made a number of recommendations, including amendments to the Bill.⁴

Trade preferences

The Bill would allow the UK to put in place its own system of trade preferences for developing countries, replacing the EU system that currently applies. This would allow the UK to continue to apply reduced tariffs to certain goods when they are imported from these countries. The Bill also allows for trade agreements with developing countries to replace those that the EU has. The value of these arrangements to certain developing countries and sectors is substantial. It has been estimated that the value of the current trade preferences scheme to the Least Developed Countries alone is around £323 million per year.

VAT and excise duties

Taxation is very largely a Member State competence. The major exception to this generalisation is indirect tax: primarily VAT – for which there is a substantive body of EU law establishing common rules across Member States – and, to a lesser extent, excise duties (duties charged on alcoholic drinks, hydrocarbon oils and tobacco products). It has long been recognised that the harmonisation of indirect taxes across Member States is an essential element to the achievement of an effective Single Market. The Bill provides for the EU concept of acquisition VAT (for business-to-business intra-EU movements) to be abolished so that import VAT is charged on all imports from outside the UK. In addition it will allow the VAT and excise regimes to continue to function whatever the outcome of the negotiations.

Delegated powers

The Bill gives the Government considerable powers to use secondary legislation (including a number of Henry VIII powers). The Treasury has published a [Delegated Powers Note](#) (174 pages long) which sets out the parts of the Bill which confer such powers and an explanation of why this has been proposed. All of the Parliamentary procedures set out in the Delegated Powers Note are for the House of Commons only as the Bill is about taxation.⁵

The Government argues that “framework” primary legislation with supplementary secondary legislation is usual practice for indirect taxation. The arrangements need to be flexible enough to deal with different circumstances and respond to changes. The precise detail of some provisions may not be known until the UK’s future relationship with the EU is clarified. Furthermore, the Government argues that secondary legislation is appropriate for the customs tariff, due to its size. The EU customs tariff contains more than 17,000 different goods and around half a million separate customs codes are needed once reduced tariffs for certain trading partners are taken into account.⁶

The House of Lords Delegated Powers and Regulatory Reform Committee published a report on the Bill in January 2018.⁷ This raised a number of concerns about the use of delegated powers and described them as a “massive transfer of power from the House of

⁴ International Trade Committee, [The UK Trade Remedies Authority](#), 10 May 2018, HC 743, 2017-19

⁵ [Taxation \(Cross-border Trade\) Bill Delegated Powers Note](#), para 11

⁶ [Taxation \(Cross-border Trade\) Bill Delegated Powers Note](#), paras 6,7 and 14

⁷ Delegated Powers and Regulatory Reform Committee, [11th Report of 2017-19](#), 17 January 2018, HL Paper 65

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Commons to Ministers of the Crown”.⁸ The Committee made a number of recommendations, including less use of the “made affirmative” procedure, use of an affirmative rather than a negative procedure in a number of clauses and the use of sunset clauses. The report was also critical of the use of public notices to make law, describing this as “highly unusual” and saying that “such provisions should attract strict surveillance by Parliament”.

The House of Lords Constitution Committee has also published a short report on the Bill.⁹ This noted that the Bill raised “significant and novel concerns”. It also said that while Brexit may require complex legal changes to be implemented quickly and flexibly, “even in light of this, the discretionary powers in the Bill are overly broad and subject to limited Parliamentary scrutiny”.¹⁰

Similar concerns were raised by UK Steel. It said that the Bill will mean that “key aspects of the UK’s trade legislation will evade proper Parliamentary scrutiny”.¹¹

⁸ Delegated Powers and Regulatory Reform Committee, [11th Report of 2017-19](#), 17 January 2018, HL Paper 65 para 4

⁹ Constitution Committee, [Taxation \(Cross-border Trade\) Bill](#), 23 February 2018, HL Paper 80, 2017-19

¹⁰ Constitution Committee, [Taxation \(Cross-border Trade\) Bill](#), 23 February 2018, HL Paper 80, 2017-19, paras 3 and 5

¹¹ UK Steel, [UK Steel Response to the Taxation \(Cross-border Trade\) Bill](#), November 2017, p2

1. Introduction

The [Taxation \(Cross-border Trade\) Bill](#) was introduced into the House of Commons on 20 November following a [debate on a Ways and Means resolution](#). The Bill received its second reading on 8 January 2018 and was considered in committee between 23 January and 1 February. No amendments were made to the Bill at Committee Stage (see section 8) but a number of amendments have been proposed for Report Stage, including on the customs union. There is further information on the customs union issues in a separate Library Briefing Paper, [Brexit: Customs and Regulatory Arrangements](#). The remaining Commons stages of the Bill will take place on Monday 16 July 2018.

The Bill, together with the [Trade Bill](#), aims to allow continuity in UK customs and trade policy after Brexit. A separate [Library briefing](#) has been published on the [Trade Bill](#). The Bill is one of a series of “Brexit Bills”, in addition to the [EUW Act](#) intended to prepare the UK’s statute book for Brexit.

The Government has also published:

- [Explanatory notes](#)
- [Delegated Powers Note](#)
- [Impact Assessments](#)

The main purpose of the Bill is to legislate for a new UK customs regime. This needs to be in place by March 2019. The future customs relationship with the EU is not yet known. This will depend on the outcome of the Brexit negotiations. The Bill is designed to be flexible enough to deal with a range of outcomes from the negotiations, including a transitional agreement and a scenario in which no deal is reached.¹²

1.1 Consideration by Parliamentary Committees

Two House of Lords Committees (the Constitution Committee and the Delegated Powers and Regulatory Reform Committee) have published reports raising concerns about the Bill. Issues raised by the Delegated Powers and Regulatory Reform Committee are discussed in section 7 below. The Constitution Committee highlighted two areas of concern (also identified by the Delegated Powers and Regulatory Reform Committee). The first of these was use of the “made affirmative” procedure. The Committee recognised that this may be appropriate in a limited number of urgent cases but were concerned that it was being proposed in the Bill “for non-urgent reasons as a convenient means of executive law-making”.¹³ The second area of concern was the use of

¹² [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 2

¹³ Constitution Committee, [Taxation \(Cross-border Trade\) Bill](#), 23 February 2018, HL Paper 80, 2017-19, paras 3 and 5

legislating by public notice with the Committee describing this “broad and subjective power” as “not constitutionally acceptable.”¹⁴

The International Trade Committee published a report on the TRA in May 2018. This said that the Bill (and the *Trade Bill*) lacked detail. The Committee also made a number of recommendations, including amendments to the Bill.¹⁵

1.2 The status of the Bill

A Bill of Aids and Supplies

The Bill was brought in on the basis of financial resolutions which were debated and agreed to on 20 November 2017. This procedure is that followed for Finance Bills (which are brought in on the Budget resolutions), but is relatively unusual in other cases. Under the procedures of the House of Commons, “any bill the main object of which is to impose a charge upon the people must be founded upon resolutions”.¹⁶ A bill such as the *Taxation (Cross-border Trade) Bill* which is introduced in this way is treated in the procedure of both Houses as a Bill of Aids and Supplies. In the House of Lords, a Bill of Aids and Supplies is usually referred to as a “supply bill”.

This status of the Bill has been accepted by two Committees in the House of Lords. The House of Lords Constitution Committee stated: “The Bill is a supply bill, which in accordance with established practice is not amended in the House of Lords”.¹⁷

It was suggested at both Second Reading and Committee Stage that the Bill would not receive adequate scrutiny in the House of Lords due to its status. For example, Peter Dowd said “They [the Government] have made it clear that this is a money Bill and will therefore avoid proper scrutiny in the House of Lords.”¹⁸ At Second Reading, Chris Leslie said:

I am disappointed that the Government have tried to twist parliamentary procedure by deeming this measure to be a money Bill. It is Mr Speaker who will decide whether or not it is a money Bill, and I think he will do so at the end of this particular Commons procedure. The Government, though, in a slightly tricky way, are putting through the Bill following a Ways and Means resolution. Why have they done that? They have gutted the Trade Bill and stuck everything they possibly can into what was the customs Bill so that it cannot be amended by the House of Lords.¹⁹

¹⁴ Constitution Committee, [Taxation \(Cross-border Trade\) Bill](#), 23 February 2018, HL Paper 80, 2017-19, para 13

¹⁵ International Trade Committee, [The UK Trade Remedies Authority](#), 10 May 2018, HC 743, 2017-19

¹⁶ Erskine May, *Parliamentary Practice*, 24th edition, 2011, p 774

¹⁷ Constitution Committee, [Taxation \(Cross-border Trade\) Bill](#), 23 February 2018, HL Paper 80, 2017-19, para 2; Delegated Powers and Regulatory Reform Committee, [11th Report of 2017-19](#), 17 January 2018, HL Paper 65, para 3

¹⁸ [Taxation \(Cross-border Trade\) Bill Deb 25 January 2018 c114](#)

¹⁹ [HC Deb 8 January 2018 c97](#)

What is a Money Bill?

Although the Bill is a Bill of Aids and Supplies, we do not know yet whether it will be certified as a money bill. Bills of Aids and Supplies are not necessarily certified as money bills.

A money bill is defined in section 1(2) of the *Parliament Act 1911*:

A Money Bill means a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, the National Loans Fund or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. In this subsection the expressions "taxation", "public money", and "loan" respectively do not include any taxation, money, or loan raised by local authorities or bodies for local purposes.²⁰

The 1911 Act requires the Speaker to certify any bill which in his opinion falls within this definition. The Speaker does not certify a bill until it has reached the form in which it will leave the House of Commons.²¹ (It is possible that amendments made in committee or on report could have a bearing on his decision, either way.²²)

Under section 1(3) of the Act, the Speaker has a duty to consult, if practicable, two members of the Panel of Chairs, appointed by the Selection Committee, at the beginning of each Session.²³ When the House of Lords Constitution Committee reported on *Money Bills and Financial Privilege of the House of Commons*, in February 2011, it noted that "The Speaker is under no statutory duty to consult further, but the Speaker takes the advice of the clerks of the House of Commons when deciding whether to certify a bill".²⁴

Under section 3 of the *Parliament Act 1911* the Speaker's certificate is "conclusive for all purposes".

If a bill is certified as a money bill it can receive Royal Assent without the House of Lords agreeing to it, as long as it was sent to the House of Lords at least one month before the end of a session:

If a Money Bill, having been passed by the House of Commons, and sent up to the House of Lords at least one month before the end of the session, is not passed by the House of Lords without amendment within one month after it is so sent up to that House, the Bill shall, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on

²⁰ *Parliament Act 1911* (chapter 13), section 1(2) (as amended)

²¹ Erskine May, *Parliamentary Practice*, 24th edition, 2011, p797

²² "The Speaker has declined to give an opinion on whether the acceptance of a proposed amendment would prevent a bill from being certified a Money bill. Similarly, in committee the Chairman has declined to anticipate the Speaker's decision ..." [*Ibid*]

²³ Sir Roger Gale and Clive Betts were so appointed on 13 September 2017

²⁴ Constitution Committee, [Money Bills and Financial Privilege of the House of Commons](#), 3 February 2011, HL Paper 97 2010-12, para 11

the Royal Assent being signified, notwithstanding that the House of Lords have not consented to the Bill.

Proceedings in the House of Lords

The status of the Bill as a Bill of Aids and Supplies (or, in the terminology in use in the House of Lords, a supply bill) will affect proceedings in the House of Lords: “So completely do the Lords accept the restriction resulting from the Commons’ privileges upon their power to amend such bills [bills of aids and supplies], that the Committee stage is now invariably negated”.²⁵

In the past controversy has arisen in the Lords about the treatment of Bills other than bills of aids and supplies that have been certified as Money Bills under section 1 of the *Parliament Act 1911*. Certification of a bill as a money bill “does not debar the Lords from amending such bills provided they are passed within the month, but the Commons are not obliged to consider the amendments. On a few occasions minor amendments have been made by the Lords to such bills and have been accepted by the Commons”.²⁶

The certification of the Savings Accounts and Health in Pregnancy Bill 2010-12 came as “a surprise” to some in the House of Lords and the proposal not to commit the Bill gave rise to the Constitution Committee’s inquiry on the subject. The Constitution Committee reported that the only money bill to have been committed in the House of Lords in the last 20 years was the *European Union (Finance) Bill 1994-95*.²⁷ The Bill was reported without amendment.²⁸ At Second Reading, the Committee Stage was foreshadowed. However, the minister, Lord Henley advised members of the House of Lords not to amend the Bill:

... I would strongly urge your Lordships that there is no practical purpose to be served by further prolonging the proceedings or by, for that matter, any amendment of the Bill. I trust therefore that the House will not in fact seek to obstruct the passage of the Bill.²⁹

²⁵ Erskine May, *Parliamentary Practice*, 24th edition, 2011, p 790

²⁶ House of Lords, [Companion to the Standing Orders and Guide to the Proceedings of the House of Lords](#), 2017, para 8.195

²⁷ Constitution Committee, [Money Bills and Financial Privilege of the House of Commons](#), 3 February 2011, HL Paper 97 2010-12, para 15,

²⁸ [HL Deb 10 January 1995 cc112-151](#)

²⁹ [HL Deb 9 January 1995 c71](#)

2. Import duty

2.1 What are customs duties and customs declarations?

Customs duties are taxes on imports. They are sometimes referred to as tariffs or import duties. Customs duties are generally set as a percentage of the value of the imported goods. In some cases, the customs duty is a specific amount relating to the volume of the imported good, such as £100 per kilogram for example. Customs duties can also be a combination – ie a percentage plus a fixed amount per unit of volume – such as £100 per kilogram plus 10% of the value of the goods.³⁰

As an EU Member State, the UK's customs duties are set by the EU (see section 2.2 below). The EU's customs duties are, on average, relatively low. The average EU tariff was 3.0% in 2015 (2.6% for non-agricultural products and 7.8% for agricultural products).³¹ While the average duty is low, duties can be significant for particular products. For example, the EU's duty on imports of cars is 10%. Duties on agricultural products can be considerably higher.

20% of customs revenue is kept by the Member States with the remaining 80% going to the EU. In 2015, £3.1 billion was returned by the UK to the EU with £772 million retained by the UK Government.³² These sums are small compared with either overall tax receipts or the main taxes such as income tax (estimated to have raised £181 billion in 2017/18), national insurance (£130 billion) or VAT (£125 billion).³³

Customs declarations are declarations by importers relating to imported goods and used as the basis for calculating customs duties.³⁴ As a member of the EU Customs Union, declarations are only required for UK imports from outside the EU.

Box 1: The Customs Declaration Service

HMRC is replacing its current customs system (CHIEF – Customs Handling of Import and Export Freight) with a new system – Customs Declaration Service (CDS). Planning for this change started before the EU referendum and was necessary as a result of changes to EU customs legislation which would have been difficult to implement using CHIEF.

In November, the Public Accounts Committee (PAC) commented on the tight timetable:

[...] HMRC's timetable is incredibly tight given the amount of work still to do. HMRC will only know by July 2018 whether the system works as intended, which is only one month before the

³⁰ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 63. Where the duty is expressed as a percentage, this is referred to as an "ad valorem" duty. Where the duty is a specified amount per unit of volume, this is known as a "specific" tariff. A compound tariff combines both.

³¹ WTO, [World Tariff Profiles 2017](#), p82. Figures are trade-weighted averages.

³² House of Lords EU Financial Affairs Sub-Committee, [Brexit and the EU Budget](#), 4 March 2017, HL Paper 125, para 17

³³ HMRC, [Tax and NICs Receipts: statistics table \(March 2018\)](#)

³⁴ ft.com/lexicon

first traders start to use it, and gives very little time to take remedial action if anything goes wrong.³⁵

The PAC warned of the consequences if the new system is not implemented successfully:

It would be catastrophic if HM Revenue & Customs' (HMRC) new customs system, the Customs Declaration Service (CDS), is not ready in time and if there is no viable fall-back option. [...] A failed customs system could therefore lead to huge disruption for businesses, with delays potentially causing massive queues at Dover and resulting in food being left to rot in trucks at the border. This is a programme of national importance that could have a huge reputational impact for the UK if it is not delivered successfully.³⁶

The PAC's report highlighted the problems that could arise at Dover:

The Port of Dover told us it currently processes up to 10,000 freight vehicles every day (except Christmas Day), the equivalent of a 180 kilometre queue. Any system issues which lead to delays in processing this traffic could result in queues building up, and trucks filled with rotting food. HMRC agreed that the impact of CDS going wrong, without an adequate back-up plan, would be catastrophic and would impact on the UK's global reputation.³⁷

A report by the Institute for Government also commented on the issues facing the CDS:

But delivery of CDS is now facing 'significant issues'. It received an 'Amber/Red' rating from the Infrastructure and Projects Authority in January 2017, and a rating of 'Amber' in July. Andrew Tyrie, chair of the Treasury Select Committee at the time, said that confidence in the project had collapsed, and a recent National Audit Office report shows the extent of the risks and issues being faced by the programme. Due to deliver in January 2019, just a few months before the Article 50 period ends, any delay to the project would have a significant impact on the UK's preparedness for day one outside the EU. This timeline is some 21 months shorter than the original plans before Brexit, and the National Audit Office suggests that, as a result of exit, HMRC will have had around three years less time to develop, test and roll out the new system.³⁸

There is further information on the CDS in a July 2017 [report](#) by the National Audit Office.³⁹ The NAO published an [updated report](#) in June 2018.⁴⁰ The head of the NAO, Amyas Morse commented:

Developing the CDS system to a tight timetable remains a major challenge. However, HMRC has made progress in developing its contingency plans, and has reduced the risk of it not having an operational system in place next March. Inevitably risks remain, and the next few months are crucial if HMRC is to make this a success."⁴¹

Civil servants reportedly told a Cabinet sub-committee that complex new technology needed to operate the border after Brexit would not be ready until 2023.⁴² In an interview on the Andrew Marr show on 6 May 2018, the business secretary, Greg Clark, said that it would take "some

³⁵ Public Accounts Committee, [Brexit and the future of Customs](#), 14 November 2017, HC 401 2017-19, p4

³⁶ Public Accounts Committee, [Brexit and the future of Customs](#), 14 November 2017, HC 401 2017-19, p3

³⁷ Public Accounts Committee, [Brexit and the future of Customs](#), 14 November 2017, HC 401 2017-19, p7

³⁸ Joe Owen, Marcus Shephard and Alex Stojanovic, [Implementing Brexit: Customs](#), Institute for Government, 11 September 2017, pp26-27

³⁹ National Audit Office, [The Customs Declaration Service](#), 13 July 2017, HC 241, 2017-19

⁴⁰ National Audit Office, [The Customs Declaration Service: a progress update](#), 28 June 2018, HC 1124, 2017-19

⁴¹ National Audit Office Press Release, [The Customs Declaration Service: a progress update](#), 28 June 2018

⁴² Daily Telegraph, ['Britain 'will not be able to leave customs union until 2023', ministers told'](#), *Daily Telegraph*, 3 May 2018; ['UK could stay in EU customs union for years after Brexit transition'](#), *Politico*, 4 May 2018

time” to implement either of the Government’s customs options, the customs partnership and a streamlined model.⁴³

2.2 Customs policy as an EU Member State

As an EU Member State, the UK is a member of the EU Customs Union. This means that trade in goods between Member States is not subject to customs duties, quotas, or customs formalities (including provision of customs declarations). Goods imported into the EU from non-EU countries are subject to the EU’s common external tariff (except where the EU has a trade agreement or provides unilateral tariff reductions to developing countries), quotas and customs procedures. These tariffs are set by the EU and are contained in the EU’s schedules at the World Trade Organization.

The EU negotiates trade agreements on behalf of the Member States. The EU is also responsible for trade defence measures (see section 3 below).

Customs policy is an “exclusive competence” of the EU. The rules of the customs union are set out in EU law. While the EU has exclusive competence over customs policy, the UK has operational freedom to decide how the rules are enforced (subject to a risk management framework, audited by the EU).

Current legislative position

The UK’s customs legislation is largely set out in an EU Regulation, which has automatic legal effect in the UK. The current legislative position is set out as follows in the White Paper:

Most of the law governing the administration of the EU Customs Union is contained in the Union Customs Code (UCC) and its delegated and implementing acts. As an EU Regulation, the UCC is directly applicable in the UK, meaning that it is automatically given legal effect in the UK. This is why there is only limited domestic legislation governing certain aspects of the current customs regime, which is primarily contained in the Customs and Excise Management Act 1979 (CEMA).⁴⁴

2.3 Why is legislation needed?

New domestic legislation is required because rules governing customs are mainly in EU law which is directly applicable in the UK. Legislation is required to create a new customs regime for the UK. This new regime needs to be in place by 2019. The White Paper said:

The authority to charge customs duty is currently contained in the European Communities Act 1972 (as amended), which will be repealed by the European Union (Withdrawal) Bill (EUWB). The EUWB will convert the body of existing EU law into domestic law and preserves the laws made in the UK to implement EU obligations. The powers in the EUWB to deal with deficiencies arising from withdrawal and to implement the withdrawal agreement cannot be used to impose or increase taxation, which

⁴³ [‘UK-EU customs partnership ‘still on table’](#)’, BBC, 6 May 2018

⁴⁴ HM Treasury, [Customs Bill: legislating for the UK’s future customs, VAT and excise regimes](#), Cm 9502, October 2017, para 2.17

includes customs duties, excise or VAT. Therefore, the UK will need new primary legislation, irrespective of any agreements reached between the UK and EU, to create a standalone customs regime, and to amend the VAT and excise regimes so that they can function effectively after the UK has left the EU.⁴⁵

The White Paper said that the legislation will mostly be based on the Union Customs Code in order to provide continuity, although in the longer term, the Government may wish to consult on changes.⁴⁶

Implications of Brexit

On leaving the EU Customs Union, the UK will have responsibility for setting its own schedule of tariffs. The Government's intention is to provide continuity in customs policy. The Explanatory Notes to the Bill say:

Responding to business representations, Parts 1 and 2 of the Bill, which provide for a new standalone Customs regime, are largely based on EU law, and it is the government's intention that the UK's Customs regime will continue to operate in much the same way as it does today following exit from the EU. However, depending on the outcome of the negotiations, traders that currently trade only with the EU may be subject to Customs declarations and Customs checks for the first time.

The Bill would allow for divergence from EU law where the government feels it is necessary to do so, or where it believes that there is a clear benefit to business to diverge from it and such divergence is consistent with whatever bilateral arrangements the government agrees with the EU.⁴⁷

While the Government's policy is to secure a trade agreement with the EU, in the event of no deal, tariffs would be imposed on UK imports from the EU (and the EU would impose tariffs on UK exports).

On leaving the EU Customs Union, customs declarations may be required for goods imported from the EU:

Customs declarations are currently only required for goods imported into the UK from outside the EU, but with the UK's departure from the EU Customs Union this requirement may also extend to goods originating from within the EU.⁴⁸

This could see the number of customs declarations made by UK businesses to HMRC increase from the current 55 million to 255 million after the UK leaves the EU.⁴⁹ HMRC estimates that 132,000 traders will have to make customs declarations for the first time once the UK leaves the EU compared with 141,000 using the system now.⁵⁰

⁴⁵ HM Treasury, [Customs Bill: legislating for the UK's future customs, VAT and excise regimes](#), Cm 9502, October 2017, para 3.1

⁴⁶ HM Treasury, [Customs Bill: legislating for the UK's future customs, VAT and excise regimes](#), Cm 9502, October 2017, para 4.1 and p3

⁴⁷ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), paras 10-11

⁴⁸ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 39

⁴⁹ Public Accounts Committee, [Brexit and the future of Customs](#), 14 November 2017, HC 401 2017-19, p3

⁵⁰ Public Accounts Committee, [Brexit and the future of Customs](#), 14 November 2017, HC 401 2017-19, p5. These figures are also quoted in HM Treasury, [Taxation \(Cross-border Trade\) Bill Impact Assessment](#), 20 November 2017, para 21

Relationship with *EU Withdrawal Act*

The Explanatory Notes to the Bill say:

The European Union (Withdrawal) Bill (EUWB) converts the body of existing EU law into domestic law. Clause 42, clause 47 and Schedule 7, Part 1 provide that a large proportion of this converted law will not apply in relation to VAT, excise or Customs. Instead domestic provisions are being made in the Bill which alter the existing domestic legislation or, in the case of Customs, introduce alternative regimes to fill the gap which is left once converted EU law no longer applies.⁵¹

The Explanatory Notes go on to say:

Part 1 of the Schedule disapplies any EU law in so far as it relates to EU Customs duty which becomes part of UK legislation as a result of clause 3 of the European Union (Withdrawal) Bill, disapplies any EU rights, powers, liabilities, obligations, restrictions, remedies and procedures which becomes part of UK legislation as a result of clause 4 of the European Union (Withdrawal) Bill, and provides that Part 1 (with the exception of the amendments in Schedule 7) of the Bill replaces EU Customs duties. However EU law which has already been implemented in domestic law, for example CEMA, will continue to have effect.

Paragraph 1(3)(c) provides that the powers in Part 1 enable provision to be made of a kind corresponding to that which could have been made under the disapplied EU law.⁵²

The Lords passed an amendment to the *EUW Bill* on the customs union. However, when the Bill returned to the Commons, this was replaced by a Government amendment requiring the Government to lay a statement before Parliament setting out the steps taken to negotiate an agreement for the UK to participate in a "customs arrangement" with the EU. The statement must be laid before October 2018.⁵³

2.4 Government policy

The Government set out its approach to customs in a position paper, [Future customs arrangements](#), published in August 2017. A [Customs White Paper](#) was published in October 2017. The Government has already published a [Trade Bill](#) which contains provisions on areas closely related to those in this Bill, in particular on trade defence.

The Government has said that its customs policy will be guided by the UK's economic interests and by the following three strategic objectives:

- Ensuring UK-EU trade is as frictionless as possible;
- Avoiding a hard border in Ireland; and
- Establishing an independent international trade policy.⁵⁴

Furthermore, the Government is seeking continuity in customs policy, at least in the short term. The White Paper said:

⁵¹ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 211

⁵² [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), paras 402-03

⁵³ Section 18 of [EUW Act](#)

⁵⁴ HM Treasury, [Customs Bill: legislating for the UK's future customs, VAT and excise regimes](#), Cm 9502, p3

As the UK leaves the EU, the government will keep UK law as consistent as possible with EU law, responding to business requests for continuity and certainty. In the longer term, and depending on the outcome of the negotiations with the EU, the government will want to consult on possible changes to this law that will help UK businesses, but now is the time to help businesses by providing continuity with the existing rules where possible.⁵⁵

The Government's policy is to leave the EU Customs Union and to seek a new trade relationship with the EU. In the Ways and Means debate, prior to the introduction of the Bill, Mel Stride said:

Let me be clear to the House that, by virtue of leaving the EU, the UK will also leave its customs union—that is a legal fact.

[...]

We will also want to ensure that we have an ambitious new customs arrangement with the EU that will allow us to keep trade between the UK and EU member states as free and as frictionless as possible.⁵⁶

The Government's [Future customs arrangements](#) paper put forward two options for a future customs relationship with the EU:

A highly streamlined customs arrangement⁵⁷ between the UK and the EU, streamlining and simplifying requirements, leaving as few additional requirements on EU trade as possible. This would aim to: continue some of the existing arrangements between the UK and the EU; put in place new negotiated and potentially unilateral facilitations to reduce and remove barriers to trade; and implement technology-based solutions to make it easier to comply with customs procedures. This approach involves utilising the UK's existing tried and trusted third country processes for UK-EU trade, building on EU and international precedents, and developing new innovative facilitations to deliver as frictionless a customs border as possible.

A new customs partnership with the EU, aligning our approach to the customs border in a way that removes the need for a UK-EU customs border. One potential approach would involve the UK mirroring the EU's requirements for imports from the rest of the world where their final destination is the EU. This is of course unprecedented as an approach and could be challenging to implement and we will look to explore the principles of this with business and the EU.⁵⁸

At the time of writing (early July 2018), the Cabinet was considering a third customs plan. A Brexit White Paper is expected to be published very soon.

A number of amendments to the Bill have been tabled seeking to maintain UK participation in a customs union with the EU (or in the EU Customs Union).⁵⁹ There is further information on the customs union

⁵⁵ HM Treasury, [Customs Bill: legislating for the UK's future customs, VAT and excise regimes](#), Cm 9502, p3

⁵⁶ [HC Deb 20 November 2017 c764](#)

⁵⁷ Sometime referred to as 'maximum facilitation' or 'max-fac'

⁵⁸ HM Government, [Future customs arrangements: A future partnership paper](#), August 2017, para 4

⁵⁹ See [Bill documents – Amendment papers](#)

issues in a separate Library Briefing Paper, [Brexit: Customs and Regulatory Arrangements](#).

The UK's future relationship with the EU will depend on the outcome of the negotiations. The Bill is designed to cover all possible outcomes, including no deal. The Minister said:

Although the precise nature of the relationship that we will end up with on customs is a subject for the negotiations, there are sensible steps that we can take now to prepare for the future. This Bill is one of those steps, providing, as it does, a framework for a new customs regime. This will allow the Government to give effect to a range of outcomes from the negotiations, including an implementation period. Businesses have called for certainty and continuity, and this Bill will, as far as possible, allow us to replicate the effect of existing EU customs laws. It is only prudent that the Government should prepare for all eventualities, so this Bill will also allow the Government to operate effective customs, VAT and excise regimes even if a deal with the EU is not reached, although, as I have set out, a negotiated settlement is in the interest of all parties. That is exactly what the Government hope and expect to achieve.⁶⁰

2.5 The Bill

Introduction

Part 1 of the Bill contains various provisions relating to import duty. These include a power to charge import duty and provisions relating to:

- Which goods are subject to duty
- When the liability for import duty is incurred
- What happens when goods are not presented to customs or a Customs declaration is not made
- Who is liable for import duty
- How much duty is payable
- When tariffs may be suspended
- The value of the goods subject to duty
- Rules of origin
- Reliefs (ie circumstances where a reduced (or zero) duty is paid on goods where duty would normally be applied)
- Use of customs agents
- Authorised economic operators (AEOs)⁶¹
- Charging of fees by HMRC. The Treasury may make regulations allowing the charging of fees for functions connected to import duty. Fees may only be charged if this is consistent with international agreements and if it is fair and reasonable for the charge to be made.

Commentary on individual clauses

Liability to import duty

Clause 3 requires chargeable goods presented to be presented to customs by making a customs declaration. Currently customs declarations are required for goods imported into the UK from outside the EU. After Brexit, this requirement could extend to imports from the EU, depending on the terms of any agreement with the EU. The number of customs declarations could increase from 55 million now to over 255 million a year.

Amount of import duty

Clause 8 requires the Treasury to make regulations creating a customs tariff. This will set the “standard” rates of customs duty for each good. This will be the rate paid, unless amended by other provisions of the Bill. The classification of goods will be based, as now, on the World Customs Organization’s Harmonised System which is used by many other countries.

⁶¹ AEO status is defined by the Government as “an internationally recognised quality mark indicating that your role in the international supply chain is secure, and that your customs controls and procedures are efficient and compliant.” Source HMRC Guidance, [Authorised Economic Operator](#).

Clause 9 relates to reduced rates of duty on imports from specific countries with whom the UK has an agreement. This would cover free trade agreements with other countries for example.

Clause 10 provides for a trade preference scheme for developing countries. These schemes reduce or eliminate duties on imports into the UK from developing countries (a list of eligible countries is in Schedule 3). See section 4 below for more on this clause.

Clause 11 relates to quotas. These are arrangements where a certain quantity of goods may be imported at a lower, or zero rate, of duty with any imports above the quota being subject to the standard rate of duty.

Clause 13 contains provisions on trade defence. If trade defence duties are imposed following a dumping or subsidy investigation, these will be additional duties and details will be set out in a public notice from the Secretary of State for International Trade. Schedule 4 contains more details of dumping and subsidy investigations. There is a similar provision for safeguarding duties. In these cases, the duty or quota must follow the recommendation of the Trade Remedies Authority. Further details of safeguard investigations are in Schedule 5 (see section 3 below for more on trade defence).

Clause 14 permits Special Agricultural Safeguards (permitted under Article 5 of the WTO Agreement on Agriculture).

Disclosure of information

Clause 25 would allow HMRC (or anyone acting on their behalf) to share information relating to import duty for purposes relating to customs duty – for example with other law enforcement partners so that it can more effectively target those who are looking to evade import duty.

In general, HMRC may only disclose the information they hold on taxpayers under certain limited circumstances – for example, to comply with a court order, or if the person to whom the information relates has given their assent. It is a criminal offence for HMRC officers to deliberately disclose information without lawful authority.⁶²

The clause states that anyone who receives information through this power may only use it for customs duty purposes and may not share the information further (unless they have permission from the HMRC Commissioners). Offences and penalties – [in section 19 of the Commissioners for Revenue and Customs Act 2005](#) – may apply if such information is disclosed, should that information allow someone to be identified.

Customs unions

Clause 31 relates to customs union agreements with other countries or territories such as an interim customs arrangement with the EU and/or

⁶² Under s18 & s19 of the [Commissioners for Revenue & Customs Act \(CRCA\) 2005](#). The department's [Manual on Information Disclosure](#) sets out these provisions in detail; see from [para IDG4000](#) onwards. See also, [HC Deb 10 July 2014 cc389-90W](#).

agreements with the Crown Dependencies.⁶³ The clause “would enable the UK to give effect to a Customs union agreement with another territory or territories” by giving effect to changes “for the purposes of import duty”.⁶⁴ The Explanatory Notes say:

Other provisions [in this clause] allow further regulations to be made for the purposes of implementing a Customs union arrangement, for example, to modify provisions made by this Bill, so that the legislative framework for Customs can be aligned between the UK and the territory with which the UK is in a Customs union.⁶⁵

See also section 7.3 below which discusses this clause in the context of delegated powers.

Regulations

Clause 32 describes the procedures for making regulations under Part 1 and Schedules 1 to 7 of the Bill. All regulations are to be made by statutory instrument. In most cases, the negative procedure will be used, although there are some exceptions to this.

For example, the first statutory instrument which establishes the customs tariff under clause 8 and any further regulations under this clause which increase the tariff in a standard case are subject to the affirmative procedure.

Under the provisions of clause 32, an Order made under clause 31 which gives effect to a Customs union between the UK and an overseas territory for the purposes of import duty must be laid in draft and approved by a resolution of the House of Commons.

Export duty

Clauses 39 and 40 relate to duties on exports (rather than on imports). The Bill contains a power to introduce an export duty through regulations. The Bill does not, itself, introduce an export duty. A provision for export duty exists in the EU Union Customs Code.

Other provisions

Clause 51 allows the appropriate Minister to make regulations relating to VAT, customs or excise duties as a result of, or otherwise in relation to, Brexit. These include the power for regulations to amend or repeal an Act of Parliament (often referred to as a Henry VIII power – see section 7 for more detail).

The Bill provides that much of EU law converted into domestic law by the *EUW Act* will not apply to VAT, excise or customs. Instead, the Bill makes provisions which alter existing domestic legislation or for customs introduces a new system to fill the gap once converted EU law no longer applies. The Explanatory Notes set out where this power might be used:

There are a number of areas where it is expected that provisions or amendments will need to be made but their content is, as yet,

⁶³ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#) para 136

⁶⁴ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#) para 135; Clause 31(4)

⁶⁵ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#) para 137

unknown. The changes required are dealt with as far as possible in the provisions of the Bill itself, but because negotiations will continue with the EU after the point that the Bill is introduced and given Royal Assent, and because of the need to legislate now to ensure that the UK has customs, VAT and excise regimes which function as required on the UK's withdrawal from the EU, it is not possible to include all these provisions in the Bill:

- provisions or amendments to address deficiencies of a similar nature to those which are dealt with by clause 7 of EUWB which arise as a consequence of leaving the EU
- provisions or amendments arising from the introduction of replacement domestic legislation or from the alterations made to domestic legislation. This includes amending existing legislation to ensure that it dovetails with the new/amended legislation
- provisions or amendments that are required to implement or facilitate any arrangements that the UK and the EU agree in their negotiations which may include replicating or applying EU law for a limited period.
- provisions or amendments that are required to implement or facilitate policy decisions made in the future which are connected to withdrawal in other policy areas which impact on VAT, Customs and excise and which may involve replicating or applying the law disappplied by the provisions in the Bill
- provisions or amendments to "transition" existing EU trade remedy measures. This might involve converting existing EU measures – e.g. measures whose complete removal upon the UK's withdrawal from the EU could damage UK producers – into new UK measures. This in turn might involve making provision for relevant processes such as applications by UK producers to determine which measures should be considered for transition and reviews: to ensure, for example, that keeping a measure in place as a UK measure post-exit was justified
- provisions or amendments that are required to deal with developments arising after the enactment of this Bill in connection with the UK's withdrawal from the EU but which have not been foreseen. The government expects that after this Bill the opportunities to legislate to accommodate unforeseen developments will be very limited. This power is drafted widely to cover legislation that is required to deal with such situations to ensure that the UK has VAT, Customs and excise regimes which function as required on its withdrawal from the EU.

Subsection (2) provides that the regulations made under the section can make any provision that could be made by an Act of Parliament, including making changes to or repealing the Bill itself. However, these regulations cannot have retrospective effect.⁶⁶

Clause 52 relates to subordinate legislation relating to VAT, customs or excise. According to the Explanatory Notes:

⁶⁶ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), paras 212-213

Subsections (2) to (4) provide that, where the person making that subordinate legislation considers it appropriate to do so in consequence of or otherwise in connection with the withdrawal of the UK from the EU, that legislation may come into force on a day to be appointed in regulations made by the Treasury. Moreover, if that subordinate legislation containing such a commencement provision is subject to the 28-day affirmative procedure, it must be approved by the House of Commons within 60 days of the first day on which any of it comes into force.⁶⁷

Clause 54 gives Ministers the power to make consequential and transitional provisions in regulations. It allows the Government to amend primary legislation via secondary legislation, often referred to as a Henry VIII power (see section 7 below).

Customs declarations

Schedule 1 contains various provisions relating to customs declarations including:

- Presentation of goods to customs
- Who may make a customs declaration
- The timing of customs declarations
- The information which must be included in a customs declaration
- Acceptance and verification of customs declarations by HMRC

Special Customs Procedures

Schedule 2 contains various provisions relating to special customs procedures.

Import duty

Schedule 6 contains provisions relating to notification of liability to pay import duty, how it may be paid and cases where HMRC will repay or remit import duty.

According to the Explanatory Notes, **Schedule 7** “makes a series of amendments to other Acts of Parliament which are required as a consequence of Part 1 of the Bill.”⁶⁸ The Explanatory Notes go on to say:

Part 1 of the Schedule disapplies any EU law in so far as it relates to EU Customs duty which becomes part of UK legislation as a result of clause 3 of the European Union (Withdrawal) Bill, disapplies any EU rights, powers, liabilities, obligations, restrictions, remedies and procedures which becomes part of UK legislation as a result of clause 4 of the European Union (Withdrawal) Bill, and provides that Part 1 (with the exception of the amendments in Schedule 7) of the Bill replaces EU Customs duties. However EU law which has already been implemented in domestic law, for example CEMA, will continue to have effect.⁶⁹

This Schedule also makes a number of changes to the *Customs and Excise Management Act 1979 (CEMA)*. These include repealing or amending provisions in *CEMA* where they would be inconsistent with or

⁶⁷ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 220

⁶⁸ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 401

⁶⁹ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 402

replicated provisions of this Bill. Many of the amendments to CEMA are minor changes to terminology.

Schedule 7 also amends a number of other Acts.⁷⁰

⁷⁰ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), paras 415-419

3. Trade defence

3.1 What are trade remedies?

Trade remedies (sometimes referred to as trade defence measures) allow a country to take steps against unfair competition from dumped or subsidised imports, or to put temporary safeguards in place:

- Dumping occurs where a company exports a product at a lower price than it is sold for on its domestic market.⁷¹
- Subsidies occur when a government provides financial assistance to companies.⁷²
- Safeguards are used as a temporary measure if a domestic industry is injured or threatened with injury caused by a surge in imports.⁷³

Trade remedies often take the form of additional tariffs, over and above the standard tariff, imposed on the dumped or subsidised goods. These are referred to as anti-dumping and anti-subsidy (or countervailing) duties.

The WTO has certain requirements governing the use of anti-dumping measures.⁷⁴

For more background on trade remedies for dumping and subsidies see:

- George Peretz QC, [Trade 101: Trade Defence Instruments](#), UK Trade Forum, 10 October 2017
- George Peretz QC, [Briefing Paper: The Government's proposed legislation for trade remedies](#), UK Trade Forum, 22 January 2018
- World Trade Organization, [Anti-dumping, subsidies, safeguards: contingencies, etc.](#)
- House of Commons International Trade Committee, [UK Trade Remedies Authority](#), 10 May 2018
- [Leaving the EU: Future Trade Remedies](#), Westminster Hall debate, 17 April 2018

3.2 How does it work now?

The trade remedies regime is currently implemented at EU level. The European Commission amended its trade defence legislation in December 2017 to deal with economies where there are state-induced distortions, such as China.⁷⁵ The new methodology also allows social and environmental criteria to be taken into account.

⁷¹ World Trade Organization, [Anti-dumping](#).

⁷² For more information on subsidies and countervailing measures see [EU State Aid Rules and WTO Subsidies Agreement](#), Commons Library Briefing

⁷³ World Trade Organization, [Anti-dumping, subsidies, safeguards: contingencies, etc](#)

⁷⁴ [WTO website](#)

⁷⁵ European Commission Press Release, [EU puts in place new trade defence rules](#), 20 December 2017. The new legislation is contained in [Regulation 2017/2321](#). See also, European Parliament Research Service Briefing (EU Legislation in Progress), [Protection from dumped and subsidised imports](#), 10 November 2017

The EU's process for investigating is set out on the [European Commission's website](#). The EU has over 100 measures in place and has taken action against imports of steel from China, for example.⁷⁶

The Bill puts in place a UK trade remedies system to carry out investigations into allegations of dumping and subsidy and to propose remedies. This new UK system will replace the EU system. There are also provisions relating to the establishment of a new public body, the Trade Remedies Authority (TRA), in the *Trade Bill*.⁷⁷

3.3 The Government's approach

The Government's approach to trade remedies was discussed in section 5.1 of the Trade White Paper. The White Paper invited feedback on this approach.

The White Paper said that the Government was a supporter of free and fair trade. It noted that trade remedy measures "form an important part of a rounded trade policy" and can be used to ensure fair trade.⁷⁸ The White Paper said that the trade remedies regime would need to take into account the interests of both the domestic industry affected by the dumped or subsidised imports and the users of these products whose costs would be increased by trade remedy measures:

The overall economic case for trade remedies needs to be considered objectively on a case by case basis. Trade remedy measures can increase the cost of affected products for user industries, and consumers, as well as the competitiveness of both user and producer industries. Therefore, it is important that measures are used judiciously and proportionately to tackle unfair trade, ensuring fair competition and addressing the injury caused to domestic producers, whilst also taking appropriate account of impacts on users and consumers and the wider trade agenda.⁷⁹

The White Paper said that the UK's trade remedies framework would be based on four principles:

- impartiality;
- proportionality;
- efficiency; and
- transparency.

Impartiality

The Government said that the trade remedies framework will be impartial and objective. The Trade Remedies Authority will be arm's

⁷⁶ European Commission, [Anti-dumping, Anti-subsidy and Safeguard statistics covering the first month of 2018](#), 16 February 2018

⁷⁷ The DIT Permanent Secretary received a Ministerial Direction authorising spending on the TRA in advance of specific statutory spending authority being granted by Parliament. See [DIT, Trade Remedies Authority \(TRA\): DIT ministerial direction](#), 4 April 2018

⁷⁸ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, p34

⁷⁹ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, p34

length from government. Its investigations process will be “as transparent, objective and efficient as possible” and its decisions will be subject to appeal.⁸⁰

Proportionality

The White Paper said:

we will ensure that the UK’s trade remedies framework is used judiciously and proportionately. Decisions will be based on clear evidence, targeted at addressing the injury caused, and take into account the interests of domestic producers and regional impacts, as well as those of other interested parties, such as user industries and consumers.⁸¹

These objectives are to be achieved through:

- Application of an economic interest test (see under “The Bill” below) before any measures are imposed. The White Paper said that details would be finalised later in the year and set out in secondary legislation or guidance.
- A threshold which must be exceeded before an investigation can begin. This threshold will be in addition to the WTO threshold which requires the complainants to account for a certain share of the domestic market.
- Duties to be based on the level of injury caused by the dumping or subsidy. The White Paper said:

The methodology for calculating injury will be informed by internal and external analysis and we have been sharing our thinking with stakeholders as the work develops, and are committed to continuing that process.⁸²

Efficiency and transparency

The Government has said that trade remedies investigations will be undertaken swiftly and effectively and will avoid unnecessary burdens on business (both complainants and the subject of the complaint). With regard to transparency, the Government has said it will balance the need to respect commercial confidentiality with the need for relevant information about cases to be available to interested parties. At the same time, the Government will ensure that the transparency arrangements do not place an unreasonable burden on business.

3.4 The Bill

The Bill’s provisions on trade defence are in **clauses 13-14** and **schedule 4** (dumped and subsidised imports) and **schedule 5** (safeguards).

⁸⁰ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, p35

⁸¹ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, p35

⁸² Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, p35

The WTO sets out a number of conditions about determining whether imports are dumped or subsidised. In both anti-dumping and anti-subsidy cases, the WTO requires that the imports must have caused (or threaten to cause) material injury to UK competitors before remedies can be imposed. The WTO also places limits on the remedies which may be imposed on the dumped or subsidised imports.

Clause 13 says that if trade remedies are imposed after a dumping or subsidy investigation, these will be an additional amount of import duty. It also refers to Schedule 4 which provides further details on investigations. Clause 13 also refers to safeguarding remedies.

Clause 14 permits Special Agricultural Safeguards. These are permissible under Article 5 of the WTO Agreement on Agriculture and allow WTO members to set additional import duty on particular agricultural products set out in their schedule of commitments. These additional duties may be used where the relevant imports either exceed a set volume of imports over a given time period or where the price falls below a set level.

Schedule 4 paragraphs 1 to 7 set out various definitions relating to dumping and subsidisation (including, for example, the meaning of dumped, the dumping margin and injury). Further detail on these definitions and how they may be used in anti-dumping and anti-subsidy investigations may be set out in secondary legislation.

Investigations and determinations

Paragraphs 8 to 10 of Schedule 4 give the TRA power to carry out investigations to determine whether imports are dumped or subsidised and whether they are causing injury to the UK industry. The TRA must have received a request to initiate an investigation from UK industry. This must show that the level of imports or injury is non-negligible and that the scale of dumping or subsidy is greater than minimal (these thresholds may be defined in regulations). Regulations may also set out the details of the investigation procedure.

Applications to the TRA for an investigation will be subject to a UK market share threshold (to be set out in regulations). This is intended to filter out cases which have little chance of success. The TRA must accept an application which meets the UK market share threshold. The TRA has discretion to accept an application which does not meet the UK threshold but does meet the WTO thresholds.

At the final stage of the investigation, the TRA must reach either a definitive affirmative determination (ie that dumped or subsidised imports are harming UK industry) or a negative determination (that this cannot be concluded on the basis of the evidence).

The TRA may also make a provisional affirmative determination. This is required if the TRA wishes to recommend imposing provisional measures to prevent harm to the UK industry during the investigation process.

Paragraph 12 covers the termination of an investigation. An investigation will end if measures are not pursued. This could be because the TRA made a final negative determination, or did not recommend measures following application of the economic interest test (see below), or because the Secretary of State rejects a recommendation to impose measures. An investigation will also be terminated if measures are imposed or if the Secretary of State accepts undertakings in lieu.

Provisional Remedies

Provisional remedies mean that importers must provide a guarantee against the goods. These may be definitively collected if there is an affirmative final determination (and certain other criteria are met).

Provisional remedies may only be imposed if the TRA believes they are required to prevent injury to the UK industry during an investigation. The economic interest test must also be met.

The rate of the guarantee must not exceed the lesser of the dumping margin or the amount sufficient to remedy the injury. There are also restrictions on when, and for how long, provisional remedies may be imposed.⁸³

The Secretary of State decides whether to accept or reject a recommendation from the TRA to impose provisional remedies. The Secretary of State may only reject the recommendation on two grounds:

- Public interest
- The recommendation does not meet the economic interest test

Where the Secretary of State rejects a recommendation, he or she must lay a statement in the House of Commons explaining why.

Definitive remedies

At the end of a dumping or subsidy investigation, the TRA must make a final decision about whether dumping (or subsidy) is causing injury to UK industry. If the Authority finds this to be the case, it makes a “final affirmative declaration” and, if not, a “final negative determination”.

If the TRA makes an affirmative declaration, and is satisfied that the imposition of measures is in the UK’s wider economic interest, it must recommend imposing definitive duties. If it decides that measures would not be in the economic interest of the UK, it must:

- Publish notice of its findings
- Notify the Secretary of State and interested parties

Where the TRA recommends definitive duties, the rate of duty must not be more than the lesser of the dumping margin and the rate necessary to remedy the injury to UK industry. Duties will be applied for as long as the TRA believes necessary to remedy the injury subject to a maximum of five years, unless extended after a review.

⁸³ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 332

As with provisional duties, the Secretary of State decides whether to accept or reject a recommendation from the TRA to impose definitive measures. The Secretary of State may reject the recommendation on only two grounds:

- Public interest
- The recommendation does not meet the economic interest test

Where the Secretary of State rejects a recommendation, he or she must lay a statement in the House of Commons explaining why.

Exporters may offer a voluntary “undertaking” in place of measures. This might involve, for example, an undertaking by an exporter to revise prices.⁸⁴

Economic interest test

The “economic interest test” is an important part of the trade remedies regime. Trade remedies protect UK industries which produce goods competing with the dumped or subsidised imports. However, they also increase prices to consumers of those goods. The Bill’s Explanatory Notes explain the rationale for the economic interest test as follows:

Before recommending measures, the Trade Remedies Authority must apply an economic interest test to establish whether those measures would be in the economic interest of the UK. The rationale for this is that because the effect of measures is to place restrictions on imports, they inherently increase costs on other parties which rely on the affected products, such as downstream users, consumers and upstream suppliers. This ensures that the need to address the injury to UK producers does not disproportionately impact other economic players in the relevant market. Other WTO members seek to address this with similar tests.⁸⁵

This test must be applied by the TRA when it is deciding whether to recommend the imposition of provisional or definitive duties (or the continuation of duties following a review). If the test is not met, the case is dismissed. But if the test is met, the TRA must recommend that remedies are put in place.

Paragraph 25 of Schedule 4 provides that there is a presumption that anti-dumping and anti-subsidy measures are in the economic interests of the UK. The burden of proof is on the TRA to prove otherwise. The factors the TRA must take into account are:

- The economic significance of affected industries and consumers in the United Kingdom: The Trade Remedies Authority would need to establish who could be affected by measures and their size and significance to the UK economy.
- The likely impact on affected industries and affected consumers in the United Kingdom: This will involve assessing the extent of the impact of measures, or lack thereof, on the UK interests already identified.

⁸⁴ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 342

⁸⁵ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 343

- The likely impact on particular geographic areas, or particular groups, in the United Kingdom: This requires the Authority to consider whether measures, or lack thereof, would impact certain groups or geographical regions in a disproportionate manner.
- The likely consequences for the competitive environment and for the structure of markets for goods in the United Kingdom: This assessment will consider how the structure and conditions of the market will evolve in the long-term if measures are or are not imposed.⁸⁶

Appeals

Paragraph 30 says that the Secretary of State may set out in secondary legislation the system for appealing against the decisions of the TRA and the Secretary of State. The Explanatory Notes say that the “Government’s intention is for the domestic appeals system to go beyond the minimum requirements of the applicable WTO agreements on domestic reviews of trade remedies decisions.”⁸⁷

The Bill contains various other provisions including the circumstances in which duties may be suspended and refunds of duties after a successful appeal.

Safeguarding measures

Schedule 5 contains various measures relating to safeguarding measures. These are intended “to provide breathing space for UK producers to adjust to increased imports and ultimately compete without the need for protection.”⁸⁸

The measures contained in Schedule 5 are broadly similar to those in Schedule 4 relating to dumped and subsidised imports. There are some differences, however. For example, the test for safeguarding measures is “serious” injury to UK producers rather than “material” injury in the case of dumped or subsidised imports and the burden of proof in relation to the economic interest test is reversed.⁸⁹

3.5 Comment

Industry views

Steel is one of the main industries which has been affected by dumping. UK Steel has published a response to the Bill.⁹⁰ The industry wishes to see a trade defence system at least as effective as the EU’s system. UK Steel therefore welcomed the provision for a trade defence system in the Bill. However, it had a number of concerns about the Bill:

We are concerned that in a number of respects the Bill as currently drafted falls seriously short of what the steel industry,

⁸⁶ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 346

⁸⁷ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 351

⁸⁸ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 369

⁸⁹ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 377

⁹⁰ UK Steel, [UK Steel Response to the Taxation \(Cross-border Trade\) Bill](#), November 2017. UK Steel has written a number of other papers on this issue which are available on their [website](#)

and many other UK industries, are seeking, and will leave us exposed to unfairly trade imports after we leave the EU.⁹¹

The concerns included:

- Lack of detail in Schedule 4 about how investigations will be conducted, calculations made and remedies applied. Many issues (UK Steel lists 22) are to be covered by secondary legislation. UK Steel's briefing on the Bill said:

While it is proper for certain matters, particularly those of an administrative nature, to be handled through secondary legislation, many of the above matters go right to the heart of how effective the UK's trade defence system will be. For many of our major trading partners (including the EU and US) such issues are covered by primary legislation. Schedule 4 contains less detail than even the applicable WTO agreements.⁹²

- The appeals procedure. UK Steel called for the legislation to make sure that UK courts are able to correct government decisions which deny UK industry the same rights as competitors in other countries.
- The balance is tipped against UK industry through for example the UK market share test and the length of time for which duties can be imposed.
- Maintaining consistency with the EU; if the UK's regime is seen as less robust than the EU, the UK is likely to be more exposed to dumped imports. There have been concerns that the EU could allow higher anti-dumping duties after Brexit, as the UK, which has been an advocate of the lesser duty rule, would no longer be part of the EU. Industry groups argue that this could leave the UK more exposed to dumped imports than the EU or US. An article in *The Times* quoted a Department of International Trade official as saying "we take the view that the lesser duty rule makes a lot of sense ... if other people decide they want to go a different way, that's their business."⁹³ As mentioned above, the EU has recently introduced changes to its trade defence regime.
- Lack of clarity on how the level of injury will be calculated. This was the subject of a PQ:

Gareth Snell

To the Secretary of State for International Trade, if his Department will bring forward draft (a) legislative proposals and (b) policy papers on how the Trade Remedies Authority will calculate injury in trade remedy investigations before further consideration by the House of the Taxation (Cross-border Trade) Bill.

Greg Hands

Work is currently underway to develop the appropriate methodology for constructing normal value in dumping investigations in cases where domestic prices are inappropriate.

⁹¹ UK Steel, [UK Steel Response to the Taxation \(Cross-border Trade\) Bill](#), November 2017, p1

⁹² UK Steel, [UK Steel Response to the Taxation \(Cross-border Trade\) Bill](#), November 2017, p2

⁹³ ['Britain "will be target for steel dumping by China"'](#), *The Times*, 9 November 2017

Work is also underway examining the options for calculating injury.

We expect this process to take some months, but we will discuss our thinking with interested parties as it develops and will continue to engage with a range of stakeholders on the detail of trade remedies policy as we have done since the summer.⁹⁴

- The economic interest test is drawn too widely – for example, remedies may be blocked if the affected market is relatively small.
- The decision-making process contained in the Bill is too complicated and “seems to be designed to make it far more difficult to introduce measures in the UK than is the case in the EU and elsewhere.”⁹⁵

Producers also argued that the lesser duty rule was flawed as it relied on calculation of the injury margin as well as the dumping margin. Industry argued that the dumping margin was much more straightforward to calculate than the injury margin.⁹⁶

The Manufacturing Trade Remedies Alliance (MTRA) has also expressed concerns about the Government’s approach.^{97 98} It said “the Government plans a very liberal trade remedies system, meaning UK manufacturers will not have adequate protection.” The MTRA also highlighted the lack of detail on how “distorted economies”, such as China, would be treated. Measuring dumping or subsidy of imports from countries with significant state involvement in the economy presents particular challenges as prices may be distorted. The MTRA said:

The White Paper included a ‘Lesser Duty Rule’ and ‘Economic Interest Test’ in the UK’s post-Brexit Trade Remedies System. It did not set out a special methodology to deal with distorted economies (e.g. China). Combined, this means the UK system will be more liberal and open to illegally dumped imports than most other WTO members.⁹⁹

In evidence to the Public Bill Committee, Dr Laura Cohen of the MTRA said:

We have three major concerns with the Bill that we think, taken together, will give much lower duties than the EU, and that will attract dumped products from around the world. Those three main concerns at a high level are: first, the measurement of the dumping margin—the calculations and the methodology — particularly where there are distorted economies, and the absence of a methodology in the Bill; secondly, the combinations of

⁹⁴ [PQ 117271 12 December 2017](#)

⁹⁵ UK Steel, [UK Steel Response to the Taxation \(Cross-border Trade\) Bill](#), November 2017, p4

⁹⁶ [Taxation \(Cross-border trade\) Bill Deb 23 January 2018 c72](#)

⁹⁷ The MTRA is a group comprising Agricultural Industries Confederation; British Ceramic Confederation; British Glass; Chemical Industries Association; Confederation of Paper Industries; Mineral Products Association; UK Steel; Community; GMB; TUC; Unite

⁹⁸ British Ceramics Confederation, [BCC’s Laura Cohen Comments on Trade Bill Publication](#), 7 November 2017

⁹⁹ British Ceramics Confederation, [BCC’s Laura Cohen Comments on Trade Bill Publication](#), 7 November 2017

various economic interests tests and public interests tests, and I will go into more detail on those; and thirdly, this lesser duty rule, and that is very much an alliance position. Overall, the effectiveness of trade remedies depends so much on the detail of the legislation that is completely absent in the Bill.¹⁰⁰

On the other hand, Sue Davies from *Which?* welcomed the economic interest test. She told the Public Bill Committee:

We think it absolutely critical that we have the economic interest test. We completely recognise that there will be cases where we need to consider whether we put remedies in place, but it is really important that when the decision is made to do that, there has also been a full assessment of what the impact would be ultimately on the end consumers. As some of the products or sectors that have involved remedies up to now have often been inputs or intermediaries into other sectors, which will then feed through to consumers, we need to ensure that we are looking at what the short-term impacts could be while also thinking longer term. We were really pleased to see the economic impact test referred to.¹⁰¹

Professor Alan Winters told the Public Bill Committee on the Trade Bill that the lesser duty rule “is a good rule to have”.¹⁰²

What happens to current cases?

The UK’s exit from the EU raises the question of what happens to the EU’s existing trade remedies. Will the UK continue to benefit from these after Brexit? The Trade White Paper said the following on this issue:

Once the UK has left the EU, and taking into account any time-limited implementation period, UK businesses will no longer be able to make a request to the European Commission to investigate claims of dumping or subsidy in the UK. If no action is taken to transition existing trade remedy measures they will, with immediate effect, no longer apply to products arriving into the UK.

Without action, this could have serious effects on certain UK industries including those in the steel, ceramics and chemicals sectors. In order to provide certainty to business and ensure continuity, we will seek to effectively continue the existing trade remedies measures which matter to UK business, and which meet WTO requirements around the level of domestic production. We will review them to ensure that they are tailored to the needs of the UK economy.

As a first step in this process we will shortly be issuing a call for evidence in order to identify which existing EU trade remedy measures are relevant to UK companies. Once we have this information we will be able to assess those measures. We will set out our approach for transitioning existing measures in more detail in the Call for Evidence and, recognising that participating in trade remedy processes can be resource intensive for business, we will ensure that we allow adequate notice and time to collect any further information that we may require.¹⁰³

¹⁰⁰ [Taxation \(Cross-border trade\) Bill Deb, 23 January 2018 c68](#)

¹⁰¹ [Taxation \(Cross-border trade\) Bill Deb, 23 January 2018 c29](#)

¹⁰² [Trade Bill Deb 23 January 2018 c53](#)

¹⁰³ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, p37

The Government issued its [Call for Evidence](#) on 28 November 2017. The deadlines for responses closed on 30 March. The Government has not yet published its response.

The International Trade Committee heard differing views on the legality of the UK continuing to apply EU anti-dumping duties after Brexit. Bernadine Adkins of law firm Gowling WLG told the Committee “it won’t be possible to grandfather the measures, otherwise you will face problems with the World Trade Organization.” The UK would have to carry out its own investigation before imposing duties. Edwin Vermulst, of law firm VVGB, told the Committee:

It seems to me that that kind of measure can be maintained if you can show there is UK production, which obviously there is, and maybe we have to conduct a review in order to see, for example, whether the dumping margin that was calculated on an EU-wide basis would be different if it was supplied only for the UK. But I think that is what DIT’s plan is.¹⁰⁴

Gareth Stace, of UK Steel, thought grandfathering would be consistent with WTO rules. If the UK needed a new investigation post-Brexit, so would the EU, as its investigation was originally based on the EU market including the UK.¹⁰⁵ UK Steel has called for existing measures to be rolled over automatically unless they are proved to be unnecessary:

UK industries currently benefit from a number of EU AD/CV [Anti-dumping/Countervailing] measures which will still be effective when the UK exits. It is crucial to those industries that these remedies continue to apply in the UK after exit, until the normal five year expiry has been reached. However, under the Bill, unless the Secretary of State takes action to the contrary, all such duties will automatically lapse. We propose that the main Bill should be amended to ensure that existing measures are automatically rolled over unless or until an economic review proves them to be unnecessary.¹⁰⁶

In the Westminster Hall debate on trade remedies, Greg Hands (the then Minister for Trade Policy) said:

My hon. Friend the Member for Stoke-on-Trent South raised points about existing EU trade remedies. He should bear it in mind that we have just finished a call for evidence on the existing EU trade remedies. That call for evidence closed on 30 March. The response was good. We will be looking at our response to that in due course. We have been clear that when we operate our own trade remedies system, we will transition those measures in the EU system that matter to UK business. We received over 70 responses from producers and other interested parties in that consultation. Most importantly, I can assure hon. Members there will not be one day when a UK industry that needs protection from unfairly traded imports will be left alone.

[...]

¹⁰⁴ International Trade Committee, [The Trade Bill, Oral evidence](#), 29 November 2017, HC603i, Q21

¹⁰⁵ MLex, UK plan to roll over EU dumping tariffs after Brexit risks WTO dispute, lawyers warn, 29 November 2017

¹⁰⁶ UK Steel, [UK Steel Response to the Taxation \(Cross-border Trade\) Bill](#), November 2017, p5

My hon. Friend asked whether EU measures will be transitioned for the full five years. We have agreed that EU trade remedy rules and regulations will continue to apply during the implementation period. We will assess which EU measures matter to UK industry, which the call for evidence that closed last month did, and maintain those measures at their current level until the TRA reviews them.¹⁰⁷

Box 2: International Trade Committee report

The International Trade Committee published a report on the UK Trade Remedies Authority in May 2018.¹⁰⁸ This made a number of comments and recommendations relating to the Bill (and the *Trade Bill*). These included:

- The Bills have insufficient detail about the UK's trade remedies framework¹⁰⁹
- The Government should explain why it proposes use of the negative procedure for scrutiny of trade remedy regulations¹¹⁰
- The Committee requested urgent assurance that the TRA will be operational by 29 March 2019. The Government should write to the Committee to explain how it proposes to ensure that the TRA will be operational by 29 March 2019.¹¹¹
- The Government should write to the Committee to clarify its position on whether it can legally carry over the EU's existing trade remedy measures after Brexit¹¹²
- The technocratic responsibilities of the TRA need to be more clearly separated from the political role of the Secretary of State in trade remedy cases. The Government should therefore amend the Bill to remove the obligation on the TRA to apply the economic interest test¹¹³
- In the interests of transparency, the Department for International Trade should publish detailed guidance on how the assessments of dumping and injury are to be undertaken¹¹⁴
- The Bill (and/or the *Trade Bill*) should be amended to provide a right of appeal over the decisions of the TRA and the Secretary of State¹¹⁵

Appeals

On the question of appeals, the then Minister of State for Trade Policy, told the International Trade Committee:

MOJ has confirmed that the appropriate destination for appeals against trade remedy decisions will be the Tax & Chancery Chamber (an Upper Tribunal) of the Unified Tribunals. The final decision, however, as to where such appeals are allocated for hearing, is purely a matter for the Senior President of Tribunals, but appellants can be confident their case will be dealt with in an expert, independent and impartial manner.¹¹⁶

¹⁰⁷ [HC Deb 17 April 2018 c112-3WH](#)

¹⁰⁸ International Trade Committee, [The UK Trade Remedies Authority](#), 10 May 2018, HC 743, 2017-19

¹⁰⁹ Para 17

¹¹⁰ Para 17

¹¹¹ Paras 28 and 30. In response to a written PQ, the Government said "We are working to set up the Trade Remedies Authority by the time the UK leaves the EU – to ensure that the UK can continue to provide a safety net to domestic industries." [PQ HL7779 24 May 2018](#)

¹¹² Para 29

¹¹³ Para 65

¹¹⁴ Para 82

¹¹⁵ Para 85

¹¹⁶ [Letter](#) from Greg Hands MP to International Trade Committee, 11 June 2018

4. Trade preferences for developing countries

Many developing countries are eligible for tariff-free or low tariff imports under current EU arrangements. If the UK is not in a customs union with the EU following Brexit, it needs to decide what tariff regime it wants to put in place for developing countries to replace the current arrangements.

The Government has already committed to giving some preferential access for developing countries, on the grounds that:

Easier access to the markets of developed countries provides vital opportunities for the world's poorest countries to help grow their economies and reduce poverty, whilst UK business and consumers rely on these relationships for lower cost goods and greater choice of products.¹¹⁷

Various other major economies have schemes in place to give developing countries better access to their markets.¹¹⁸

The Bill would allow the UK to set up a trade preference scheme, allowing imports from developing countries to be subject to lower tariffs. Many of the details of this new trade preference scheme would be in secondary legislation, although the Bill does require that the scheme must include a zero rate of duty for imports from the Least Developed Countries.

The Bill also allows lower tariffs to be put in place in line with trade agreements between the UK and other countries, including those with developing countries.

The International Trade Committee are currently holding an inquiry into the UK's future trade relationships with developing countries, particularly those in the Commonwealth. The [inquiry webpage](#) brings together written and oral evidence.

4.1 Context: the current EU schemes

The [current EU regime](#) is made up of the 'Everything But Arms' scheme for the Least Developed Countries, and the 'GSP' (Generalised Scheme of Preferences) and 'GSP+' schemes for other low and lower middle income countries. These sit alongside a range of trade agreements with developing countries. The legal basis for the 'Everything But Arms', GSP and GSP+ schemes is [EU regulation No 978/2012](#).¹¹⁹

¹¹⁷ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, 9 October 2017

¹¹⁸ Including Australia, Canada, Japan, New Zealand, Norway, Russia, Switzerland, Turkey and the United States, as well as the EU. Source: World Trade Organization, [List of PTAs](#) [online, accessed 15 Dec 2017]

¹¹⁹ [Regulation \(EU\) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation \(EC\) No 732/2008](#), as amended by various Commission delegated regulations

The value of the current arrangements to developing countries is substantial. It has been estimated that the value to the Least Developed Countries alone of access to UK markets is £323 million per year.¹²⁰

It has been estimated that 25% of UK imports from developing countries comes under the GSP regime, and around 16% that is under free trade agreements (economic partnership agreements and other free trade agreements). About 50% are duty free as the standard (MFN) tariff is zero. The remainder are subject to non-zero standard (MFN) tariffs.¹²¹

Reduced import duties are also important for UK businesses and consumers, as they can reduce the prices that they have to pay. Key sectors include food and drink, and clothing.¹²²

Least Developed Countries – ‘Everything But Arms’

The 49 Least Developed Countries currently have duty-free and quota-free access to all products, except for arms and ammunitions, under the EU’s ‘Everything But Arms’ initiative.¹²³

The group of Least Developed Countries is defined by the [UN](#). They are low-income countries with “severe structural impediments to sustainable development”; they are highly vulnerable to economic and environmental shocks and their people have relatively low levels of health and education.¹²⁴

Other developing countries – GSP and GSP+

Other low and lower-middle income countries are currently eligible for the EU’s standard ‘Generalised Scheme of Preferences’ (GSP) or ‘GSP+’ schemes. At present 17 countries have access under GSP and another nine under GSP+. GSP and GSP+ both involve the partial or entire removal of tariffs on two thirds of all product categories.

Of the two, the GSP+ scheme offers greater advantages for developing countries – removing, rather than reducing, tariffs on many product categories. To be part of the GSP+ scheme a country must take certain actions to support sustainable development and good governance.¹²⁵

¹²⁰ Based on estimate by Jane Kennan of €385 million annually, cited in Overseas Development Institute (ODI) and UK Trade Policy Observatory, [The impact of the UK’s post-Brexit trade policy on development](#), September 2016

¹²¹ [Oral evidence from Dr Mendez-Parra \(ODI\) to International Trade Committee](#), 21 March 2018

¹²² Department for International Development and Department for International Trade, [Government pledges to help improve access to UK markets for world’s poorest countries post-Brexit](#), 24 June 2017

¹²³ European Commission, [Generalised Scheme of Preferences \(GSP\)](#) [online, accessed 2 January 2018]

¹²⁴ United Nations, [Least Developed Countries](#) [online, accessed 2 January 2018]

¹²⁵ European Commission, [Generalised Scheme of Preferences \(GSP\)](#) [online, accessed 2 January 2018]

Countries with trade agreements

At least 50 developing countries also have individual or collective trade agreements with the EU.¹²⁶ These include Economic Partnership Agreements (EPAs), which are trade and development agreements negotiated between the EU and African, Caribbean and Pacific partners engaged in regional economic integration processes.

4.2 The future UK regime and transition

The Bill would allow the UK to set up a trade preference scheme, as explained in more detail below. Much of the detail of this new trade preference scheme would be in secondary legislation, but the Bill requires that the scheme must include a zero rate of duty for imports from the Least Developed Countries.

The Government has however said that it intends that the preferences for developing countries under the current EU scheme will continue when the UK first leaves the EU, to ensure that market access for all beneficiary countries is maintained.¹²⁷ It has also said that it wants to replicate existing trade agreements with developing countries:

As we leave the EU, we will maintain current access for the world's LDCs to UK markets and aim to maintain the preferential access of other (non-LDC) developing countries. This means we will establish a UK unilateral trade preferences scheme to support economic and sustainable development in developing countries. This will include those countries currently benefitting from the EU's GSP, including beneficiaries of the EBA, standard GSP and GSP+ tiers. We will also seek to replicate existing EPAs (in line with other EU-third country FTAs) as we prepare to leave the EU.

Our first priority is to deliver continuity in our trading arrangements with developing countries as we leave the EU. This is vital to maintain existing supply chains. Without these trading arrangements, clothing, for example, from some of the poorest countries could face tariffs of over 10% which could prevent these countries from trading effectively, and result in costs being passed on to UK consumers through higher prices at the till.¹²⁸

Alongside these commitments, the Government has also pledged to support developing countries through aid spending.¹²⁹

Various authors have stressed the importance of continued trade preferences and trade agreements for certain developing countries and sectors. For example, one said:

... were the UK to exit the EU without a mechanism in place to safeguard existing preferences, garments and textiles factories in

¹²⁶ HMRC, [UK Trade Tariff: preferential trade arrangements for countries outside the EU](#) has a list of countries showing which schemes each is currently eligible for. Count of countries from ODI, [Post-Brexit trade policy and development: current developments; new directions?](#) March 2017 – based on EU TARIC database

¹²⁷ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 68

¹²⁸ Department for International Trade, [Preparing for our future UK trade policy](#), 9 October 2017

¹²⁹ See for example Department for International Development and Department for International Trade, [Government pledges to help improve access to UK markets for world's poorest countries post-Brexit](#), 24 June 2017

Bangladesh, cane sugar producers in Mauritius, Fiji, and Belize, and smallholder banana farmers in St Lucia could go out of business overnight.¹³⁰

4.3 The details of the new trade preference scheme

Clause 10 of the Bill would allow the Secretary of State to set up a trade preference scheme, in secondary legislation (regulations) made under the negative procedure.

A trade preference scheme would allow a set of developing countries to export to the UK with no, or lower, tariffs on certain goods. Different tariffs could apply to different countries and different goods. Lower rates may be subject to conditions.

The scheme would have to include a zero rate of duty for imports from the least developed countries (aside from arms and ammunition). The least developed countries are defined in Schedule 3 (discussed below).

As set out above, it is the Government's intention to maintain preferences that apply under the EU scheme at first.¹³¹

The Government have also said that countries would not be part of the scheme if they are part of another arrangement – for example a Free Trade Agreement – that gives them better access than they would have under the scheme.¹³² This is similar to one of the criteria that applies to the current EU scheme.¹³³

As with various other regulations made under the Bill, the Government argues that the negative procedure is appropriate here as regulations might be lengthy, technical, frequently changed, not yet known and/or administrative. The regulations setting out the current EU scheme ([EU regulation No 978/2012](#)) were adopted by the EU Parliament and Council – these regulations include various provisions allowing technical / routine updates through Commission delegated regulations.

The lists of countries

Schedule 3 of the Bill lists the countries to which the trade preferences scheme in clause 10 can apply. The starting set of countries essentially matches those that are eligible under the current EU scheme.

Least developed countries

Part 2 of Schedule 3 lists Least Developed Countries – they will be subject to zero-tariffs under clause 10, for all goods aside from arms and ammunition.

The definition of this group of countries is based on the Least Developed Countries list from the [United Nations](#). This is a list of low-income countries judged as confronting severe structural impediments

¹³⁰ Emily Jones, [Brexit: Opportunity or peril for trade with small and poor developing economies?](#) International Centre for Trade and Sustainable Development, 26 July 2016

¹³¹ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 68

¹³² [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 69

¹³³ [EU regulation No 978/2012](#)

to sustainable development. They are highly vulnerable to economic and environmental shocks and have relatively poor levels of health and education.

The Government say that they expect countries to stay in this list while they are defined as Least Developed Countries by the UN, or for three years after leaving the group (“graduating”).¹³⁴ This is in line with the approach under the current EU scheme.

Other eligible countries

Part 3 of Schedule 3 lists other developing countries (aside from the Least Developed Countries) that are eligible for preferences under a scheme made under clause 10. The definition of this group of countries is based on the list of lower and lower-middle income countries from the [World Bank](#). It also includes some small island states that are not classified by the World Bank but are considered to have a similar level of national income.

Countries are expected to stay in this list while they are defined as lower and lower-middle income countries (or if they have been an upper-middle income country for less than three years),¹³⁵ in line with the current EU scheme.

Changes to the lists

The Secretary of State can change these lists through secondary legislation, under the negative procedure.

The Government would need to have regard to the UN and World Bank classifications when reviewing the countries making up these groups, but would not be legally obliged to follow these in future. This is because they wish to avoid UK legislation being “framed by an external body which may change its approach from time to time”.

¹³⁴ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 315

¹³⁵ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 319

5. VAT and Excise Duties

5.1 Introduction

Taxation is very largely a Member State competence. The implications of the UK lying outside the EU are likely to be less significant for taxation compared with other policy areas.

The major exception to this generalisation is indirect tax: primarily VAT – for which there is a substantive body of EU law establishing common rules across Member States – and, to a lesser extent, excise duties. It has long been recognised that the harmonisation of indirect taxes across Member States is an essential element to the achievement of an effective single market. Unlike most internal market measures, which use qualified majority voting, the harmonisation of taxation is decided by unanimity.

The consequences of the EU's shared competence in indirect tax is most frequently discussed in the context of the UK's limited discretion in setting the rates of VAT on individual goods and services. In addition many commentators have raised concerns about the UK's ability in the future to maintain its existing range of VAT reliefs (such as the zero rates of VAT which apply to food and children's clothes) from any further harmonisation of VAT law.¹³⁶ The Government's position on this issue, and set out recently in a written answer, is that, "all taxes remain under review and future decisions on VAT will be continue to be taken as part of the normal Budget process following the UK's departure from the European Union. In the meantime, the UK remains a member of the EU and will continue to meet its rights and obligations. That includes the application of EU VAT rules."¹³⁷

There are no equivalent provisions with regard to other taxes, though all national legislation has to comply with the overarching provisions of the Treaty guaranteeing the free movement of goods, persons, services and capital across the single market and prohibiting discrimination. There is a substantive body of case law where the European Court of Justice has ruled that individual provisions of a Member State's tax code fail this test. Member States' powers to act in relation to taxation must also be exercised in accordance with State Aid rules.

Finally, there are a number of EU instruments relating to administrative cooperation to exchange information and help tackle tax evasion. In the latter case it seems likely that outside the EU the UK will seek to maintain some form of bilateral agreement akin to these provisions, given the growing consensus between governments that there is a very important international dimension to taxing multinational corporations fairly and effectively tackling tax avoidance.

¹³⁶ For more background see, [VAT : European law on VAT rates](#), Commons Library Briefing

¹³⁷ [PQ119341, 20 December 2017](#)

Part 3 and Part 4 of the Bill cover VAT and excise duties – specifically those duties charged on alcoholic drinks, hydrocarbon oils and tobacco products.

The Explanatory Notes to the Bill summarise the main provisions in EU law which harmonise these taxes across Member States, and the UK legislation which implements these provisions:

EU law largely harmonises VAT and excise rules across the EU.

As an EU Member State, the UK is required to implement EU Directives in domestic legislation. The main legislation for VAT is the EU Principal VAT Directive (Directive 2006/112) and the main legislation for excise is the Excise Directive (Directive 2008/118). Other EU Directives also apply and there are various EU VAT and excise Regulations which are directly applicable in the UK.¹³⁸

The UK has implemented the Principal VAT Directive through the *Value Added Tax Act 1994* (as amended). The main body of the Act sets out the general principles governing the tax, such as when the tax becomes chargeable, what the rate of VAT is, who has to pay it, and what VAT businesses can recover. More detailed rules, such as lists of supplies of goods or services that are exempt or zero-rated, are contained within its schedules. The Act also provides a range of powers to introduce secondary legislation. Some parts of HMRC's VAT public notices also have the force of law. This tertiary legislation usually prescribes administrative procedures.

The UK also gives effect to EU excise rules in primary legislation, including through the *Customs and Excise Management Act 1979*, *Alcoholic Liquors Duty Act 1979*, and *Tobacco Products Duty Act 1979*. EU excise provisions are also implemented substantially through secondary legislation, such as the *Excise Goods (Holding, Movement and Duty Point) Regulations 2010* (SI 2010/593). This includes the duty suspension regime, which ensures the equal treatment of excise goods moving within and between Member States with excise duty only being charged in the member state where the goods will be consumed.¹³⁹

The Notes set out the purpose of this section of the Bill as follows:

The Bill will provide for amendment of existing VAT and excise legislation. It will provide for the EU concept of acquisition VAT (for business-to-business intra-EU movements) to be abolished so that import VAT is charged on all imports from outside the UK.

In addition, the Bill will allow the VAT and excise regimes to continue to function whatever the outcome of the negotiations. So, for example, the Bill will give the government:

- the flexibility to give effect to an agreement with the EU on supplies or movements in progress on the day of EU exit and enable supplies or movements of goods and services by businesses and individuals to continue as freely as possible thereafter

¹³⁸ In this context it is worth noting [Council Regulation \(EU\)282/2011](#) – known as the 'VAT implementing regulation' – which lays down implementing measures for the Principal VAT Directive "in particular giving guidance on determining the status of the customer, whether he acquires services for business use and where he is located ... [It] is an important guide to the interpretation and application of many of the rules in the Principal VAT Directive." *Tolley's VAT 2017/18* 2nd ed para 19.4.

¹³⁹ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), paras 30-32

- the flexibility to deal with VAT on movements of goods and services between the UK and EU
- the flexibility to allow HMRC to adapt IT systems, for example the Excise Movement and Control System, for UK internal excise duty suspended movements
- the flexibility to vary the UK information sharing obligations to give effect to any new agreement about the continued exchange of information with EU Member States to tackle avoidance and evasion.¹⁴⁰

The Customs White Paper noted that this approach follows usual practice in legislation for both VAT and excise duties:

For VAT and excise it is usual practice for primary legislation to set out a 'framework', and for secondary legislation to be used to set out rules concerning administration, collection and enforcement. This is the approach that the government will also be taking to the new customs regime. This is also necessary to give the UK the flexibility to adapt the regimes in response to future developments, for example, negotiations with the EU, international agreements, or changes in trader behaviour and compliance.¹⁴¹

5.2 Concerns regarding upfront import VAT

VAT is payable on the goods that businesses bring to the UK, though the accounting treatment differs depending on whether the goods come from an EU Member State or a non-EU country. Consequently EU VAT law distinguishes between 'acquisitions' – the supply of goods between businesses from one Member State to another, and 'imports' – the supply of goods from outside the EU.¹⁴² Businesses are entitled to use 'postponed accounting' for VAT on acquisitions, but not on imports – as the Chartered Institute of Taxation (CIOT) explains:

Postponed accounting for import VAT allows businesses to offset import VAT via their quarterly VAT returns for imports from the EU. (NB. Imports from EU are technically called acquisitions while we remain EU members.) For imports from outside the EU a business has to either pay VAT at the point of import or via a deferment account, and then claim it back up to three months later in the VAT return. Such accounting is enabled currently through acquisition VAT for purchases of goods from the EU – which will go after Brexit as we leave the Single Market - and through the reverse charge for services.¹⁴³

Several stakeholders, including the British Retail Consortium (BRC), have raised concerns that one consequence of Brexit would be that a large

¹⁴⁰ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), paras 19-20. The Notes underline this point elsewhere (para 3); that is, "in relation to VAT and excise, it is necessary to amend existing legislation as a consequence of the UK's withdrawal from the EU with or without an agreement in order to ensure that these regimes work appropriately on withdrawal."

¹⁴¹ HM Treasury, [Customs Bill: legislating for the UK's future customs, VAT and excise regimes](#), Cm 9502, October 2017 para 3.3

¹⁴² HMRC, [VAT: imports, acquisitions and purchases from abroad](#), April 2016

¹⁴³ CIOT press notice, [Institute highlights possible relief from Brexit burden for importers](#), 28 November 2017. For more details of the 'reverse charge' for services see, HMRC, [VAT Notice 741A: place of supply of services](#), 1 November 2017.

number of businesses would face serious cash flow difficulties, if they were required to account for VAT on all imports from EU Member States at the point of import.¹⁴⁴

The Chancellor presented the autumn Budget on 22 November 2017, and although the issue did not figure in his speech, the Budget Report stated the following:

Import VAT – Businesses currently benefit from postponed accounting for VAT when importing goods from the EU. The government recognises the importance of such arrangements to business due to the cash flow advantage they provide. The government will take this into account when considering potential changes following EU exit and will look at options to mitigate any cash flow impacts.¹⁴⁵

The announcement was welcomed by the CIOT, among others:

The suggestion that HMRC are looking at helping importers with their post Brexit operations is welcomed by the CIOT. However, the Institute cautions business and their advisers that there is no certainty that postponed accounting will be HMRC's preferred approach when the UK leaves the EU.

Alan McLintock, Chair of CIOT's Indirect Taxes Sub-committee, said: "Continuing postponed accounting after Brexit would avoid a huge strain on businesses' cash flow and ease their respective administration work, especially as it is estimated that around 180,000 business are set to have to deal with customs declarations that have not before, once we leave the EU."¹

"Postponed accounting will help cut the cash flow impact on all importers, large and small, where significant amounts of cash will otherwise become tied up due to the delay between the payment of import VAT and the associated later recovery through the importer's UK VAT return.

"We note that the Government have not promised to implement postponed accounting but only to take postponed accounting 'into account' following the EU exit. We look forward to receiving more information on exactly what this means in practice and whether it will be limited to trade with EU countries only or extended to imports from the rest of the world."

Notes: ¹ Introducing customs declarations after Brexit would affect up to 180,000 UK traders and could cost traders over £4 billion a year, according to the IfG analysis paper [Implementing Brexit: Customs](#), September 2017.¹⁴⁶

Subsequently in answer to a PQ on 22 January Lord Bates, Minister of State, said, "the Government's aim is to keep tax and duty processes as close as possible to what they are now."¹⁴⁷ Writing in the *Tax Journal*,

¹⁴⁴ BRC, [A fair Brexit for consumers: the Customs Roadmap](#), Winter 2017 p9. See also, BRC, [We need a post-Brexit VAT plan, and quickly: BRC blog](#), 11 January 2018.

¹⁴⁵ [Autumn Budget 2017](#), HC 587, November 2017 para 3.62. see also, HMT, [Overview of tax legislation & rates](#), November 2017 para 2.44

¹⁴⁶ CIOT press notice, [Institute highlights possible relief from Brexit burden for importers](#), 28 November 2017. See also, "UK pledges to mitigate business Brexit damage from upfront VAT", *Financial Times*, 8 January 2018.

¹⁴⁷ [HL PQ4506, 22 January 2018](#)

David Wilson (RSM) suggested that “the solution may lie in adopting the special regime operated by the Netherlands”:

Although this wouldn’t address the payment and clearance for customs duty, it could mean that instead of paying the import VAT at the time of importation, import VAT would be accounted for and recovered on the same VAT return, much as it is now for intra-community supplies.¹⁴⁸

The Government’s Impact Assessment, published alongside the Customs Bill, did not give any estimate of the potential costs that businesses would incur from any necessary changes to the UK VAT regime:

The exact timing and nature of the necessary changes to the VAT and excise regimes is not yet known and therefore impacts cannot currently be estimated.

It is our intention that the administration of the VAT and excise regimes following EU exit will remain largely as it currently is, in so far as this is desirable and practicable. The Bill makes provisions whereby the UK could diverge from EU law where it is necessary to do so where there is clear benefit to business from diverging from it and such divergence is consistent with whatever bilateral arrangements the Government agrees with the EU.¹⁴⁹

In the light of these concerns the Chair of the Treasury Select Committee, Nicky Morgan, wrote to HMRC’s Chief Executive Jon Thompson on 9 January; part of her letter is reproduced below:

The Impact Assessment published with the Bill makes no attempt to quantify the costs arising from the changes to the VAT regime, or indeed from any of the other provisions contained therein. I would therefore be grateful for:

- An estimate of the costs to businesses, to consumers and to HMRC arising from the charging of import VAT on EU trade, without any unilateral or negotiated mitigations in place.
- A description of the options under consideration to mitigate these costs, in the absence of a negotiated outcome; an assessment of the risks to revenue collection associated with these measures; and an assessment of whether the measures would also have to be applied to non-EU imports in order to comply with WTO rules.
- A description of what negotiated options are under consideration to mitigate these costs. In particular, I invite you to rule out participation (or close association equivalent to participation) in the EU VAT area as part of the UK’s end-state relationship with the EU.
- A timeline illustrating when and how HMRC intends to notify firms that stand to be affected by changes to the VAT regime of the actions they will need to take to comply with new obligations, taking into account the fact that the existence and scope of a negotiated outcome may not be known with certainty until the end of the year.

¹⁴⁸ “Is there a solution to the post-Brexit import VAT conundrum?”, *Tax Journal*, 19 January 2018

¹⁴⁹ [Taxation \(Cross-border Trade\) Bill Impact Assessment](#), 20 November 2017, para 39

- An assessment of the consequences of import VAT being applied to UK exports to EU Member States, including the impact on export competitiveness, and the risks to the UK tax base arising from possible behavioural responses.¹⁵⁰

In turn Mr Thompson sent the following reply:

Thank you for your letter of 9th January concerning the future of the UK's VAT regime.

As the Chancellor set out at Autumn Budget, he is aware of the potential changes to VAT accounting treatment, which could affect the point at which import VAT is due to be paid, after EU Exit. To be clear this could potentially change the timing of when VAT is due to be paid, but it would not change the amount of VAT. He will consider these potential impacts on businesses as part of any decision on import VAT accounting.

The Government's aim is to keep VAT processes as close as possible to what they are now, providing the best continuity and certainty for businesses. The Taxation (Cross-Border Trade) Bill provides the ability to pursue the aim of keeping future treatment consistent with existing processes, and caters for a range of outcomes.

We recognise the importance for businesses of postponed accounting for VAT when importing goods from the EU, due to the cash flow advantages it provides. We are actively engaging with stakeholders to make sure that businesses have their voices heard and have significant opportunity to feed into the Government's decision making on VAT accounting treatment. This is subject to the outcome of negotiations with the EU, which are ongoing.

We will continue to analyse options and advise Ministers on the best way to mitigate cash flow impacts, and Ministers will be looking closely at this issue going forward.¹⁵¹

Subsequently on 27 March the Committee launched an inquiry on VAT, which is to look, in part, at this issue.¹⁵² On Brexit, the Committee has asked for views on three questions:

- What opportunities and challenges for the UK VAT regime are presented by the UK's exit from the European Union?
- What are the chief concerns for HMRC and for business?
- What impact will Brexit have on HMRC's efforts to reduce the VAT element of the tax gap?

There was some mention of this issue during the evidence sessions at the start of the Committee stage of the Bill, on 23 January. Kirsty Blackman asked about the implications of moving to import VAT when William Bain (British Retail Consortium), Anastassia Beliakova (head of trade policy at the British Chambers of Commerce) and Peter

¹⁵⁰ Treasury Committee, [Correspondence from Chair of Treasury Committee to the Chief Executive of HMRC](#), 9 January 2018. The Committee has also published a short brief by the BRC on this issue: [Briefing on VAT and Import Duties clauses in Taxation \(Cross-border Trade\) Bill](#), January 2018.

¹⁵¹ Treasury Committee, [Correspondence from the Permanent Secretary to HMRC relating to the future of the UK's VAT regime](#), 31 January 2018

¹⁵² Treasury Committee press notice, [Three tax inquiries launched](#), 27 March 2018. Further details are [on the Committee's site](#).

MacSwiney (Agency Sector Management) gave evidence. An extract is reproduced below:

Q5 : Kirsty Blackman : Around the VAT issue, do you have concerns about moving from acquisition to import VAT? ...

William Bain: Yes, that is a huge concern because companies will have a big cash flow hit. The movement of goods within the European Union has been treated as VAT-free up to now. If the UK is treated as a third country afterwards, companies ostensibly will face an up-front cash payment. There are policies—domestic and in terms of the negotiations—that could mitigate that. The Government could introduce a deferment scheme, as is the case in Spain. They could look at other domestic policies to tackle it. More fundamentally, they could look at a form of self-assessment for VAT, which would obviate the need for up-front payments.

... Whatever happens domestically, UK companies will still face the burden of having to register for VAT purposes in each member state where they offer services and in most member states where they provide goods. That requires an international solution such as staying in the EU VAT area—even though that might involve treaty change—the establishment of a new common VAT area, or some other strong VAT co-operation. The domestic element and the negotiation element are both required to sort the problem out in the round.

Anastassia Beliakova: VAT and future potential VAT cash flow issues are a serious concern for our members. To echo the points already made, international measures that are not contingent on negotiations could be adopted. Deferment schemes are one. There are already deferment schemes in the UK, but they could be more generous. For instance, they ask businesses to provide bank guarantees, which is yet another cash flow issue for businesses. Some companies can waive it, but only after they have had a clean record of VAT payments for three years, which not all SMEs, for instance, could provide.

Another potential solution is to consider postponed accounting, which in effect is what we already have as members of the EU VAT area. The Government could consider setting out policy that would introduce postponed VAT accounting for imports from all third countries. That would alleviate future concerns in relation to Brexit and simplify existing procedures quite significantly.

Peter MacSwiney: The [Joint Customs Consultative Committee](#) has requested a return to postponed accounting; that is not popular with the Treasury, of course.¹⁵³

In a later session Jeremy White (customs duties spokesman of the CIOT) mentioned this issue in relation to the Government's approach in framing the Bill:

On the replacement of VAT on acquisitions being dealt with in a VAT return, we see flexibility in the Bill and in the announcements of HMRC and the Treasury. That can be replaced by postponed accounting of import VAT. That kind of flexibility is good.

When we look at the flexibility that we would like to see in respect of some of the special procedures and information systems, we think, "Yes, that will be good." In particular,

¹⁵³ [Taxation \(Cross-border Trade\) Bill Deb, 23 January 2018, cc7-8](#)

guarantee waivers—taking a different view from the EU on guarantees—are a good thing. The Bill would give us that structure, and we applaud that.¹⁵⁴

More recently the European Scrutiny Committee has published a report on this issue,¹⁵⁵ in the context of proposals that the European Commission has published for a series of longer-term reforms to the EU VAT system.¹⁵⁶ The Committee suggests that “Brexit, effectively, represents a trade-off”:

- If the UK comes to an agreement with the EU on continued adherence to the VAT Directive and its supplementary legislation, it may be able to avoid the barriers to trade [from leaving the EU VAT Area] ... including the need for VAT-related border controls on goods exported to an EU country after Brexit. However, this would come at the cost of having to follow legislation over which the Government will have substantially less influence than it does now (considering that, under the Treaties, Member States can veto EU tax legislation).
- If the Government does not want an arrangement with the EU to remove VAT-related obstacles that entails continued adherence to EU VAT law, there are likely to be new—and substantial—barriers to trade with the EU. This would pose a particular problem for the Irish border: without either UK participation in the EU system used to track movement of goods¹⁵⁷ or physical border controls, products could pour into the UK (and the EU) without VAT being paid.¹⁵⁸

However, in the Committee’s view, the Government has failed to provide any substantive details as to “how it intends to balance these competing pressures, and how collection of VAT on imports can be guaranteed on goods entering the UK via Ireland in the absence of any physical infrastructure on the border.”¹⁵⁹

5.3 VAT and Excise on personal imports, parcels and gifts

Most interest in the UK’s post-Brexit trade and customs policy has been from business stakeholders. That said, one aspect of the current customs, VAT and excise regimes is an issue that is often raised with Members by constituents: the implications of these EU-wide rules for personal imports.¹⁶⁰ The Customs White Paper addressed this issue in

¹⁵⁴ [op.cit. c23](#)

¹⁵⁵ ‘Clarity call on VAT on cross-border trade after Brexit’, [BBC News](#), 23 April 2018

¹⁵⁶ Details of the Commission’s Action Plan on VAT are on its site at:

https://ec.europa.eu/taxation_customs/business/vat/action-plan-vat_en

¹⁵⁷ The VAT Information Exchange System (VIES), which is only available to EU Member States applying EU VAT law

¹⁵⁸ The European Commission, in the draft Withdrawal Agreement, proposed as a fall-back option that Northern Ireland could remain part of the Single EU VAT Area and continue applying EU VAT law indefinitely to circumvent this problem. However, this would effectively shift the customs border to the Irish Sea, in between Northern Ireland and Great Britain.

¹⁵⁹ European Scrutiny Committee, [Value Added Tax: EU proposals for reform and the implications of Brexit](#), 3 April 2018, HC 301-xxii 2017-19, pp5-6

¹⁶⁰ HMRC publish an outline of the rules [on Gov.uk](#), and detailed guidance with details of the underlying legislation in [A guide for international post users, HMRC Notice 143, January 2018](#).

some detail in its discussion of a contingency scenario – that is, where the UK leaves the EU without a negotiated outcome on customs arrangements.

The White Paper provides a summary of the current arrangements – first in relation to individual travellers ...

Currently, EU rules mean that individual travellers arriving in the UK from the rest of the EU do not have to pay any VAT, customs or excise duties on goods they bring into the UK for their personal use. These travellers can use the blue channels when passing through customs.

Individual travellers coming from outside of the EU can bring in a certain amount of goods for their own use up to the personal allowances limit without paying customs duty, VAT or excise duty. They make their declaration by going through the green channel. Those with goods over their personal allowance have to declare this on arrival in the UK by using the red channel or red-phone point and pay the VAT and excise duties due.

... second in relation to parcels sent from other Member States, and those sent from outside the EU:

The tax treatment of goods sent to UK customers in the form of small parcels differs depending on whether the parcel is sent from the rest of the EU or outside of the EU. It also depends on who sends the parcel and who receives it.

Currently, the sender of a parcel in another Member State is responsible for paying VAT and excise duties due on the parcel (as set out in the table below). No customs duty is payable on parcels sent from within the EU, and where the VAT is paid depends on the distance selling rules. UK excise duty, however, has to be paid on all excisable goods sent to the UK by parcel.

Table 2.A: Current arrangements for goods sent as small parcels from the EU to the UK

	Customs	VAT	Excise
Business to business	No customs duty is payable	VAT is accounted for by the receiving business through their normal periodic VAT return	Excise duty is payable on all excisable goods and is accounted for by the business using one of two schemes
Business to consumer	No customs duty is payable	VAT is accounted for in the seller's country unless the distance selling threshold is exceeded, in which case the seller must register and account for VAT in the UK	Excise duty is payable on all excisable goods and is accounted for by the receiving business using one of two schemes
Consumer to consumer	No customs duty is payable	No import VAT is payable	Excise duty is payable on all excisable goods and is accounted for by a UK representative of the sender when the goods are delivered.

The sender of a parcel from a non-EU country is not responsible for VAT and excise duties due on the parcel (as set out in the table below). Instead, the recipient of the parcel is liable for the taxes and duties. This is collected by the delivery firm (either Royal Mail

or courier) along with their handling fee. The taxes collected are remitted to HMRC.¹⁶¹

Table 2.B: Current arrangements for goods sent as small parcels from non-EU countries to the UK

	Customs	VAT	Excise
Business to business	No customs duty is payable on parcels below £135 ^a	No import VAT is payable on parcels valued at £15 or less ^{a, b}	Excise duty is payable on all excisable goods
Business to consumer	No customs duty is payable on parcels below £135 ^a	No import VAT is payable on parcels valued at £15 or less ^{a, b}	Excise duty is payable on all excisable goods
Consumer to consumer	No customs duty is payable on parcels below £135 ^c	No import VAT is payable on gifts valued at £39 or less ^c	Excise duty is payable on all excisable goods

* There is no allowance for commercial consignments of alcohol, tobacco, perfume and eau de toilette so customs and import VAT are payable on all commercial consignments of these goods.

^b Commercial consignments sent to the UK from the Channel Islands do not benefit from relief of import VAT.

Two points are worth underlining. First, the EU provisions which set these monetary limits specify that no import VAT is payable on commercial consignments under €10, but allow Member States to apply a higher limit, up to €22 – which the UK has done.¹⁶² Member States may grant these exemptions subject to the condition that they are not liable to affect “the conditions of competition on the market.”¹⁶³ Clearly setting the ceiling for ‘low value consignment relief’ (LVCR), as it is known, represents a trade-off. More tax would be collected if the limit was €10, but more Customs and postal staff would be needed to process packages and impose charges, as many more consignments would no longer qualify for relief.

For VAT purposes the Channel Islands lie outside the EU. For some years there were concerns about the ability of some UK retailers to exploit LVCR by selling goods over the internet VAT-free from subsidiaries based in Jersey and Guernsey. In the 2011 Budget the Coalition Government announced it would cut the UK’s LVCR threshold from £18 to £15 from 1 November 2011 and “explore options with the European Commission” to prevent the relief being exploited “for a purpose it was not intended for.”¹⁶⁴ Subsequently the Government announced that it would legislate to withdraw LVCR entirely from mail order goods imported from the Channel Islands, with effect from 1 April 2012.¹⁶⁵

Second, these rules set a higher €45 limit to apply to gifts. The 2009 directive consolidated earlier legislation, and the €45 limit has been in place for over 20 years. This legislation was implemented in the UK by secondary legislation – specifically SI 1986/939, which set the limit at £36, with effect from 1 July 1986. The limit has been changed several

¹⁶¹ HM Treasury, *Customs Bill: legislating for the UK’s future customs, VAT and excise regimes*, Cm 9502, October 2017, para 2.14, paras 2.15-6

¹⁶² The legislation is consolidated in [Council Directive 2009/132/EC](#) (articles 23 & 24).

¹⁶³ Recital 5 of Council Directive 2009/132.

¹⁶⁴ *Budget 2011*, HC 836 March 2011 para 2.158 (Table 2.1 : item 38)

¹⁶⁵ [HC Deb 9 November 2011 cc15-16WS](#). For more background see, [VAT on postal packages, Commons Library Briefing paper](#)

times since then to ensure parity between the UK limit expressed in £ and the EU-wide limit expressed in Euros – and is now set at £39.¹⁶⁶

As the €45 ceiling has been fixed for many years, constituents are often surprised to receive a gift on which there is tax to pay because its value exceeds the limit. Though the issue has not generated much comment in the House, the Government were asked about their position on the limit being increased in a PQ in December 2012:

Simon Hart: To ask the Chancellor of the Exchequer if he will make representations to the European Commission and other member states in support of an increase in the limit set for goods imported into the EU which are exempt from VAT under Council Directive 2006/79/EC.

Mr Gauke: When deciding where to set the threshold for this import VAT relief on small non-commercial consignments, careful consideration has to be given to balancing the tax impact on individuals, with the impact on small UK businesses who are required to account for VAT on similar goods regardless of their value. As there is no evidence that the current threshold is causing difficulties to individuals, whereas there is recent clear evidence that a high import relief threshold has an adverse impact on small businesses, the UK has no plans to raise this issue with the European Commission.¹⁶⁷

Turning back to the White Paper, it noted that the Customs Bill would include provision to implement a negotiated solution to personal imports:

The Bill provides the necessary powers to implement a negotiated solution on goods carried by passengers or sent as small parcels. The government's aim is to ensure that people travelling between the UK from the EU can continue to carry on as they do now, and that the movement of goods as small parcels, via Royal Mail and fast parcel operators, continues to operate effectively. This will maximise fluidity, protect revenues and guard against an increase in tax evasion.¹⁶⁸

It went on to ask for views on a contingency scenario in the absence of a negotiated solution, including arrangements for personal imports:

The movement of goods by individuals via travel or small parcels

Under a contingency scenario, for goods carried by passengers or sent as small parcels, the government's aim is to avoid disruption, enable efficient and effective tax procedures and guard against an increase in tax evasion. For individual travellers entering and exiting the UK carrying goods (including across the border with Ireland), the tax processes will be kept as close as possible to what they are now whether they enter from the EU or the rest of the world (and similarly for exit).

This will, for example, ensure that people travelling to the UK from the EU can continue to carry on as they do now and if they do, they will not have to pay any UK tax on the goods that they bring back with them for personal use.

¹⁶⁶ HMRC, [Customs Information Paper 69 \(2016\)](#), 30 December 2016

¹⁶⁷ [HC Deb 17 December 2012 c567W](#)

¹⁶⁸ HM Treasury, [Customs Bill: legislating for the UK's future customs, VAT and excise regimes](#), Cm 9502, October 2017, para 5.20

A contingency scenario would also mean changes to how tax is collected on goods sent as small parcels. It would not be appropriate to extend the current rules for low value parcels from non-EU countries to include parcels sent from the EU. Due to the EU's geographical proximity to the UK, allowing parcels valued £15 or less to be sent from the EU without VAT being payable would potentially undermine the UK high street in the same way as low value parcels sent from the Channel Islands did before the rules were changed in 2012.

Applying the current rules for parcels sent from non-EU countries to all parcels would also increase the volume of parcels on which Royal Mail and fast parcel operators have to collect tax, and more UK consumers would have to pay tax when their goods are delivered. Instead, the UK is exploring alternative collection mechanisms, including technology-based solutions, to help collect the taxes due on parcels valued below £135 from the business selling the goods to minimise consumer burdens when the parcel is delivered.¹⁶⁹

5.4 The Bill

Part 3 and Part 4 of the Bill deal with VAT and excise duties. In both cases the Explanatory Notes underline that the changes to be made by these parts of the Bill “are conditional upon the outcome of exit negotiations with the EU”:

In the event of a negotiated outcome being reached, the government may choose not to make an appointed day order commencing these changes. The government would subsequently legislate to give effect to the negotiated outcome through use of a power provided by this Bill and existing powers.¹⁷⁰

Value Added Tax

As noted, VAT is payable on the goods that businesses bring to the UK, though the accounting treatment differs depending on whether the goods come from an EU Member State or a non-EU country. Consequently EU VAT law distinguishes between ‘acquisitions’ – the supply of goods between businesses from one Member State to another, and ‘imports’ – the supply of goods from outside the EU.¹⁷¹ These two concepts are established in UK law by section 1(b) and (c) of the *VAT Act (VATA) 1994*. Section 15 of *VATA 1994* determines the circumstances when goods are to be treated as imports for these purposes.

Clause 41 would make consequential amendments to s1 of *VATA 1994*, abolishing the concept of acquisitions, as “in the absence of a negotiated agreement, these goods will fall to be treated as imports and subject to import VAT.” It would also substitute a new s15, to maintain “the current treatment that import VAT is due at the same time and from the same person(s) who is/are liable for Customs duty (or would be if duty were due).”¹⁷²

¹⁶⁹ HM Treasury, [Customs Bill: legislating for the UK's future customs, VAT and excise regimes](#), Cm 9502, October 2017, para 5.41-3

¹⁷⁰ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), paras 168, 176

¹⁷¹ For more details see, HMRC, [VAT Notice 702: imports](#), May 2017

¹⁷² [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 170

It is the Government's intention to provide legal continuity during Brexit by copying over the entire body of EU law onto the UK's post-exit statute book. The *EUW Act* seeks to do this by creating a new category of domestic law for the UK: retained EU law.

In turn **clause 42** of the Bill sets out how EU law converted into domestic law when the *EUW Act* takes effect applies to VAT. Under **clause 42(2)** and **(7)** the Treasury would have power to exclude or modify this direct EU legislation by statutory instrument; this secondary legislation would be subject to the negative resolution procedure: **clause 42(6)**.

Clause 42(5) provides that where the Principal VAT Directive "remains relevant for determining the meaning and effect of the law" then it is to be "read for that purpose in the light of the provision made by the implementing VAT regulation but ignoring such of its provisions as are excluded by regulations made by the Treasury by statutory instrument."¹⁷³ **Clause 42(1)** provides that the implementing VAT regulation, and any relevant direct EU legislation transposed by the *EUW Act*, will cease to have effect, subject to this proviso.¹⁷⁴

Provision is made by the *EUW Act* to provide instructions to the UK courts on the relevance of judgements of the Court of Justice of the European Union (CJEU).¹⁷⁵ Of crucial importance to VAT and the success or failure of VAT avoidance schemes, the CJEU has established the principle that the concept of 'abuse of right' or 'abuse of law' applies to the tax.

In a definitive judgement in 2006 – *Halifax plc v C&E Comms*¹⁷⁶ – the Court "held that the application of EU law could not be extended to cover transactions carried out not in the context of formal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by EU law. It was for the national court to determine whether action constituting such an abusive practice had taken place. Any transactions involved in an abusive practice must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice."¹⁷⁷

In a second case – *Kittel v Belgian State*¹⁷⁸ – the Court ruled that "input tax deducted in respect of a purchase may be disallowed if it is subsequently ascertained, having regard to objective factors, that the trader knew – or should have known – that, by his purchase, he was

¹⁷³ As noted above, [Council Regulation \(EU\)282/2011](#) – the 'implementing VAT regulation' – lays down implementing measures for the Principal VAT Directive.

¹⁷⁴ **Clause 42** is one of the provisions in the Bill that may come into force on such a day as appointed by regulations to be made by the Treasury: **clause 55(3)**.

¹⁷⁵ For details see, [The European Union \(Withdrawal\) Bill: Supremacy and the Court of Justice](#), Commons Briefing paper CBP8133, 8 November 2017.

¹⁷⁶ [ECJ Case C-255/02](#), 21 February 2006

¹⁷⁷ *Tolley's VAT 2017/18* (2nd ed) para 4.1. For the application of the 'Halifax doctrine', as it is known, by the UK courts in striking down a VAT avoidance scheme see, [HMRC v the Atrium club Ltd](#), Ch D [2010].

¹⁷⁸ [ECJ Case C-439/04](#), 6 July 2008

participating in a transaction connected with the fraudulent evasion of VAT.”¹⁷⁹

Clause 42(3) and **(4)** provide that “the principle of EU law preventing the abuse of the VAT system (see, for example, the cases of *Halifax* and *Kittel*) continues to be relevant” for the purposes of VAT law, in accordance with the provision to be made by the *EUW Act*.

Clause 43 & Schedule 8 would make a series of consequential amendments further to clauses 41 & 42 to *VATA 1994* and other enactments relating to VAT.

Excise Duties

As noted above, the Customs White Paper acknowledged that exit from the EU would require the UK to introduce arrangements for charging and collecting excise duty on postal packages. **Clause 44** would allow HMRC to introduce regulations to this effect. Of note, **Clause 44(2)** specifies that the regulations may provide “that the liability of the sender of the goods to excise duty arises only in relation to goods of a value described in the regulations.”

Clause 45 would provide HMRC with the power to make regulations more generally for excise duties. The Explanatory Notes to the Bill underline that “it is not yet known what will be agreed with the EU as regards excise and therefore what changes will be required to existing legislation. Given this, the power is broad enough to deal with all possible outcomes.”¹⁸⁰ **Clause 45(2)** sets out a *non-exhaustive* list of areas that these regulations may cover. Moreover **clause 45(3)** states that the power to make regulations under this provision “may (among other things) be exercised by amending or repealing any Act of Parliament (whenever passed).” This is one of the four provisions in the Bill that would grant a power to affect primary legislation that has been commonly referred to as a ‘Henry VIII power’.¹⁸¹

Clause 46 relates to information collection, use and sharing. It has two elements, both of which can only be used if the HMRC Commissioners believe that they would “facilitate the administration, collection or enforcement of any excise duty” (**clause 46(8)**).

Firstly, the clause would allow the HMRC Commissioners to make regulations, through secondary legislation generally under the negative procedure, obliging traders to provide information. The regulations must “give effect to international excise arrangements.” The Delegated Powers Note states that this power will allow the UK to fulfil its obligations under any international agreements (including with the EU) on excise that require the supply of information from revenue traders for onward supply to the other parties to the agreement.¹⁸²

¹⁷⁹ *Tilley & Collison’s UK Tax Guide 2016/17* para 87.38. For details on how HMRC apply the ‘Kittel principle’, see their online [VAT Fraud Manual](#) – from para 50000.

¹⁸⁰ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 183

¹⁸¹ See section 7 for more details

¹⁸² [Taxation \(Cross-border Trade\) Bill Delegated Powers Note](#), para 238

Secondly, the clause would allow HMRC Commissioners to make written directions that would allow HMRC to exercise its legal powers to obtain information related to excise duty, in relation to international excise arrangements.

HMRC would then be allowed to share such information if the disclosure is required for the international excise arrangements and if HMRC Commissioners were satisfied that the recipient is bound or has undertaken to observe rules of confidentiality that are at least as strict as those that apply in the UK. HMRC officers are not generally allowed to deliberately disclose information without lawful authority.¹⁸³

Unlike the power in clause 25, there is no mention of additional restrictions on further disclosure of this information, or an associated offence.

Clause 47 would provide how EU law converted into domestic law by the *EUW Act* applies to excise duty – similar in form to **clause 42**. Of particular note, **clause 47(4)** states that nothing in this provision is to be read as restricting the general regulation making power to be established by clause 45.

Clause 48 deals with the procedure by which regulations under Part 4 of the Bill are to be made. Several points are worth noting.

First, regulations are to be subject to the negative procedure – **clause 48(6)** – with one exception. **Clause 48(2)** and **(3)** specify that regulations made under clause 45 of the Bill are subject to the affirmative procedure *if* they amend or repeal any Act of Parliament; restrict any rebate of or relief from excise duty; extend the descriptions of goods on which excise duty is chargeable or extend the cases in which stamping or marking of goods is required.¹⁸⁴

Second, **clause 48(7)** provides for a “specific procedure provision”:

In order to maintain a functioning excise regime once the UK leaves the EU, it is anticipated that clause 45 (and the other new excise powers in the Bill) will be used in conjunction with existing excise powers. For the most part, use of existing excise powers is subject to scrutiny by both Houses of Parliament, although a number of recent Acts introducing new excise powers have required Commons-only scrutiny in line with the broader convention on tax legislation.

The Bill therefore includes a **specific procedure provision** to allow existing excise powers to be used with the new excise powers in Part 4, as well as the powers in clause 51 (withdrawal from the EU) and clause 54 (consequential and transitional provision) in certain cases.

If a statutory instrument contains an excise duty provision made under any of the above mentioned clauses and also excise duty provision under any other enactment, if the other enactment requires approval of both Houses, the parliamentary procedure provided for in the Bill applies, not the procedure in the other

¹⁸³ Under s18 & s19 of the [Commissioners for Revenue & Customs Act \(CRCA\) 2005](#). The department’s [Manual on Information Disclosure](#) sets out these provisions in detail; see from [para IDG4000](#) onwards. See also, [HC Deb 10 July 2014 cc389-90W](#).

¹⁸⁴ [Taxation \(Cross-border Trade\) Bill Delegated Powers Note](#), para 32, para 320-326

enactment. This would mean that statutory instruments relating to excise duty made using a combination of the powers in these clauses and existing powers would be scrutinised by the House of Commons only. The procedure provision does not apply where the other enactment requires the affirmative procedure.

This provision ensures the streamlining of procedures for statutory instruments needed to ensure the excise regime continues to function as required once the UK has left the EU. Without the ability to combine powers the number of statutory instruments needed would be substantially increased and this more fragmented approach would make the legislation less accessible for users. Commons-only scrutiny is appropriate and in line with the convention on tax legislation as the powers will be used for purely tax purposes.¹⁸⁵

The Explanatory Notes state that “the Government **does not intend** to use the powers in the Bill to make provision which is incidental to the main provisions in the regulations concerned in order to make the regulations subject to scrutiny by the House of Commons only, where otherwise they would be subject to scrutiny by both Houses” (**emphasis added**).¹⁸⁶

Clause 49 deals with the interpretation of terms used in Part 4 of the Bill, and in particular, specifies that in this context, ‘excise duty’ refers only to those duties charged on alcohol, hydrocarbon oils and tobacco.

Clause 50 & Schedule 9 make a series of consequential amendments in connection with the UK’s withdrawal from the UK, and so similar in purpose to clause 43 & Schedule 8.

¹⁸⁵ [Taxation \(Cross-border Trade\) Bill Delegated Powers Note](#), para 46-8

¹⁸⁶ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 202

6. Territorial extent and commencement provisions

The Bill extends to England, Wales, Scotland and Northern Ireland. According to the Government, the Bill does not give rise to the need for a legislative consent motion in the Scottish Parliament, National Assembly for Wales or Northern Ireland Assembly.

The Bill's commencement provisions are set out in **Clause 55**. The following come into force on the day on which this Act is passed:

- Part 1 (import duty) – only for the purpose of exercising any power to make any regulations or give a public notice
- Part 2 (export duty)
- Sections 44-46, 48 and 49 (excise duty)
- Part 5 (Other provision connected with withdrawal from the EU)
- Part 6 (final provisions)

Subsection 55(2) sets out certain provisions which will come into force on a day specified by the Treasury in secondary legislation. The remaining provisions come into force on a day to be specified by the Treasury in regulations. Different provisions may have different commencement dates.¹⁸⁷

¹⁸⁷ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 467

7. Delegated powers

7.1 Introduction

Delegated powers to make secondary legislation are fundamental to the structure of this Bill, which contains over 150 powers to make tax law. These powers enable the Government to create a standalone customs regime that can operate after exit day. The Government argues that “framework” primary legislation with supplementary secondary legislation is usual practice for indirect taxation.¹⁸⁸ Further, the scale of the changes to legislation required means that using primary legislation for many of the matters covered by this Bill, especially in the limited time-frame prior to exit day, would not be efficient use of parliamentary time. The EU customs tariff contains more than 17,000 different goods and around half a million separate customs codes are needed once reduced tariffs for certain trading partners are taken into account.¹⁸⁹ The Government has justified the procedures used in this Bill on the basis that Parliament will be under pressure to approve a large amount of secondary legislation “around the time of exit day”.¹⁹⁰

The Treasury has published a [Delegated Powers Note](#) (DPN). This 174-page document sets out the parts of the Bill which confer powers to make delegated legislation and explains why they have been proposed. The note includes a detailed clause-by-clause analysis of the delegated powers in the Bill. Paragraphs 28 to 49 summarise the Parliamentary scrutiny procedures. All of the Parliamentary procedures set out in the DPN are for the House of Commons only as the Bill is about taxation.¹⁹¹

The House of Lords’ Delegated Powers and Regulatory Reform Committee (DPRRC) has described the powers as a “massive transfer of power from the House of Commons to Ministers of the Crown”.¹⁹² The House of Lords Select Committee on the Constitution described the powers in the Bill as “overly broad and subject to limited parliamentary scrutiny”.¹⁹³ Similar concerns were raised by UK Steel. It said that the Bill will mean that “key aspects of the UK’s trade legislation will evade proper Parliamentary scrutiny”.¹⁹⁴

As with each of the Brexit Bills published thus far, part of the justification for including delegated powers is to cover the contingency scenario of the UK leaving the EU without a negotiated agreement, as well as enabling the Government to implement a number of different outcomes to the negotiations.¹⁹⁵ The changes made using the powers in

¹⁸⁸ [Taxation \(Cross-border Trade\) Bill Delegated Powers Note](#), paras 6

¹⁸⁹ [Taxation \(Cross-border Trade\) Bill Delegated Powers Note](#), paras 6,7 and 14

¹⁹⁰ [Taxation \(Cross-border Trade\) Bill Delegated Powers Note](#), para 35

¹⁹¹ [Taxation \(Cross-border Trade\) Bill Delegated Powers Note](#), para 11

¹⁹² Delegated Powers and Regulatory Reform Committee, [11th Report of 2017-19](#), 17 January 2018, HL Paper 65, para 4

¹⁹³ Constitution Committee, [Taxation \(Cross-border Trade\) Bill](#), 23 February 2018, HL Paper 80, 2017-19, para 5

¹⁹⁴ UK Steel, [UK Steel Response to the Taxation \(Cross-border Trade\) Bill](#), November 2017, p2

¹⁹⁵ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 7

this Bill will to an extent depend on the substance of both the withdrawal agreement and the declaration on the future relationship. As such, how the powers in this Bill will be used will in part depend on the outcome of the vote on the agreements presented to Parliament when the negotiations are concluded.¹⁹⁶

The Explanatory Notes set out the range of contexts that the powers could be used for: “an implementation period, and implementation of a new Customs regime in the event there is no negotiated settlement”.¹⁹⁷ As such it is difficult to predict how or when the powers, including the clause 31 power to implement a customs union arrangement, might be used.

The powers in this Bill should be understood in context of those in the other Brexit Bills. Almost all of the powers in the *EUW Act* cannot be used to impose or increase taxation. Further, the *Trade Bill* powers are limited to implementing non-tariff barriers. The powers in this Bill provide a complementary set of powers to legislate in respect of tax matters arising from the UK’s withdrawal from the EU. Together these powers supply a comprehensive framework that can be used to implement whichever outcome is secured.

7.2 The Government’s case for the powers in this Bill

The Explanatory Notes say that the delegated powers are included in the Bill to allow:

- the government to make future amendments to the imposition, administration, collection and enforcement of Customs duty. This will allow the UK’s Customs regime to keep pace with future developments in trade, trader behaviour and international agreements. It will also allow the government to implement simplifications to the regime that it is not possible to implement immediately on EU exit
- flexibility to make appropriate amendments to VAT and excise legislation so that the VAT and excise regimes continue to function after EU withdrawal, including ensuring the continued effective administration and collection of VAT and excise duties
- the government to make appropriate amendments to primary legislation and use secondary legislation to implement negotiated agreements.¹⁹⁸

The powers in the Bill are to be exercised by the Treasury, the Secretary of State for International Trade or HMRC. Any HMRC power to make regulations relating to import duty may also be exercised by the Treasury.¹⁹⁹

¹⁹⁶ Jack Simson Caird, [Parliament and the withdrawal agreement: the “meaningful vote”](#) 9 February 2018

¹⁹⁷ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 2

¹⁹⁸ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), paras 21 and 22

¹⁹⁹ [Taxation \(Cross-border Trade\) Bill Delegated Powers Note](#), paras 15 and 16

The Delegated Powers Note explains that most of the delegated powers relate to import duty. The note continues:

The Bill has been drafted in such a way as to ensure that these powers are proportionate to the amount of secondary legislation required to establish this regime. They are intended to work together as a single set of arrangements to enable the Treasury, the Secretary of State and HMRC to effectively administer and, where appropriate, charge appropriate import duties. Accordingly, none of the powers should be seen in isolation; rather, each relates to specific areas of a single regime, and all are required to ensure that that regime can be operated effectively.²⁰⁰

7.3 Clause 31 – Customs Union Arrangements

Clause 31 of the Bill would grant ministers a power to make secondary legislation to give effect to a “Customs union arrangement with another territory or territories”.²⁰¹ A territory could include an international organisation such as the EU. This power is noteworthy as it relates to one of the most significant policy areas connected to Brexit, namely the UK’s relationship with the EU’s customs union. Further, the provision is constitutionally significant as it provides that an Order in Council should have effect “despite any enactment”.

During the Second reading debate, Mel Stride, the Financial Secretary to the Treasury, explained the purpose of clause 31:

Clause 31 makes provision for this country to enter into a customs union with another territory. That territory could be the existing customs union of the European Union after we have left the European Union, or it could be another territory separate from it. As he will know, such a move would be subject to a treaty and would not be entered into until a draft statutory instrument had been laid before the House and approved under the affirmative procedure, and then subsequently approved by Her Majesty as an Order in Council.²⁰²

During debate on this provision in the Commons, Peter Dowd MP, Shadow Chief Secretary to the Treasury, questioned whether the power gave Parliament the appropriate level of oversight over the decision to enter into a customs union.²⁰³ In response Mel Stride pointed out that the Bill and the power is not concerned with authorising or approving such agreements but rather is designed to provide a means for implementing such agreements.²⁰⁴ Parliament’s input into the decision to enter into a customs union will be through its role in scrutinising, approving and ratifying international agreements and treaties.

In relation to any commitment to maintain part of the EU’s customs union during the transition period, and the UK’s relationship with the EU’s customs union after transition, both Houses are expected to vote

²⁰⁰ [Taxation \(Cross-border Trade\) Bill Delegated Powers Note](#), para 8

²⁰¹ [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), para 135

²⁰² [HC Deb 8 January 2018 c55](#)

²⁰³ [Taxation \(Cross-border Trade\) Bill Deb, 1 February 2018, c264](#)

²⁰⁴ [Taxation \(Cross-border Trade\) Bill Deb, 1 February 2018, c265](#)

on both the withdrawal agreement and the declaration on the future relationship, through a resolution, in late autumn 2018.²⁰⁵

The scope of clause 31 is not restricted to any particular arrangements for a customs union. As a result some have sought clarification from the Government as to how the power will be used in the long-term. Nigel Mills MP pointed out that the power could be used “in theory” to implement “a customs union with the trans-Pacific trade area in 25 years’ time, and it could go through on the affirmative resolution process”.²⁰⁶ In such circumstances, scrutiny of regulations made under this Bill would not necessarily facilitate debate on the merits of entering into such an arrangement. Scrutiny would take place through Parliament’s supervision of the negotiation and approval of such an arrangement. In the debate on the *Trade Bill*, the Government has said that it will bring forward proposals that set out how Parliament will “interact with future trade agreements”.²⁰⁷

“Despite any enactment”

Clause 31(4) provides that the Order in Council made to give effect to a customs union arrangement would have effect “for those purposes despite any enactment”. This appears to imply that the Order in Council, a form of secondary legislation, would take effect over and above any existing statutory provision, even if it was primary legislation. Section 1(2) of the *European Union (Notification of Withdrawal) Act 2017* contained a similar provision “despite any provision made by or under the European Communities Act 1972 or any other enactment”. The words “despite any enactment” make it clear that Parliament intends that the secondary legislation made under this power can override any conflicting legislative provision.

A power to disapply legislation

The House of Lords Delegated Powers and Regulatory Reform Committee’s report on the Bill drew attention to clause 31(6)(a), which “allows HMRC to modify or disapply not only any Act of Parliament whenever passed but also Part 1 of the Bill itself”. The DPRRC pointed out that as a customs union could “potentially govern the whole range of import duty”, this could “effectively allow the amendment of the whole of Part 1 of the Bill by means of negative regulations”.²⁰⁸

7.4 Clause 42

Clause 42 (2) is noteworthy for the way that it interacts with the *EUW Act*. Clause 42(2) contains a power for the Treasury to make exclusions or modifications in the application of section 4 of the *EUW Act* in relation to VAT. Section 4 of the *EUW Act* is a sweeper provision that will preserve rights, powers, liabilities, obligations, restrictions, remedies and procedures currently given effect to by section 2(1) of the *European*

²⁰⁵ Jack Simson Caird, [Parliament and the withdrawal agreement: the “meaningful vote”](#) 9 February 2018

²⁰⁶ [HC Deb 8 January 2018 c87](#)

²⁰⁷ [Trade Bill Deb 25 Jan 2018 c151](#)

²⁰⁸ Delegated Powers and Regulatory Reform Committee, [11th Report of 2017-19](#), 17 January 2018, HL Paper 65, para 20

Communities Act 1972 after exit day. This includes directly effective rights in the EU treaties. This power would enable ministers to modify provisions relating to VAT preserved by clause 5 if they are “no longer be appropriate” or “need to be modified” as a result of the outcome of the negotiations.

7.5 Henry VIII powers

Several clauses allow the Government to amend primary legislation via secondary legislation (sometimes referred to as “Henry VIII powers”).

These are:

- **Clause 45 (General regulation making power for excise duty purposes etc).** **Clause 48** makes various provisions about the regulations made under clause 45. Where the regulations amend or repeal an Act of Parliament (or in certain other cases), the made affirmative procedure applies. Otherwise, the negative procedure applies. Both affirmative and negative procedures are House of Commons only.
- **Clause 51 (Power to make provision in relation to VAT or duties of customs or excise).** Regulations which amend or repeal an Act of Parliament are subject to the made affirmative procedure. Otherwise, the negative procedure applies. Both affirmative and negative procedures are House of Commons only.
- **Clause 54 (Consequential and transitional provision).** Regulations amending or repealing an Act of Parliament are subject to the made affirmative procedure. Other regulations are subject to the negative procedure (House of Commons only).
- **Schedule 3 part 4 (Power to amend list of eligible developing countries)** allows the Secretary of State to change the list of countries eligible for the trade preferences scheme, in parts 2 and 3 of Schedule 3, by regulations subject to the negative procedure (House of Commons only).

Sunset clauses

The House of Lords Delegated Powers and Regulatory Reform Committee’s report on the Bill argued that certain powers should be limited by sunset clauses:

We invite the Government to time-limit those regulation-making powers that do not need to exist in perpetuity, as they did for the European Union (Withdrawal) Bill. We consider that candidates for a sunset clause include clauses 42 (EU law relating to VAT), 45 (general regulation making power for excise duty purposes), 47 (EU law relating to excise duty) and 51 (VAT or duties of customs or excise).²⁰⁹

²⁰⁹ Delegated Powers and Regulatory Reform Committee, [11th Report of 2017-19](#), 17 January 2018, HL Paper 65, para 23

Public notice

The House of Lords Delegated Powers and Regulatory Reform Committee criticised the powers in the Bill that use a power to make law by “public notice”:

The Bill relies heavily on the concept of making law by “public notice”. Paragraph 39 of the Treasury’s Delegated Powers Memorandum says that such notices will only make provision that is purely technical or administrative in nature. Nonetheless, clause 32(9) of the Bill allows anything that can be done under public notice to be done by regulations, implicitly acknowledging the importance of things done by public notice. For Ministers and others to make law by “public notice”, without any recourse to Parliament, is highly unusual and such provisions should attract strict surveillance by Parliament. The Statute of Proclamations 1539 gave proclamations the force of statute law. Although it was repealed in 1547 after the death of Henry VIII, it now enjoys a limited revival under the veil of Ministers and HMRC making law by “public notice”.

We consider that the creation of a generally applicable system for making determinations which are capable of affecting an individual’s legal position should ordinarily be dealt with by legislation, subject to scrutiny by Parliament, rather than by public notice without any such scrutiny.²¹⁰

The House of Lords Select Committee on the Constitution’s report on the Bill stated that “a broad and subjective power to legislate by public notice is not constitutionally acceptable”.²¹¹

The House of Lords Delegated Powers and Regulatory Reform Committee also criticised the fact that powers in the Bill to make tertiary legislation are not subject to parliamentary scrutiny.²¹²

7.6 Procedures used to exercise delegated powers

The procedures by which Parliament approves secondary legislation are a common concern across the Bills proposing to address the UK’s departure from the European Union. The *EUW Act* was designed in such a way that a great deal of secondary legislation would be made under negative resolution procedure. In those cases there was a risk that some instruments would take effect without having received the levels of Parliamentary oversight commensurate with their impact.

The solution adopted for the *EUW Act* has been to create a “sifting committee” to examine instruments made under negative resolution procedure. This committee would give an advisory opinion as to whether those instruments should instead be the subject of debate and affirmation by Parliament before they can take effect.

²¹⁰ Delegated Powers and Regulatory Reform Committee, [11th Report of 2017-19](#), 17 January 2018, HL Paper 65, para 25

²¹¹ Constitution Committee, [Taxation \(Cross-border Trade\) Bill](#), 23 February 2018, HL Paper 80, 2017-19 para 13

²¹² Delegated Powers and Regulatory Reform Committee, [11th Report of 2017-19](#), 17 January 2018, HL Paper 65, para 30

Although Ministers are not obliged to follow the sifting committee's recommendations, the process is an additional means by which Parliament can hold Ministers to account for their choice of procedure and their reasons for refusing to follow a recommendation of the sifting committee. No equivalent provisions exist to sift the statutory instruments made under the authority of the *Taxation (Cross-border Trade) Bill*.

The House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC) had a particular interest in this Bill. It acknowledged that the Bill is what is termed in the House of Lords a supply bill (generally termed a Bill of aids and supplies in the Commons) and that in accordance with established practice such bills are not amended in the House of Lords.²¹³ The DPRRC, however, considered that the secondary law-making powers in the Bill, were particularly far-reaching and had wider implications for effective scrutiny by the House of Commons. To that end, the DPRRC expressed concerns about how secondary legislation will be given effect under the Bill. It has two main criticisms:

- that in several cases negative procedure would be used where an affirmative procedure would be more appropriate; and
- that the use of "made affirmative" procedure (rather than "draft affirmative" procedure) should be tightly constrained to urgent cases.

DPRRC contrasted the approach of the *Taxation (Cross-border Trade) Bill* with the more restrictive approach adopted by the then *EUW Bill*.²¹⁴ Under that scheme a Minister must include (in any regulations made under made affirmative procedure) a declaration explaining why the secondary legislation should take effect before the draft has been approved by Parliament.²¹⁵

With some clauses in the Bill, the Government presumes to use negative procedure most of the time, but proposes to use affirmative procedure in limited exceptional cases. The DPRRC was critical of this presumption in the absence of a clear justification for it. It could find no immediate and obvious reason, for example, why some exercises of the powers under clauses 8 and 39 should be treated differently from others:

The Government do not explain why the first set [of import/export duty regulations] are singled out [for affirmative procedure] but not necessarily subsequent regulations. Subsequent regulations of equal importance (save where they increase [import/export duty]) are apt to be dealt with under the negative procedure. **We**

²¹³ Delegated Powers and Regulatory Reform Committee, [11th Report of 2017-19](#), 17 January 2018, HL Paper 65, para 3; and Constitution Committee, [Taxation \(Cross-border Trade\) Bill](#), 23 February 2018, HL Paper 80, 2017-19 para 2

²¹⁴ Delegated Powers and Regulatory Reform Committee, [11th Report of 2017-19](#), 17 January 2018, HL Paper 65, para 9

²¹⁵ Schedule 7 para 4(2) *EU(W) Bill*

consider that an affirmative procedure should generally apply to [clauses 8 and 39].²¹⁶

Effectively, therefore, the DPRRC has called for the Bill's presumption in favour of negative procedure to be reversed for **clauses 8** and **39**. They identified several other delegated law-making powers in the Bill that they also believed should be exercised using an affirmative procedure rather than negative procedure given their significance and scope:

- **clause 14** (setting the level of duty on agricultural goods);²¹⁷
- **clause 19** (setting reliefs for import duty);²¹⁸
- **clause 22** (a broad power relating to "authorised economic operators");²¹⁹
- **clause 30** (a broad residual power concerning provision for import duty);²²⁰ and
- **clauses 42** and **47** (broad powers to amend the regimes concerning VAT and certain excise duties).²²¹

7.7 The "made affirmative" procedure

What the procedure involves

The "made affirmative" procedure allows an instrument to be made by a Minister before it is laid before Parliament, but must be approved within a specified period in order to continue in force.

The *EUW Act*, provides for the made affirmative procedure to be used in "urgent cases". More broadly, instruments relating to tax or duty changes that have to come into force relatively quickly or at particular times are subject to made affirmative procedures. For example, section 1 of the *Alcoholic Liquor Duties Act 1979* (as amended, by the *Finance Act 2010*, [section 66](#)) allows the definition of cider to be amended by regulations under the made affirmative procedure.

In its report on fast-track legislation, the House of Lords Constitution Committee described the made affirmative approach as "a kind of 'fast-track' secondary legislation". The Committee also noted that "Instruments laid as made instruments almost inevitably place a serious time pressure on those drafting them".²²² The need for an opportunity to scrutinise statutory instruments made under the made affirmative procedure may be thought, therefore, to be particularly pressing.

²¹⁶ Delegated Powers and Regulatory Reform Committee, [11th Report of 2017-19](#), 17 January 2018, HL Paper 65, paras 11 and 16

²¹⁷ para 12

²¹⁸ para 13

²¹⁹ para 14

²²⁰ para 15

²²¹ paras 17-19

²²² Constitution Committee, [Fast-track Legislation: Constitutional Implications and Safeguards](#), 7 July 2009, HL Paper 116-I 2008-09, paras 134-135

Instances where the made affirmative procedure would be used

The accompanying [Delegated Powers Note](#) directly addresses the use of made affirmative procedure in the *Taxation (Cross-border Trade) Bill*.²²³ It acknowledges that the procedure would be used for several significant purposes including:

- the use of regulations to amend primary legislation;²²⁴
- the first regulations concerning the UK customs tariff;²²⁵
- the first regulations concerning the UK export duty;²²⁶
- other regulations made that would increase the amount of the customs tariff/export duty payable;²²⁷ and
- regulations that would: restrict any rebate or relief from excise duty; extend the descriptions of goods on which excise duty is chargeable; or extend the cases in which stamping or marking of goods is required.²²⁸

The Government has explained that its motivation for using made affirmative procedure in these cases (rather than draft affirmative procedure) is to ensure continuity of the system of customs tariffs and export duty.²²⁹

The Constitution Committee's report on the Bill said it was concerned that the made-affirmative procedure was being sought for "non-urgent cases".²³⁰ The Committee said it agreed with the DPRRC that the made affirmative procedure was only justified for urgent cases.²³¹

How long can an instrument can have effect without Parliamentary approval?

The Bill provides that parliamentary approval, usually only from the House of Commons (as matters are tax/duty-related) is required within 28 days of the made affirmative instrument being laid. However, clause 52 allows this period to be extended to 60 days where the instrument is related to the UK's withdrawal from the European Union.

The Government's justification for this change is that it recognises:

"the inevitable pressure that Parliament will be under to approve regulations in connection with the UK's withdrawal from the EU around the time of exit day."²³²

²²³ [Taxation \(Cross-border Trade\) Bill Delegated Powers Note](#), paras 32-35

²²⁴ Under clauses 45, 51 and 54(1)

²²⁵ clause 8

²²⁶ clause 39

²²⁷ clauses 8 and 39

²²⁸ clause 45

²²⁹ [Taxation \(Cross-border Trade\) Bill Delegated Powers Note](#), para 33

²³⁰ Constitution Committee, [Taxation \(Cross-border Trade\) Bill](#), 23 February 2018, HL Paper 80, 2017-19, para 9

²³¹ Constitution Committee, [Taxation \(Cross-border Trade\) Bill](#), 23 February 2018, HL Paper 80, 2017-19, para 9

²³² [Taxation \(Cross-border Trade\) Bill Delegated Powers Note](#), para 35

There is no equivalent of clause 52 in the *EUW Act* for any secondary legislation introduced under the made affirmative procedure; the ordinary requirement for approval within 28 days applies in all cases.

The effect of this change to made affirmative procedure is two-fold.

- Secondary legislation could have full force and effect for over twice as long as is normally the case under made affirmative procedure without Parliament having approved it.
- The amount of time available to Parliament in which it could annul an instrument made under the procedure is also over twice as long.

The Government has explained that this change is connected to pressures concerning Parliamentary time on or around exit day itself. This does not explain, however, why these made affirmative instruments are to be treated differently from those made under the *EUW Act*. Many of them will also be made in connection with the UK's withdrawal from the EU.

8. Summary of Second Reading and Committee Stage debates

8.1 Second reading debate

The Bill had its [Second reading](#) on 8 January 2018.

The Financial Secretary to the Treasury, Mel Stride, introduced the Bill. He said that the UK would be leaving the EU customs union “allowing us to establish and enhance our trading relationships with old allies and new friends around the world”.²³³ The Minister said that the Bill aimed to provide certainty and continuity to business. The Bill was designed to prepare the UK for Brexit by creating a standalone customs system and amending the VAT and excise regimes. It was an enabling Bill, intended to be sufficiently flexible to accommodate a range of outcomes from the negotiations with the EU.

For the Opposition, the Shadow Chief Secretary to the Treasury, Peter Dowd, said that the Bill lacked detail and gave new powers to Ministers.²³⁴ He referred to “the greatest centralisation of powers that Parliament has seen since the war”²³⁵ and called for proper powers of Parliamentary scrutiny.²³⁶ He said that the Bill failed to guarantee frictionless trade with the EU, did not provide HMRC with adequate resources or provide enough detail on the Trade Remedies Authority. Mr Dowd described the trade remedies elements of the Bill as “pitiful” and said they were far weaker than those of the EU.²³⁷ The Labour Party moved a reasoned amendment reflecting these concerns. The amendment was defeated by 309 votes to 265.

The second reading debate covered a range of issues including powers to enter into future customs unions, trade remedies, use of delegated powers and free ports.

On customs unions, Nigel Mills commented that the powers were drawn widely – there being no time or geographic limit – and argued that customs unions should be the subject of primary legislation.²³⁸ Marcus Fysh argued that “it would be worth knowing a bit more about what the intent of this is and exactly how it would operate.”²³⁹

A number of members criticised the trade remedy provisions of the Bill for lack of detail or for not protecting manufacturing industry sufficiently. For example, Gareth Snell criticised the Bill for not explaining how injury would be calculated and for its use of the lesser duty rule which he argued the EU is moving away from.²⁴⁰ Stephen

²³³ [HC Deb 8 January 2018 c55](#)

²³⁴ [HC Deb 8 January 2018 c67](#)

²³⁵ [HC Deb 8 January 2018 c68](#)

²³⁶ [HC Deb 8 January 2018 c69](#)

²³⁷ [HC Deb 8 January 2018 c70](#)

²³⁸ [HC Deb 8 January 2018 c89](#)

²³⁹ [HC Deb 8 January 2018 c109](#)

²⁴⁰ [HC Deb 8 January 2018 c86](#)

Kinnock said the Bill in its current form would “fatally undermine the British manufacturing sector” and called on the Government to reconsider the trade defence measures in the Bill.²⁴¹ The Government argued that the Bill took a “balanced approach” taking into account the interests of both producers and consumers.²⁴²

For the SNP, Kirsty Blackman raised concerns about the extent of the delegated powers in the Bill and mentioned the Bill’s Henry VIII powers.²⁴³

Anna Turley and Simon Clarke used the debate to argue in favour of free ports and, in particular that Teesport should be given this status. Free ports are areas outside a country’s customs territory where goods can be imported, processed and re-exported without being liable for customs duty.²⁴⁴ Such a policy could provide a boost to economically disadvantaged areas and help rebalance the UK economy away from London.

The Bill was given a Second Reading by 309 votes to 265.

8.2 Committee stage

The Bill was considered in Committee over eight sittings between 23 January and 1 February. While a number of amendments and new clauses were proposed, the Bill was not amended in Committee. The Committee took oral evidence from a number of witnesses before its line-by-line scrutiny of the Bill. The transcript of the Committee stage is available [here](#) and the record of proceedings [here](#).

Delegated powers and Parliamentary scrutiny

Much of the debate at Committee Stage was about whether the Bill allowed adequate Parliamentary scrutiny of the powers given to the Government.

Enhanced Parliamentary scrutiny

Labour and the SNP both proposed amendments which would require greater Parliamentary oversight. For example, Labour proposed a number of new clauses which would require the House to pass an amendable resolution authorising the main provisions of the regulations. The SNP proposed that a super-affirmative resolution procedure be used for certain anti-dumping, subsidy, safeguard and VAT provisions.²⁴⁵

Peter Dowd said the following when discussing clause 9 of the Bill (preferential tariff rates):

The powers the Government have given themselves under the Bill to offer preferential rates to other countries through free trade agreements, and with no regard to the House of Commons,

²⁴¹ [HC Deb 8 January 2018 c115-16](#)

²⁴² [HC Deb 8 January 2018 c56](#)

²⁴³ [HC Deb 8 January 2018 c74](#)

²⁴⁴ [HC Deb 8 January 2018 c90](#)

²⁴⁵ [Taxation \(Cross-border Trade\) Bill Deb, 1 February 2018, c267](#)

should concern us all. I will return to time after time to the theme of parliamentary accountability.

[...]

It appears that the powers outlined in the clause, as in other clauses, comprise a huge accretion of power to the Treasury, which will give it a hegemony in Parliament, notwithstanding the issue of negative or affirmative resolutions. Ministers will be left to their own devices to introduce regulations where they see fit, with no parliamentary oversight of any significance ...²⁴⁶

In response, the Government argued that it was common practice to have framework primary legislation supplemented by secondary legislation in the area of indirect taxation. In addition, the Minister said:

The Bill introduces a comprehensive framework for a new stand-alone customs regime. It ensures that the scrutiny and procedures that apply to the exercise of each power are appropriate and proportionate, taking into account the technicality of the regulations, the frequency with which they are likely to be made and how quickly the law may need to be changed.²⁴⁷

Similar arguments about the Parliamentary procedures and level of scrutiny were made throughout the Committee Stage proceedings.

A large number of amendments to clause 32 (Regulations etc) were proposed by the SNP. These were largely about increasing the level of Parliamentary scrutiny these regulations would receive. Mel Stride argued that the case had not been made that “existing and well understood parliamentary procedures for making regulations were inadequate.”²⁴⁸ On VAT, he said:

I made it clear on Second Reading that we will look sympathetically and appropriately at the particular issue of the change from acquisition VAT to import VAT, including the change in timing of VAT payments with its effect on a large number of businesses as they trade with the European Union in future.²⁴⁹

The amendments were not pressed to a vote but the SNP said they would return to them at Report Stage.

Sunset clauses

Labour and the SNP proposed amendments introducing sunset clauses to limit the time during which the delegated powers in the Bill could be used. For example, amendments of this kind were proposed in relation to Clause 45 (regulation-making power for excise duty purposes), clause 47 (EU law relating to excise duty) and clause 51 (power to make provision in relation to VAT or duties of customs or excise).

The Opposition pointed out that such sunset provisions were included in the then *EUW Bill*. For example, on clause 45, Jonathan Reynolds said:

It makes little sense to the Opposition that such provisions are included in the European Union (Withdrawal) Bill, but that there are no corresponding provisions in this Bill. Adding these

²⁴⁶ [Taxation \(Cross-border Trade\) Bill Deb](#), 25 January 2018, c121

²⁴⁷ [Taxation \(Cross-border Trade\) Bill Deb](#), 25 January 2018, c126-27

²⁴⁸ [Taxation \(Cross-border Trade\) Bill Deb](#), 1 February 2018, c273

²⁴⁹ [Taxation \(Cross-border Trade\) Bill Deb](#), 1 February 2018, c278

provisions to the Bill would be an important step in providing a much-needed check to delegated powers.²⁵⁰

The Government argued against sunset clauses on the grounds that it was not known when the final outcome of the negotiations with the EU would be confirmed and that powers were needed to legislate in the future, not just after exit day.²⁵¹

HMRC resources

A number of Members raised the issue of whether HMRC had sufficient resources to deal with increased workload after Brexit. Kirsty Blackman asked what assessment had been made of the extra resources required.²⁵² Labour proposed New Clause 9 which would require HMRC to provide an assessment of the staffing and IT requirements for implementing the provisions of the Bill and the prospects of those requirements being met before commencement. Anneliese Dodd said:

We heard some compelling evidence from witnesses last week who talked about changes that have occurred within HMRC and the resourcing of the customs element of HMRC. In particular, they talked about how a helpline for businesses with customs problems had been removed, the potential impacts of the new regionalised system for HMRC, and how the removal of local offices would mean that HMRC staff will no longer have a physical presence in Scotland north of Glasgow and Edinburgh, and none on the whole south coast of England. ... There are also continuing worries about whether staff numbers are appropriate²⁵³

Mel Stride said that the Government were in regular discussions with HMRC and were looking at an extra 3,000 to 5,000 HMRC personnel, with the figure likely to be towards the top of this range.²⁵⁴

Trade remedies

Economic interest test

Labour proposed a number of amendments to Schedules 4 and 5 relating to the economic interest test. In particular, Labour argued that this test should not be applied at the preliminary stage of determination. The amendments also sought to remove the requirement that the Secretary of State or TRA look at the economic significance of affected industries and consumers in the UK. This would penalise small and emerging sectors. The amendments also sought to change the economic interest test so that remedies would be applied unless the economic benefits of the remedy were *significantly* outweighed by the costs to importers or consumers.

The Minister said that provisional measures could have large economic effects, so the economic interest test ought to apply at this stage as well. This would also ensure consistency between the two stages of the

²⁵⁰ [Taxation \(Cross-border Trade\) Bill Deb](#), 1 February 2018, c305

²⁵¹ [Taxation \(Cross-border Trade\) Bill Deb](#), 1 February 2018, c307

²⁵² [Taxation \(Cross-border Trade\) Bill Deb](#), 25 January 2018, c87

²⁵³ [Taxation \(Cross-border Trade\) Bill Deb](#), 1 February 2018, c325

²⁵⁴ [Taxation \(Cross-border Trade\) Bill Deb](#), 1 February 2018, cc326-27

investigation. The Minister also noted that the Bill already had a starting presumption in favour of duties in anti-dumping and anti-subsidy measures. The amendment was pushed to a vote and defeated by ten votes to nine.²⁵⁵

Lesser duty rule

The Opposition put forward a series of amendments on the lesser duty rule. In particular, they set out circumstances where the dumping margin would be used rather than the lesser duty rule. Labour argued that relatively few other countries have a mandatory lesser duty rule.

The Government argued that evidence from the EU showed that duties imposed under the lesser duty rule were often high and very effective. The trade remedies regime needed to get the balance between producers and consumers right. Many UK industries relied on imports as part of global supply chains. Various amendments in this group were pushed to a vote but defeated by ten votes to nine.²⁵⁶

Time limits

Labour put forward an amendment which would require the Secretary of State to make a decision on TRA recommendations within two weeks. Labour argued that it was anomalous that the TRA should be subject to deadlines but that the Secretary of State was not. A further Labour amendment would require that duties normally be in place for a period of five years, rather than the period being decided by the TRA. Labour argued that this was common practice internationally. The SNP supported the Labour amendments.

For the Government, Graham Stuart argued that while two weeks might be sufficient for the Secretary of State to make a decision in most cases, an arbitrary two-week deadline might not allow enough time for more complex cases. In any event, there would be pressure on the Secretary of State to make a decision quickly.

On the question of duties being in place for five years, the Minister said that WTO agreements did not say that five years was the default duration for duties but rather that measures could remain in force for five years. The TRA had powers to ensure measures would continue if this was needed to protect industry.

The amendment which would require the Secretary of State to make a decision within two weeks was defeated by ten votes to nine.²⁵⁷

Public interest test

Labour proposed an amendment which would amend the public interest test so that the Secretary of State could only reject a recommendation by the TRA on grounds of national security. The Minister argued that the Secretary of State would only reject the TRA's recommendations where there was a strong argument for doing so and

²⁵⁵ [Taxation \(Cross-border Trade\) Bill Deb](#), 30 January 2018, c190

²⁵⁶ [Taxation \(Cross-border Trade\) Bill Deb](#), 30 January 2018, cc203-04

²⁵⁷ [Taxation \(Cross-border Trade\) Bill Deb](#), 30 January 2018, c208

would be required to explain the decision to Parliament. The amendment was withdrawn.

Authorised Economic Operators

The SNP proposed an amendment that would require the Treasury to report to the House on a number of issues relating to the operation of the Authorised Economic Operator (AEO) scheme. These included the criteria to be used in deciding whether a person should become an AEO, a comparison of the UK scheme with those in Austria and Germany (and any other country the Chancellor considered relevant), the level of resources to be provided by HMRC to operate the scheme and a target timetable for authorisation. Kirsty Blackman said she had concerns that firms would find it difficult to be authorised as AEOs.

Labour also proposed amendments to this clause, requiring regulations to be made by Treasury Ministers rather than HMRC and requiring regulations to be made using the affirmative procedure, in line with the recommendation of the House of Lords Delegated Powers and Regulatory Reform Committee.

In response, Mel Stride said that the AEO was an administrative process and therefore HMRC should be responsible for making regulations. HMRC had already committed to improving the authorisation process. The draft regulations would set out the criteria for AEO status. There could be different classes depending on the size of the business.

The SNP amendment and the Labour amendment requiring the powers to be exercised by Treasury Ministers rather than HMRC were put to a vote. Both were defeated by ten votes to nine.²⁵⁸

Customs union

Labour proposed two amendments to clause 31 on customs unions. The first amendment required the Government to make a statement to the House before laying a draft Order in Council relating to customs unions. The second amendment limited the duration of the delegated power under this clause to five years after Brexit day and the duration of any delegated instruments under this clause to six years. These provisions would mean that primary legislation would be required for a permanent customs union.

Labour welcomed the Bill's provision for a customs union option but argued that there was insufficient Parliamentary scrutiny. Mr Dowd said:

Opposition amendment 6 would instead require a Minister to make a statement to the House of Commons on the establishment of a customs union, outlining the specific details of the customs union and how they were reached, as well as the effects of the new customs arrangements on trade with other countries and territories. I consider that—I think that most people will—to be the minimum level of parliamentary oversight that we should expect, and one that would ensure the government are accountable to this House.²⁵⁹

²⁵⁸ [Taxation \(Cross-border Trade\) Bill Deb](#), 30 January 2018, cc251-52

²⁵⁹ [Taxation \(Cross-border Trade\) Bill Deb](#), 1 February 2018, c263

Labour also drew a distinction between a temporary customs union and a permanent arrangement. Labour's second amendment would ensure that a permanent customs union would require primary legislation.

Mel Stride explained the purpose of the clause:

The clause caters for any international arrangements such as this that establishes a new customs union. The clause does not provide the power to enter into an international agreement; such an agreement does not require a specific statutory basis. Instead, it simply allows the UK's customs regime to reflect such an agreement by providing the means necessary to implement it. Once an agreement has been reached, an Order in Council will be required before it can take effect for import duty. That order can itself be made—this is a critical response to the remarks of the hon. Member for Bootle—only if it has first been approved, in draft, by the House of Commons under the draft affirmative resolution procedure. I am sure the Committee agrees that that will afford a high level of parliamentary scrutiny for each stage of the process.²⁶⁰

The Minister argued that as the House would have the opportunity to debate the draft Order, the requirement for a statement by a Minister was unnecessary. Placing time limits on the clause would also be inappropriate as establishing a customs union could be a long-term process and could make overseas partners less likely to enter into such an arrangement.

Neither amendment was pushed to a vote.

²⁶⁰ [Taxation \(Cross-border Trade\) Bill Deb](#), 1 February 2018, c265

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