Written Submission: Evidence to the Finance and Constitution Committee of the Scottish parliament on UK Trade Bill

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Evidence to the Finance and Constitution Committee

Trade Bill

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This submission is in response to a call for evidence to inform the Finance and Constitution Committee's scrutiny of the Trade Bill and the associated Legislative Consent Motion.

1. GOVERNMENT PROCUREMENT AGREEMENT

1.1 Scope

The Trade Bill provides the executive the power to implement obligations derived from the Government Procurement Agreement (GPA).

The WTO Government Procurement Agreement includes two broad categories of rules. Firstly, there are national treatment obligations that require GPA members not to discriminate against procurement suppliers of other parties. Non-discrimination obligations included in the GPA are typically subject to a number of limitations based on three parameters: entities covered; value thresholds; and coverage in regards of goods, services and construction services[2]. With respect to the type of entities covered by the GPA, countries are entitled to choose the extent to which their market access commitments apply to procurement from central government entities, sub-central governmental entities and other governmental entities[3]. Federal countries such as Canada and the US have thus been able to exclude provincial/state and local government procurements from non-discrimination requirements under the GPA. GPA members can also set the minimum value of public procurement contracts above which the non-discrimination obligation applies

The second broad category of obligations are the so-called 'framework rules' – that is, minimum rules that together establish an overall regulatory framework that aims to ensure open, transparent and competitive public procurement procedural frameworks. Such procedural rules usually relate to transparency requirements, eligibility of tenderers, contract award procedures and judicial and administrative enforcement.

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[2] Article II(2) GPA
[3] Article II(4) GPA.

Currently the UK benefits from the GPA in its capacity as an EU Member State. Whether the UK would remain a party of the GPA once it formally leaves the EU is a question that is the subject of some debate. However, the Trade Bill Explanatory Notes[4] published by the UK Department of International Trade accepts that the UK will leave the GPA once it formally withdraws from the EU and will need to accede as a new party in its own right. Although the EU's exclusive competence in the area means that the UK is in principle precluded from negotiating trade agreements, it is understood that the UK is, in cooperation with the EU, currently engaged in discussions relating to the terms of its accession to the GPA. On 3 October 2017, a Joint EU-UK Letter to the WTO membership was published confirming that the EU and the UK would work together on the UK's objective of remaining within the GPA upon leaving the EU, on the basis of the commitments currently contained in the EU schedule of commitments.

1.2 Potential amendments to terms of UK GPA membership

With respect to national treatment commitments, it is expected that the UK's new proposed GPA coverage will be at the very least in line with the existing EU GPA commitments. Any proposal to reduce access to the UK procurement market would be unlikely to be looked upon favourably by GPA membership, not least because the UK represents a smaller market than that on the basis of which the EU GPA coverage was negotiated. The Explanatory Notes state that the changes to UK regulations as a result of the accession to the GPA would include those relating to the creation of new Government Departments as a result of the UK's exit from the EU, which are currently not mentioned in the EU GPA schedules. However, the possibility that GPA parties may demand a renegotiation of terms of the UK's accession and demand additional market access commitments from the UK should not be dismissed.

These framework rules only establish minimum standards. Since the EU procurement rules are accepted to be GPA-compliant, accession to the GPA should not require any substantive amendments in UK procurement rules as they currently stand.

[4] Trade Bill Explanatory Notes. Available at: https://publications.parliament.uk/pa/bills/cbill/2017-2019/0122/en/18122ennew.pdf

2. INTERNATIONAL TRADE AGREEMENTS

2.1 Scope

The Trade Bill provides the executive the power to implement obligations derived from international trade agreements. There is a significant deal of uncertainty concerning what is encompassed by the term “international trade agreements”.

Clause 2(3)(a) of the Bill describes an international trade agreement as (a) a free trade agreement, or (b) an international agreement that mainly relates to trade, other than a trade agreement. The Trade Bill defines free trade agreements as agreements notifiable under Article XXIV GATT(7)(a). This includes customs union and free trade agreements.

A customs union is defined by Article XXIV(8)(a) GATT as the substitution of a single customs territory for two or more customs territories, so that (i) duties and other restrictive regulations of commerce […] are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and, (ii) substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union”. This would include customs union agreements with Turkey, Andorra and San Marino.

A free trade area is defined under Article XXIV(8)(b) GATT as an agreement whereby “a group of two or more customs territories in which the duties and other restrictive regulations of commerce […] are eliminated on substantially all the trade between the constituent territories in products originating in such territories”). The Explanatory Notes to the Trade Bill list by way of example free trade agreements signed by the EU countries, such as those with Switzerland, Canada and South Korea. It would also include agreements such as the European Economic Area (EEA) agreement and the EU-Ukraine Deep and Comprehensive Free Trade Agreement.

The Trade Bill provides that the UK intends to implement international trade agreements only to the extent that the European Union was a signatory to the agreement immediately before exit day. This means that the Trade Bill empowers the executive to implement international trade agreements that have not yet been ratified by the EU on the day the UK formally withdraws from the EU. Free trade agreements that have been signed but are currently in the process of being ratified include the EU-Singapore FTA and the EU-Canada Comprehensive Economic Trade Agreement (CETA).

Conferring power to implement obligations derived from international trade agreements that have merely been signed by the EU, rather than ratified, raises questions about the democratic legitimacy of the process. International trade agreements that are not yet ratified will not have gone through the entire parliamentary scrutiny process either at EU or national level. This is certainly the case of agreements such as the CETA which is a mixed agreement and will therefore have to be ratified by both the European Parliament and the national parliaments. In order to ensure that parliamentary scrutiny is not bypassed, the Trade Bill could be amended to provide that only those agreements that have been ratified by the prior to the UK's withdrawal of the EU are covered by the bill.

The Trade Bill does not provide much guidance with respect to the term 'international trade agreements that mainly relate to trade'. The Explanatory Note states that these include "key trade agreements, and associated ancillary agreements" such as mutual recognition agreements. Although not specifically mentioned in the Trade Bill, one would assume that the concept of international trade agreements would also encompass customs cooperation or facilitation agreements concluded by the EU. It has also concluded international agreements with countries such Australia and the United States that protect names of origin (geographical indications) for agricultural products and foodstuffs, notably wine and spirits.

There are number of areas that are increasingly covered by free trade agreements but which are arguably not *mainly* related to trade liberalisation. Contemporary EU free trade agreements contain provisions addressing issues such as competition law,and labour and environmental protection. This raises the question of whether stand-alone agreements focusing on such issues could also be considered as "international trade agreements" for the purpose of the Trade Bill. For example, the EU currently has in place agreements concerning cooperation on anti-competitive activities with countries such as Japan and the United States. As stated above, it has also concluded stand-alone agreements relating to the protection of geographical indications. Similar questions can be raised with respect to international treaties signed by the EU in areas such as aviation and environmental protection.

Therefore, as currently drafted, the Trade Bill is very broad in its scope. The vagueness of the term "international trade agreements" provides a significant amount of discretion to the government to decide which type of agreements negotiated by the EU could fall under the scope of the Trade Bill. In light of the significant powers that are being conferred to the executive to implement international trade agreements under the Trade Bill, as well as the light-touch level of parliamentary scrutiny currently envisaged (see Section 3), it may be worth considering amending the Trade Bill to provide further clarity in terms of the type of

international agreements concluded by the EU that would fall within the scope of the bill. This could be achieved, for example, by including in the Trade Bill an exhaustive list of the international trade agreements that fall within the scope of the bill.

2.2 Potential amendments to 'rolled-over' international trade agreements

The Explanatory Notes explain that the executive power provided under the bill to implement international trade agreements will be limited to non-tariff measures. Tariff measures are addressed under the Taxation (Cross-Border Trade) Bill. The Explanatory Notes also state that the "aim is to establish a UK trade agreement with each partner country based, as closely as possible, on the corresponding trade agreement that country has with the EU"[5].

However, the EU FTAs cannot simply be copy pasted in their current state or with only minor changes. This is acknowledged in the Explanatory Notes, which state that it "may also be necessary to substantively amend the text of the previous EU agreements, so that the new agreements can work in a UK legal context". In fact, the UK international trade agreements will be entirely separate legal instruments and are likely to be substantially different from the EU FTAs for both political and technical reasons.

Firstly, third countries are likely to see the transitioning of FTAs as an opportunity to revise the terms of these agreements. Some may also consider that to the extent that the UK is now offering a much smaller market than the EU single market, the terms of trade have changed, meaning that the marker access commitments included in these FTAs must also be renegotiated. In this respect, it is worth nothing that there are recent reports that countries such as Chile and South Korea have already signalled that post-Brexit, the status quo will not be maintained and that key aspects of existing EU trade agreements, such as agriculture, will have to be renegotiated with the UK[6].

Secondly, from a technical perspective, the idea that UK will be able to simply copy-paste existing EU FTAs does not take into account the fact that the rules of origin will have to be amended. As explained by the UK Trade Policy Observatory, the renegotiation of rules of origin included in trade agreements will be a tri-lateral process involving the UK, the third

[5] Paragraph 38 Explanatory Notes.
[6] Hans Von der Bruchard, EU trade partners demand concessions for Brexit transition rollover, Polictico. 2 February 2018. Available at: https://www.politico.eu/article/eu-trade-partners-object-to-brexit-transition-roll-over/.

countries and the EU[7]. Finally, some text included in current EU FTAs would no longer make sense in the context of a UK-only trade agreement. For example, all recent EU FTAs tend to include schedules listing EU and third country geographical indications that must be protected by both parties. References to geographical indications from other EU Member States will have to be removed.

3. THE POWER TO IMPLEMENT THE GPA AND INTERNATIONAL TRADE AGREEMENTS

The implementation of international trade agreements will be achieved through Henry VIII clauses. This executive power to implement international trade agreement is laid down in sections 1(1) and 2(1) of the bill which provide that an appropriate authority may by regulations make such provision as the authority considers appropriate for the purpose of implementing the GPA or international trade an agreement which the United Kingdom is a signatory.

The regulations will be subject to the negative scrutiny procedure meaning that the delegated legislation remains law unless a House votes to annul it within a limited time period.

Parliamentary scrutiny on the implementation of international trade agreements will therefore be limited under the current Trade Bill. This is problematic because, as discussed, (i) the term 'international trade agreement' used by the Trade Bill is vague and potentially very wide in its scope: (ii) the Trade Bill covers EU free trade agreements that have merely signed, rather than only those that have been ratified under EU law; and (iii) the UK government has acknowledged the implementing power conferred by the Trade Bill "is broad enough to allow implementation of substantial amendments, including new obligations"[8].

4. RESTRICTIONS ON DEVOLVED AUTHORITIES AND THE SEWEL CONVENTION

In accordance with the Sewel Convention, the Scottish Parliament must give its consent where the UK Parliament intends to legislate a matter that is normally legislated by the Scottish Parliament. It is outlined under the Devolution Guidance note 10 that any proposals

[7] Peter Holmes and Michael Gasiorek, "Grandfathering Free Trade Agreements and Rules of Origin: What might appear bilateral is in fact trilateral!" 27 September 2017. Available at: https://blogs.sussex.ac.uk/uktpo/2017/09/27/grandfathering-ftas-and-roos/

[8] Delegated Powers Memorandum by the Department for International Trade paragraph 46. Available at: https://publications.parliament.uk/pa/bills/cbill/2017-2019/0122/Trade-Bill-Delegated-Powers-Memorandum.pdf

in UK Parliament legislation which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers require the consent of the Parliament. The convention is further restated under section 28 of the Scotland act which recognises "that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament".

It can be argued that, together, the EU Withdrawal Bill and the Trade Bill both alter the legislative competence of the Scottish Parliament and legislate in areas of devolved competence.

Clause 11(1) of the Withdrawal Bill maintains the current prohibition on the Scottish Parliament to legislate in a manner that is incompatible with "retained EU law". More specifically, it restricts the ability to amend retained EU law in a way that would have been incompatible with EU law before the UK's withdrawal.

This restriction also affects the interaction between devolved authorities and future UK trade policy. One of the advantages of leaving the EU is that devolved authorities could in theory be able to regulate matters falling within their competence in a manner that better reflects their interests and preferences. For example, with respect to procurement, should the UK leave the EU without a deal or even with a CETA-style agreement, this would significantly expand the regulatory flexibility available to the UK and allow it to address some of the flaws typically associated with the EU procurement regulatory system[9]. To the extent that the GPA rules are far less detailed and restrictive than EU rules, devolved authorities such as Scotland would, in theory, have a greater degree of regulatory autonomy in setting procurement rules once the UK leaves the EU.

However, as the Withdrawal Bill restricts the ability of devolved territories from amending retained EU law, the devolved administrations may be precluded from adopting a procurement system which better reflects their own regulatory preferences.

[9] The foregoing is subject to certain caveats. The extent to which the UK or Scotland would be able to deviate from the current regulatory framework once it leaves the EU depends on what type of agreement is struck with the EU. In the case of a soft-Brexit where the UK remains a party to the European Economic Area agreement, the status quo would be maintained as the UK would still be bound by EU directives and case law on procurement. Should the UK's future trade relationship with the EU come in the shape of a free trade agreement, the constraints imposed on procurement rules would depend on the level of economic integration pursued by the agreement. The EU-Ukraine FTA, for example, requires Ukraine progressively approximate its laws with the EU directives and keep up with the evolution of the acquis communautaire (including EU case law). By contrast free trade agreements such as the EU-Canada CETA do little more than replicate the text of the GPA.

This approach is replicated in the Trade Bill. Paragraph 2(1) of the Schedule 1 to the Trade Bill provides that devolved authorities may not make regulations implementing the GPA or international trade agreements which modify any retained EU law or anything which is retained by virtue of section 4 of the Withdrawal Bill. A similar restriction is not imposed on UK ministers in order to ensure that the UK-wide regulatory framework provided by EU-retained law is maintained. However, this means that the powers of UK ministers will be increased in areas of devolved competence which would arguably alter the constitutional balance between Westminster and Scotland.

5. PARLIAMENTARY SCRUTINY

As a preliminary point, it is important to highlight that the Trade Bill is silent on the negotiation phase of international trade agreements, as it focuses only on the implementation phase. More specifically, the bill makes no mention of any parliamentary procedure which would lead up to the negotiation and ratification of trade agreements. Most countries have in a place, at a very basic level, a trade negotiating authority mechanism where Parliament can give the authority to the executive branch to negotiate trade agreements and ratify such trade agreements once negotiations are concluded.

The Explanatory Notes explain that Parliamentary approval for ratifying both the UK's membership of the GPA and the international trade agreements covered by the Trade Bill will be sought via the Constitutional Reform and Governance Act 2010 (CRGA). Under the CRGA, the Parliament has a de facto power to block the ratification of international treaties. The government must submit international treaties before both Houses for 21 sitting days and if the House of Commons resolves that the treaty is not ratified, a further 21 sitting-day period is triggered. If parliament maintains its refusal to ratify the agreement, the process is repeated indefinitely.

In the context of the negotiation and conclusion of trade agreements, this system is not fit-for-purpose. A more substantial involvement of parliament in the decision making process involving the negotiation of trade agreements is required. As stated above, at a basic level, most countries will grant parliament the power to either approve or reject the international agreement as a whole.

Many jurisdictions have gone further by allowing for substantial parliamentary engagement prior and during the negotiating process. For example, in the EU, trade negotiations may only be initiated once the Council of Ministers has approved a negotiating mandate for the

Commission. The draft negotiating directive must be made available to the European Parliament prior to the granting of the authorisation. While the European Parliament has no formal role in the authorization of the negotiations, it does have extensive rights to be kept informed during the entire procedure. The European Commission must report to the European Parliament on the progress of negotiations after each negotiating round. The European Parliament can adopt resolutions that signal conditions under which it is willing to approve the agreement at the end of the process. When the Commission submits the finalised version of the negotiated agreement for approval, the European parliament cannot make any amendments but votes to either approve or reject the entire agreement.

In the US, the negotiation and conclusion of trade agreements occurs in accordance with the Trade Promotion Authority. TPA is the authority Congress grants to the President to enter into certain trade agreements, and to have their implementing bills considered under expedited legislative procedures, provided the president observes certain statutory obligations. The fast track approach does not mean that the US Congress has no role to play in the decision making process. Before the negotiations begin, the executive must notify Congress of its intention to enter into trade negotiations and consult with the House Ways and Means, Senate Finance and other relevant committees. Likewise, once negotiations have been completed, the executive must notify Congress of its intention to enter into the agreement and consult relevant congress committees on issues relating to the nature of the agreement, how it achieves the purposes defined in TPA, and any potential effects it may have on existing laws. Finally, agreements concluded under the TPA can either be approved or not.

In addition to formal procedures allowing for parliamentary scrutiny, there are also other tools that should be put in place in order to enhance the democratic legitimacy of trade negotiations. Firstly, some consideration should be given to the creation of mechanisms and obligations that enhance the transparency of trade negotiations. The European Commission, for example, publishes the draft negotiating directive, a report of each negotiating round and its initial negotiating proposals and organises regular meetings with civil society actors.

There are additional measures that have been put in place to enhance the quality of parliamentary scrutiny of the negotiation and conclusion of EU FTAs. Firstly, the European Commission must carry out a scoping exercise where it will hold preliminary discussions with third parties to determine whether a free trade agreement with a particular third country is feasible or indeed desirable. Secondly, the Commission will order an impact assessment. This will include a public consultation with stakeholders and interested parties. It also carries out sustainability impact assessment which looks at the likely economic, social and

environmental effects of a trade agreement. The Commission also regularly carries out ex-post evaluations to assess the effects of FTAs.

In this respect, it should be noted that, on 17 January 2018, an amendment to the Trade Bill has been tabled proposing that negotiations on international trade agreements cannot begin until a public consultation and a geographic impact assessment examining the effect of the agreement on the devolved territories are carried out[10]. Such an amendment would be to enhance the democratic legitimacy and the quality of parliamentary scrutiny on such agreements.

The lack of parliamentary scrutiny envisaged by the Trade Bill in the process of transitioning EU third country free trade agreements is reflective of the need for urgency in transitioning current EU FTAs once the UK leaves the EU, and the fact that most of these agreements have already been through the comprehensive parliamentary scrutiny process carried out at EU and (for EU mixed agreements) national level. However, the small role attributed by the bill to parliament and devolved authorities seems ill-placed given that some of the agreements may require substantive modifications whilst some have not gone through the entire EU parliamentary scrutiny process. It is also important to ensure that the decision making process concerning the negotiation of "rolled-over" trade agreements covered by the Trade Bill are not used as a template for the negotiation of future international trade agreements.

6. ROLE OF DEVOLVED ADMINISTRATIONS IN NEGOTIATING TRADE AGREEMENTS

The Trade Bill does not foresee any role for devolved administrations in the decision-making processes surrounding the negotiation and conclusion of trade agreements. This is problematic, since many issues covered in contemporary EU trade agreements are also devolved matters (e.g., agriculture and procurement).

There are a number of examples in federal countries of systems of inter-governmental relations that allow for cooperation between central and sub-national governments in the development of trade policy. Canada, in particular, has institutionalised cooperative mechanisms that allow for the consultation and sometimes even the involvement of provinces in trade negotiations. Consultations occur in the framework of the Federal-Provincial committee on Trade (C-Trade), a body composed of trade representatives from both the federal government and provincial executives. It meets on a quarterly basis to

[10] Available at: https://publications.parliament.uk/pa/bills/cbill/2017-2019/0122/amend/trade_rm_pbc_0117.1-4.html

discuss a wide variety of trade policy issues from broad discussions on the general orientation of the Canadian international trade policy framework and Canada's position in relation to the negotiation of bilateral or multilateral trade agreements, to discussions on specific trade topics of relevance to the provinces. Beyond these meetings, the federal government also makes draft negotiating documents available to province representatives, who are invited to submit their observations and put forward their agendas. The C-Trade meetings therefore provide a platform for ongoing information exchange on the development of trade negotiations and a venue through which provinces can influence the negotiating positions of the federal government. In doing so, the discussions enhance the legitimacy of the negotiated agreements in the eyes of the provincial executives.

The C-Trade cooperation framework is also complemented by a number of consultative committees that focus on sector specific issues. For example, agriculture is not an issue that is typically addressed in the context of C-Trade but rather in a specifically designated federal-provincial committee. In addition to these consultative mechanisms, the provinces maintain regular dialogue with the federal government on trade policy matters. Cooperation occurs through informal communication channels of communication between trade officials on both sides. However, informal cooperation remains limited to minor administrative and technical issues, rather than the more important policy issues.

Finally, there are recent examples of occasions where the role of provinces in trade negotiations was elevated to that of an active participant in trade negotiations. During the negotiations of the EU-Canada Comprehensive Economic Trade Agreement, the EU, which was hoping to gain access to the provincial procurement markets in Canada, requested that provinces be involved in the negotiation process. Another recent example can be found in the context of the negotiation on the TransPacific Partnership (TPP) where, at the request of the United States, provinces were not allowed to present sit at the negotiating table but were briefed after all negotiating meetings and given the opportunity to voice their concerns and advise on matters that fell within their competence.

The UK currently has in place a series of agreements which provide guidelines and mechanisms to ensure cooperation and coordination in policy making in matters that fall within the sphere of competence of the devolved administrations. The UK system has, however, failed to provide an effective framework for inter-governmental cooperation in areas of foreign policy that overlap with devolved matters. In 2015, the House of Lords Select Committee on the Constitution issued a report on inter-governmental relations in the United Kingdom which found that, with the exception of the European Affairs sub-committee,

the Joint Ministerial Committee had proved highly ineffective in fostering cooperation between the UK government and devolved administrations.

The UK's system of inter-governmental cooperation, as it currently stands, would not provide devolved administrations the type of influence on trade policy and trade negotiations that is bestowed on Canadian provinces. To redress that balance, the UK should consider the establishment of a formal and institutionalised system of cooperation based on regular consultations. The formal cooperation mechanism can adapt the template set by Canadian inter-governmentalism and create a Joint Committee on Trade (JCT) focused exclusively on trade. The JCT would be composed of relevant ministerial representatives of the central government and devolved administrations and meet four times per year to discuss major issues relating to trade agreements, such as the setting of negotiation objectives and common positions, and the identification of areas where trade agreements should reflect the specific circumstances of devolved territories. Inter-governmental cooperation in this area should be made legally binding to ensure that cooperation occurs on a continuous basis rather than on an ad hoc basis. The additional security resulting from the requirement to hold regular meetings would encourage the devolved administrations to assume responsibility in trade matters, and to make the necessary investment to develop capacity and expertise in trade matters. The regular dialogue would also build trust between the parties, which is more likely to lead to constructive cooperation.

The formal institutionalised mechanisms of cooperation should also reflect the complex nature of contemporary trade agreements. The complexity relates to the subject matters regulated in trade agreements as well as the processes involved in negotiating, concluding and implementing them. Cooperation should encompass all areas covered in trade negotiations that overlap with devolved matters. The JCT should be granted the power to establish working committees focused on key areas of strategic interests for devolved administrations. These sub-committees would be composed of civil service staff with expertise on specific trade issues from both central government and devolved administrations, and would be used to carry out more technical discussions.

Consideration must also be given to the right of devolved administrations to participate in trade negotiations. The Canadian experience shows that the inclusion of sub-national representations in international negotiations need not undermine the cohesion of a country's negotiating position. On the contrary, the evidence suggests that the involvement of representatives of devolved administrations would add a layer of legitimacy to the negotiation process and improve the chances of successful outcome. Devolved administrations are more experienced and attuned to the complexities of matters that fall

wholly within devolved competence and would be better placed to put forward solutions and break deadlocks that may arise in relation to such matters. In short, allowing for such representation would reflect the fact that devolved territories are also responsible for matters addressed in trade agreements, further reinforcing buy-in for such agreements at devolved levels.

An amendment to the Trade Bill was tabled on 23 January 2017[11], to create a clause that would establish a Joint Ministerial Committee as a forum where devolved administrations could be consulted on (i) the terms upon which the United Kingdom is to commence negotiations with respect to any international trade agreement; and (ii) proposals to amend retained EU law for the purposes of the implementation of international trade agreements. The amendment would be welcome as it creates a legally binding obligation on the UK government to consult with devolved territories for each individual trade agreement. It could, however, go further by establishing a legal obligation to hold a specified number of meetings on an annual basis that would allow devolved authorities to follow up on the progress of negotiations and shape such negotiations progressively.

[11] Available at: https://publications.parliament.uk/pa/bills/cbill/2017-2019/0122/amend/trade_day_pbc_0131.1-5.html