

Unlock Democracy evidence submission

Trade Bill public bill committee

About Unlock Democracy

Unlock Democracy is a grassroots campaign for democratic and constitutional reform in the UK. It is owned and run by its members. The campaign is cross-party, Brexit-neutral, and took no position on the outcome of the referendum.

Executive Summary

- Unlock Democracy has identified three primary areas of concern with the Trade Bill, which are the democratic deficits in trade deal negotiation, scrutiny, and ratification.
- The Secretary of State for International Trade told the House of Commons that the bill “is not about trade agreements... this Bill is about continuity of existing agreements.”¹ It is possible - and in fact has already come to pass - that trading partners will request changes to these existing deals. It is therefore a cause for concern that no mechanisms are proposed to either assess the impact of proposed changes, and subject proposed changes to parliamentary scrutiny and then approval.
- Given that the Article 50 exit date is set for March 2019 and the Secretary of State for International Trade has made public his intentions to start signing deals as soon as possible after Brexit, it is a matter of urgency that the government bring forward its proposals for how trade is going to be conducted for new trade deals, given the conspicuous absence of any proposals in this bill. This should include comprehensive reform of the way trade deals are negotiated and ratified so that Parliament is guaranteed a meaningful role throughout.
- To date the current government has expressed a concerning attitude towards parliamentary scrutiny. This has most obviously been borne out in the process of exiting the European Union. Statutory changes are required to the way trade deals are done to mandate a role for Parliament in setting negotiating objectives, scrutinising negotiations, and having a meaningful and binding vote on final deals – which means the opportunity to amend, reject, or accept a deal put forward.

Treaty-negotiation

1. The trade deals entered into after Brexit will have a profound effect on the country for decades to come. The UK is a parliamentary democracy where parliamentary sovereignty is a defining principle. A meaningful role for Parliament involves, as a basic democratic standard, the opportunity for both houses to influence the substance of the government’s negotiating position, hold the negotiating parties to account during negotiations, and ratify final deals.

¹ HC Debate (9 January 2018), vol. 634, cols 217 and 221, available at: <https://hansard.parliament.uk/commons/2018-01-09/debates/582F83B5-0943-4BE2-A473-599C6C4897F9/TradeBill>

2. The professed aim of this Bill is to put in place mechanisms to transpose existing deals that the UK has already entered into as part of EU membership. In October 2017 the Secretary of State made a public commitment to sign them “the second after midnight”² on Brexit day in March 2019.
3. While in the best possible case these deals will be transposed over directly, it is currently unclear what would happen in the event that one party requires a change in terms. This is already the case - South Africa has rejected the option to roll over the existing deal and wants to negotiate greater access to Britain's agricultural sector³. What is notably absent from this bill are mechanisms to ensure transparency and parliamentary scrutiny where changes to current deals are sought.
4. This is of particular concern to Unlock Democracy given the breadth of modern trade deals, which have the potential to touch on all aspects of public and private life - everything from the standards of the food we eat, regulations governing the medicines we take and those that protect citizens' personal data, to the power of the government to manage public sector procurement. We already know, for example, that Prime Minister has left open the option for US based private healthcare companies to be involved in the NHS⁴ in a post-Brexit trade deal with the USA. One of President Donald Trump's most senior advisors separately told a conference hosted by the Confederation of British Industry (CBI) that the UK should not “hinder development of a closer post-Brexit US-UK relationship by continuing divergent standards and regulations.”⁵
5. One argument frequently put forward to assert that trade should not be transparent is that it weakens the negotiating hand. This has been the government's approach to date with Brexit negotiations - the government has not allowed Parliament to participate in the development of the UK's negotiating position and it has been consistently reluctant to provide even the most basic information. For example, the Prime Minister publicly labelled giving Parliament a meaningful vote on the Brexit deal as a move which would “incentivise” the EU to offer the UK a “bad deal”⁶.
6. In the UK, parliamentary involvement in making trade deals is not without precedent; ahead of the Maastricht conference then Prime Minister John Major put a motion before the House of Commons asking MPs to endorse his negotiating position⁷.

² Payne, A. and Bienkov, A. (2017) [Liam Fox promises to sign 40 free trade deals the 'second after' Brexit](#), [Business Insider UK](#)

³ Leroux, M. (2017) [Fox suffers South Africa trade setback](#), The Times

⁴ Watts, J. (2017) [Theresa May suggests UK health services could be part of US trade deal](#), Independent

⁵ Cox, J. (2017) [Britain must scrap EU rules and allow chlorine-washed chicken if it wants post-Brexit trade deal with US, Trump adviser says](#), Independent

⁶ Parker, G. and Allen, A. (2017) [Downing St warns Lords against incentivising EU to offer bad Brexit deal](#), The Financial Times

⁷ HC Debate (20 November 1991), vol. 199, cols 269-390, available at:

<http://www.publications.parliament.uk/pa/cm/199192/cmhansrd/1991-11-20/Debate-1.html>

7. Many European countries have procedures which put their national parliaments at the heart of negotiations without jeopardizing their national interests. Some legislatures in Europe provide us with examples to look to for how parliaments are involved in mandating their government's position in treaty negotiation:
 - i. For intra-EU negotiations this is often done by a committee with special responsibility for EU affairs.
 - ii. In Denmark, prior to an EU Council meeting the minister concerned is required to appear before the European Affairs Committee. They give an oral presentation outlining the government's negotiating position, including potential criticisms and the parameters they will operate in. The Committee is able to ask questions and debate the matter. The Committee is then asked to accept or reject the position, and if members representing more than 90 of the 179 seats have stated their opposition to the position the minister must return with a revised proposal at a later date⁸.
 - iii. Similar systems are also in place in Finland⁹ and the Netherlands¹⁰, although the mandate in these countries is politically but not legally binding.
8. While comparable committees exist in the UK Parliament, their powers are much more limited. The UK Parliament has no committee specifically responsible for scrutinising treaty negotiations. Unlike some of its European counterparts, the European Scrutiny Committee (EUSC) in the House of Commons does not have a role in mandating the government's negotiating position prior to European Council meetings. Detailed analysis of issues with this committee as a scrutiny body is included in Unlock Democracy's report, '*A Democratic Brexit: Avoiding Constitutional Crisis in Brexit Britain*'.
9. A parliamentary committee is an appropriate place to build legitimacy for a negotiating position. The cross-party nature of committees fosters cooperation and deliberation, in contrast to the often adversarial nature of debates on the floor of the house. Decisions about post-Brexit trade deals will necessarily bind future Parliaments for decades to come, and it is therefore important they are not made on the whim of the governing political party but are instead developed through cross-party collaboration and deliberation.

The scrutiny of trade deals by Parliament

10. As well as having power to influence the government's negotiating position in advance of trade deals being negotiated, Parliament needs to be able to provide effective and meaningful scrutiny of trade deals. This is particularly pertinent for this bill given there are currently no mechanisms for Parliament to scrutinise and approve any proposed changes to existing deals, which have already and will inevitably continue to arise. It is both possible and practical for Parliament to be given

⁸ The Danish Parliament's EU Information Centre (2012), [The European Affairs Committee of the Danish Parliament](#)

⁹ The Finnish Parliament, [The Grand Committee - Parliament's EU committee](#) (no date)

¹⁰ Borjes, L., Munro, R., White, H. (2016) [Parliamentary scrutiny of European Union Legislation, lessons from other European countries](#), The Institute for Government

information about the negotiations and for mechanisms to be put in place - where required - to ensure that confidential information remains so.

11. It is accepted that a certain level of confidentiality may be required. However provisions can be made for the viewing of confidential documents, and indeed they have for other treaty negotiations. For example, draft versions of the Transatlantic Trade and Investment Partnership (TTIP) were made available to MEPs and MPs in secure reading rooms.¹¹ If the government has total control over the flow of information there is a risk they will use this to limit scrutiny.
12. The only tools for scrutiny currently available to Parliament is the ability to criticise elements of a deal that will already have been made, and that they are powerless to change. To prevent Parliament being sidelined, further measures for parliamentary involvement must be put in place. There are far fewer opportunities for Parliament to influence and scrutinise treaty negotiations than there are for the national parliaments of our European counterparts. Such monumental negotiations should be conducted on the basis of a national position with broad consensus. Parliament should be involved in formulating and approving such a negotiating position. There should also be structures in place to ensure that they have sufficient information with which to scrutinise the government in the negotiation proceedings. At present, there are insufficient opportunities for Parliament to be meaningfully in shaping, scrutinising or ratifying trade deals.

Recommendations - giving Parliament a role in setting objectives and scrutinising negotiations

13. A new treaty committee should be established that is given a central role in the trade deal negotiation process and should be afforded extra powers. Before each key negotiation stage the Prime Minister or relevant minister should be required to appear before the Committee and seek a mandate for their negotiating position.
14. The relevant minister should give an oral presentation outlining their position including the limits or 'red lines' within which they will operate. The committee should then be given the opportunity to accept, reject or amend the position.
15. The relevant minister should be required to report back to the committee at key stages in the negotiation process. These key stages are to be agreed with the committee prior to entering negotiations.
16. The committee should have the power to require the minister to appear before Parliament if it believes it to be necessary.
17. The government should provide the committee with all negotiating documents, including confidential documents. At a minimum they should be provided with as much information at the European Parliament and equivalent information on British

¹¹ Davies Boren, Z. (2015) [TTIP controversy: Secret trade deal can only be read in secure 'reading room' in Brussels](#), Independent

negotiating objectives should be provided. Documents should be supplied as soon as possible, preferably in advance of the European Parliament. The committee should then decide which documents to distribute to Parliament.

18. Provisions should be made for the examination of confidential documents and the committee may meet in secret.

Treaty ratification

19. Given the potential for modern trade deals to significantly impact signatories and their citizens, it is only right that finalised deals are subject to meaningful parliamentary approval - that is, Parliament should have the right to amend, reject, or accept deals prior to ratification.
20. Unlike many other countries that have provisions in their constitutions for parliamentary ratification of trade deals, in the UK the government does not need the consent of Parliament to ratify a deal. The only power Parliament possesses in this regard is the negative power to object to ratification. This is not an adequate counterbalance to the government's comprehensive power in this area.
21. Parliament has had the power to object to treaty ratification since the 1920s as a convention which was only recently put on a statutory footing in the Constitutional Reform and Governance (CRaG) Act 2010. There are significant limitations imposed on the powers of the House of Commons over trade deals. MPs have no opportunity to amend trade deals; they can only be wholly rejected, and this power still falls short of an affirmative vote. In the House of Commons there is no process for holding a debate and vote to object to ratification. The house must pass a resolution, which means that unless there is the opportunity for an Opposition Day debate within the 21 day period after the treaty has been laid, MPs are entirely reliant on the government of the day making time to hold a vote.
22. Most other European countries require a vote in their parliaments before a trade deal can be ratified, with requirements often laid out in the country's constitution:
 - i. In Spain, the state can only enter treaties "of a political nature" with "prior authorization of the Cortes General"¹².
 - ii. The Italian constitution requires that most treaties go through a multi-stage process similar to legislation¹³.
 - iii. According to article 53 of the French constitution, the President ordinarily has the power to ratify treaties, but it also states: "Peace Treaties, Trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be

¹² Government of Spain (1978) [Spanish Constitution](#)

¹³ Government of Italy (2012) [Constitution of the Italian Republic](#)

ratified or approved only by an Act of Parliament. They shall not take effect until such ratification or approval has been secured.”¹⁴

- iv. According to article 167 of the federal constitution of Belgium, all regional parliaments must approve treaties before they are ratified¹⁵.

23. The picture in the UK is starkly different. For example, when the Comprehensive Economic Trade Agreement (CETA) between the EU and Canada was ratified the Belgian regional Parliament of Wallonia was given a vote, in line with their constitutional requirements. In the UK, our Parliament wasn't even allowed to debate the deal, let alone vote on it. The Secretary of State for International said MPs would not be offered a debate on the CETA deal until after it had been ratified¹⁶ which would have made any objections or amendments politically impossible. This decision led the European Scrutiny Committee to require Dr Fox to give emergency evidence¹⁷ on the subject of why he did not offer MPs a debate and decided instead to override opportunities for oversight and scrutiny. This should serve as a stark warning of how concentrated power is in the hands of a single minister when it comes to making trade deals and how, under the current system, Parliament is inevitably powerless to scrutinise or influence ratification if it so desires.

24. The Secretary of State's current attitude suggests a similar approach will be taken to future trade deals post-Brexit. For example, letters released by the Department for International Trade between the UK and the US trade representative in December 2017 outlined that a wide range of information relating to the US-UK trade deal will remain classified for four years after the conclusion of talks¹⁸.

25. Given that the trade white paper, '*Preparing for Our Future UK Trade Policy*', proposed no reforms regarding Parliament's role in trade deal negotiations or ratification¹⁹, it is a matter of urgency for separate legislation to be brought forward to introduce new mechanisms that guarantee parliamentary involvement in ratification, given the absence of any commitments in the bill as it stands. It should also be noted that the Trade Bill was published on the 7 November, just one day after the deadline for responses to the white paper (6 November). This worryingly suggests that little or no attention was given to stakeholder feedback when the bill was being drafted.

26. Other governments around the world are successfully able to perform their functions relating to making international trade deals whilst also obtaining the consent of their respective parliaments. There is no conceivable reason as to why the UK Parliament should continue to be prevented from setting negotiating objectives, scrutinising the negotiations, and the having a meaningful vote on final deals.

¹⁴ Government of France (1958), [Constitution of France](#)

¹⁵ Belgian House of Representatives (2014) [The Belgian Constitution](#)

¹⁶ Stone, J. (2016) [MPs will be allowed to debate controversial EU trade deal Ceta only after it has been signed, says minister](#), Independent

¹⁷ European Scrutiny Select Committee (2016) [Liam Fox gives emergency evidence on Parliamentary scrutiny of CETA](#)

¹⁸ Ball, J. and Carter L. (2017) [Brexit: Liam Fox's department signs deal to keep trade talks secret](#), Unearthed

¹⁹ Department for International Trade (2017), [Preparing for Our Future UK Trade Policy](#)

Recommendations

27. Separate legislation should be introduced to provide wholesale reform to the way trade deals are negotiated and ratified that places power firmly in the hands of Parliament not government. This should state that the government may only ratify a trade deal once the consent of Parliament has been obtained. Parliament should vote on all trade deals and be given the opportunity to debate any existing trade deal, with provisions made for the ratification of treaties by the government alone in exceptional circumstances concerning matters of war and peace.

28. A committee should be established in the House of Commons with responsibility for scrutinising trade deals in detail. It may conduct inquiries and publish reports where necessary. The committee should have the power to decide which treaties are debated on the floor of the house. This is a substantial job and not one that could be done by an existing committee on top of its existing workload, given the high volume of post-Brexit trade deals anticipated by Dr Fox.