

# Legislative Consent Memorandum

## Trade (Comprehensive and Progressive Agreement for Trans-Pacific Partnership) Bill

### Background

1. This memorandum has been lodged by Shona Robison, Deputy First Minister and Cabinet Secretary for Finance, under Rule 9B.3.1(a) of the Parliament's standing orders, and is supported by Tom Arthur, Minister for Community Wealth and Public Finance. The Trade (Comprehensive and Progressive Agreement for Trans-Pacific Partnership) Bill (CPTPP) was introduced in the House of Lords on 8 November 2023. The Bill can be found at: <https://bills.parliament.uk/bills/3509>.

### Content of the Trade (Comprehensive and Progressive Agreement for Trans-Pacific Partnership) Bill

2. This Bill consists of eight clauses and a Schedule. The Bill covers three areas where primary legislative intervention is necessary to comply with the terms of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP): conformity assessment bodies; public procurement; and intellectual property.

3. The Explanatory Notes to the Bill set out the UK Government's view of its purpose and main functions. The UK Government describes the Bill as providing measures to ensure the UK will be compliant with its international obligations pursuant to CPTPP. The Bill triggers the legislative consent process for the part of the Bill relating to public procurement, as this is a devolved competence.

4. Clause 1 describes the meaning of CPTPP as a Free Trade Agreement known as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which was signed on 8 March 2018, with the UK accession protocol signed on 16 July 2023.

5. Clause 2 enables the Secretary of State to make regulations to implement Article 8.6 of the CPTPP Chapter on Technical Barriers to Trade. This article requires each Party to accord to conformity assessment bodies located in the territory of another Party treatment no less favourable than that it accords to conformity assessment bodies located in its own territory or in the territory of any other Party.

6. Accreditation of conformity assessment bodies is a reserved matter and Clause 2 is not judged to be within the legislative competence of the Scottish Parliament nor to modify the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers. As such, the clause does not require legislative consent.

7. Clause 3, in combination with the Schedule, amends domestic public procurement legislation in three ways, in order that it is compliant with the terms of the CPTPP. For Scotland, these are set out in Schedule 1, Part 2 of the Bill.

8. The first set of amendments relating to public procurement concerns contracts awarded pursuant to international rules. At present, the domestic regulations exclude from their scope procurements:

- that the contracting authority is obliged to award under procedures established by an international agreement or an international organisation;
- that the contracting authority undertakes in accordance with procurement rules provided by an international organisation where the contract is fully financed or co-financed for the main part by that organisation; and
- procurements involving defence or security aspects awarded pursuant to international rules.

9. These exclusion provisions need to be amended to remove the possibility of a contract being awarded in accordance with the rules of a non-majority funding international organisation instead of domestic procurement rules.

10. The exclusions provisions also need to be amended to provide that when a contract is awarded pursuant to the procurement rules of a funding international organisation or donor, and those rules do not restrict the participation of suppliers, the general duty of equal treatment applies to the competition (despite the domestic regulations not otherwise applying).

11. The second area where amendment of the domestic procurement rules is needed relates to the detail authorities are required to put in a notice advertising the award of a contract. As the domestic regulations are currently drafted, there is the option to include the value of the successful tender (or tenders), or the highest tender and lowest tender taken into consideration. In order to comply with the terms of CPTPP membership, it is necessary to remove the option for authorities to list the value of the highest and lowest tenders in lieu of the actual contract value.

12. The third area where amendment of the domestic procurement rules is needed to comply with the CPTPP is to insert the CPTPP into the relevant international agreements lists in Scottish procurement regulations, parties to which are afforded rights of equal treatment in relation to covered contracts.

13. Part 2 of the Schedule amends the Public Contracts (Scotland) Regulations 2015, the Utilities Contracts (Scotland) Regulations 2016, and the Concession Contracts (Scotland) Regulations 2016 accordingly. Part 1 of the Schedule makes equivalent amendments to the regulations currently in force in England, Wales and Northern Ireland. Part 3 of the Schedule provides that such amendments do not apply to procurements commenced before the Schedule enters into force.

14. The regulations amended by Part 1 of the Schedule will be revoked by the Procurement Act 2023, when the substantive provisions of that Act are commenced. Subsections (1) to (3) of Clause 3 therefore amend that Act for the same purpose. That Act will not generally apply to devolved Scottish authorities.

15. Clauses 4 and 5 of the Bill make changes in relation to geographical indications (GIs), and copyright and related rights, in order to ensure compliance with the Intellectual Property Chapter of the CPTPP agreement. Clause 4 will amend UK domestic law relating to the registration of GIs, including processes for opposition to GI registration and the cancellation of a registered GI. Clause 5, *Performers' rights*, expands the eligibility criteria by which performers can qualify for rights in their performances in the UK. This is not within the devolved competence of the Scottish Parliament.

16. Clauses 6 to 8 set out the extent, commencement and short title provisions of the Bill. The Bill extends to the whole of the UK, with the exception of those provisions which make amendments to procurement legislation only in force in certain parts of the UK. Clause 7(1) provides that the amendments to devolved Scottish procurement legislation will enter into force on the day on which the CPTPP enters into force for the UK.

## Provisions which require the consent of the Scottish Parliament

17. Procurement is a devolved matter and therefore the implementation of international agreements is devolved to the extent it relates to procurement. The Bill is a relevant Bill under Rule 9B.1 of the Parliament's standing orders, as it makes provision applying to Scotland for purposes within the legislative competence of the Parliament.

## Reasons for recommending legislative consent

18. Legislative consent is required for Clause 3 and the schedule (Part 2) of this Bill as it relates to Scotland.

19. Those provisions make minor technical amendments, as set out in paragraphs 7 to 13, to the devolved public procurement rules as they apply in Scotland, as well as equivalent amendments to the rules in the rest of the UK. As these amendments are necessary in order to implement an international obligation, there is no substantive discretion exercisable in the matter. Should consent be

withheld and those provisions are removed from this Bill, separate primary legislation would be needed in Scotland. Given that these amendments are needed to implement an international obligation across the whole of the UK, and that there is no substantive discretion available in so doing, allowing the UK Parliament to legislate provides for more effective use of time and resource.

20. The Scottish Government will continue to work with the UK Government to agree a pragmatic approach to preparations for commencement of those provisions of this Bill that relate to Scotland.

## EU alignment

21. The amendments to the Scottish procurement regulations made by this Bill, and described in this memorandum, do amount to material divergence from EU law, however they are very minor. As they are required in order to meet an international obligation, Scottish Ministers have no substantive discretion in the matter.

## Consultation

22. The Scottish Government understands that engagement carried out across the UK Government before the CPTPP accession process started did not uncover any substantive concerns about the impact of the changes to the procurement rules made by this Bill. The Scottish Government agrees that any practical impact is likely to be very minor.

23. There has been constructive engagement between the UK Government and the Scottish Government on the clauses in the Bill relating to public procurement.

## Financial Implications

24. There are no financial implications to this Bill.

## Conclusion

25. The Scottish Government is supportive of the procurement provisions of the CPTPP Bill. It will therefore be recommending that the Scottish Parliament gives consent to this Bill because, as set out above, it will make small, technical amendments to Scottish procurement regulations and give effect to international obligations, over which the Scottish Government has no substantive discretion.

## Draft Legislative Consent Motion

26. The draft motion, which will be lodged by the Minister for Community Wealth and Public Finance, is:

“That the Parliament agrees that the relevant provisions of the Trade (Comprehensive and Progressive Agreement for Trans-Pacific Partnership) Bill, introduced in the House of Lords on 8 November 2023, relating to procurement, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

Scottish Government  
November 2023

This Legislative Consent Memorandum relates to the Trade (Comprehensive and Progressive Agreement for Trans-Pacific Partnership) Bill (UK legislation) and was lodged with the Scottish Parliament on 22 November 2023

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