

Delegated Powers Memorandum - THE TRADE (COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP) BILL

Memorandum from the Department for Business and Trade to The Delegated Powers and Regulatory Reform Committee

A. Introduction

1. This Memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with the scrutiny of the Trade (Comprehensive and Progressive Agreement for Trans-Pacific Partnership) Bill (“the Bill”). The Bill will be introduced in the House of Lords on 8 November 2023. The Memorandum has been prepared by the Department for Business and Trade (“the Department”). This Memorandum identifies the provisions of the Bill that confer a power to make delegated legislation and explains why the power has been taken and the nature of, and the reason for, the procedure selected.
2. To support its policy objectives, the legislation includes one new delegated power and an amendment to an existing delegated power. The Department has considered the use of the new power and the amendment to an existing delegated power in the Bill as set out below and is satisfied that they are necessary and justified. The Bill is not in the nature of a skeleton bill.

B. Overview and purpose of the Bill

3. The purpose of this Bill is to implement legislative changes in four specific areas to enable the UK to comply with its legal obligations when it accedes to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (the “CPTPP”).
4. The CPTPP is a free trade agreement that was signed on 8 March 2018 at Santiago, Chile and comprises of 11 original members. The UK concluded negotiations to join the CPTPP on 31 March 2023 and signed the Accession Protocol – which sets out the terms and conditions of the UK’s accession to the CPTPP – on 16 July 2023. When the Accession Protocol enters into force, the UK accedes to the CPTPP and becomes a Party to the CPTPP.
5. The CPTPP is a vast free trade bloc spanning five continents and 12 countries, including the UK when it accedes. The CPTPP was created to expand and as it grows the UK will stand to benefit from access to new markets. The UK will be able to shape future membership of the group, and welcomes interest from economies willing and able to meet the high standards and comprehensive market access commitments of the agreement. A new economy can only join the CPTPP if there is consensus amongst the membership. Economies including Costa Rica, Ecuador and Uruguay have formally applied to join the CPTPP. Thailand, the Philippines,

and Republic of Korea have also expressed an interest in joining. If these economies were to join the CPTPP with the UK, the combined 2022 GDP would increase to just over £14 trillion, an expanded group which covered 9% of all UK exports in 2022. Accession puts the UK at the heart of a dynamic group of sovereign countries, including Viet Nam, which is predicted to be one of the fastest growing economies in the next decades.

6. The Bill follows two other key pieces of free trade agreement-implementing legislation; the European Union (Future Relationship) Act 2020 and the Trade (Australia and New Zealand) Act 2023. Other relevant legislation in this area includes the Trade Act 2021, which contains powers to implement our “Trade Continuity Agreements”, i.e., bilateral agreements that provide for continuity in the trading relationship between the UK and the relevant country following the UK’s exit from the European Union.
7. The Bill has eight clauses and one Schedule. The relevant clauses are as follows:
 - (a) Clause 2 (Treatment of conformity assessment bodies etc.): contains a power to enable the Secretary of State to make regulations amending legislation in order to implement Article 8.6 of the CPTPP, which provides for the national treatment of conformity assessment bodies established in other CPTPP Parties.
 - (b) Clause 3 and Schedule 1 (Procurement): contains provisions to ensure that the public procurement regime complies with particular areas of the CPTPP by directly amending existing regulations¹ and the Procurement Act 2023 for when the UK accedes to the CPTPP. The changes will give effect to the UK’s market access commitments to CPTPP suppliers; and bring that framework into compliance with two technical provisions of the procurement chapter. Those concern procurements funded by an international organisation and the information to be published in a contract award notice.
 - (c) Clause 4 (Designation of origin and geographical indications): contains provisions which directly amend domestic legislation to change the grounds for opposing applications to register an agri-food geographical indication and the grounds for cancellation of registered agri-food geographical indications. Geographical indications are intellectual property rights which protect the names of products which have a special relationship with their geographic origin.
 - (d) Clause 5 (Performer’s rights): contains provisions which directly amend the Copyright, Designs and Patents Act 1988 to expand the eligibility criteria by which a performer can qualify for rights in their performances in the UK, in line with requirements under the CPTPP. This provision also contains an

¹ The Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016, and the Concession Contracts Regulations 2016 in relation to England, Wales, and Northern Ireland; and the Public Contracts (Scotland) Regulations 2015, the Utilities Contracts (Scotland) Regulations 2016, and the Concession Contracts (Scotland) Regulations 2016 in relation to Scotland.

amendment to an existing delegated power in section 206(4) of the Copyright, Designs and Patents Act 1988.

C. Summary of Delegated Powers

8. There is one new delegated power in the Bill and one clause which amends an existing delegated power contained in in section 206(4) of the Copyright, Designs and Patents Act 1988 (the 'CDPA 1988').
9. The power in clause 2 would enable the Secretary of State to amend legislation to ensure that conformity assessment bodies established in CPTPP Party territories will be treated no less favourably than ones located in the UK in relation to conformity assessments for products supplied in Great Britain, pursuant to article 8.6 of CPTPP. This is a narrow power, designed to make minor, technical, amendments to existing secondary legislation and some retained EU Law (which will become known as assimilated law after the end of 2023)².
10. Clause 5(3) of the Bill amends an existing delegated power in section 206(4) of the CDPA 1988. The existing power can be used to make secondary legislation to restrict the protection extended to foreign performances (those that take place outside of the UK, a Crown Dependency or Gibraltar; or which are not given by a national or resident of any of those places). The amendment to the power in clause 5 of the Bill is necessary to ensure that this power can continue to be used in the same way, so that other amendments in clause 5 of the Bill do not inadvertently erode the scope of this power.

Clause	Power	Parliamentary procedure
2(1), (2)	Regulations – to amend subordinate legislation in order to implement Article 8.6 of CPTPP	Negative
Clause 5(3)	Amendment to existing power in section 206(4) of the Copyright, Designs and Patents Act 1988	Existing power is negative

D. Analysis of the Delegated Power by Clause

Power to make regulations in order to implement Article 8.6 of CPTPP (treatment of conformity assessment bodies etc.) (clause 2(1), (2))

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Negative

Context and purpose

² See section 5(1) of the Retained EU Law (Revocation and Reform) Act 2023.

11. Some product regulations require third party conformity assessment of products. These assessments are carried out by approved conformity assessment bodies ('CABs'), which are bodies commissioned by manufacturers to provide assurance that their products meet the requirements of applicable technical regulations. CABs typically require accreditation from the UK Accreditation Service ('UKAS') in order to be approved to carry out assessments by the UK. UKAS is the UK's National Accreditation Body and is independent of government, operating under a Memorandum of Understanding between itself and the Department. It accredits CABs by reference to specific standards.
12. The retained EU law³ version of the Regulation on Accreditation and Market Surveillance (EC) No 765/2008 ('GB RAMS') is the legislative framework for CAB accreditation and conformity assessment in Great Britain. Rules for the approval of CABs by the relevant Secretary of State are found in individual technical regulations, including some retained EU law. For medical devices and automotive products, in addition to the accreditation process by UKAS, CABs must also go to the Medicines and Health Regulatory Agency for medical devices, or the Vehicle Certification Agency for automotive products respectively for further approvals in relation to these particular types of products.
13. As part of its accession to CPTPP, the UK is required, in respect of products to be placed on the GB market, to give CABs located in CPTPP Parties' territories the same treatment as it gives to its own CABs (national treatment of CABs or 'NTCABs'). In practice, this means that the UK should allow CABs in CPTPP Parties to apply to the relevant UK accreditation body to become accredited, and the same or equivalent procedures, criteria and other conditions to accredit, approve, license or otherwise recognise CABs in the UK should be applied to CABs located in a CPTPP Party.
14. Some of the UK's CAB regulations, explicitly or implicitly, require CABs to be a legal entity located in GB, the UK, or a country with which the UK has a Mutual Recognition Agreement. In order to provide for NTCABs, these regulations will therefore need to be amended so that CABs based in CPTPP Parties can apply to be accredited by the relevant UK regulator. This is the purpose of the power afforded to the Secretary of State by clause 2(1).
15. Clause 2(1) confers a power on the Secretary of State to make statutory instruments that amend subordinate legislation in order to implement Article 8.6 of CPTPP, which provides for NCTABs. Clause 2(2) clarifies the scope of this power, providing that regulations made under clause 2(1) may make consequential, supplementary, incidental, transitional or saving provision.

³ To be known as assimilated law after the end of 2023 per section 5(1) of the Retained EU Law (Revocation and Reform) Act 2023.

16. The power therefore allows the Secretary of State, by regulations made by statutory instrument, to make the necessary amendments to subordinate legislation which place conditions on the location of CABs, and to make such other ancillary changes as may be necessary as a consequence of this.
17. The effect, once the power has been used to make secondary legislation to implement Article 8.6, and the CPTPP enters into force as between the UK and the relevant CPTPP Party in issue, is that CABs located in CPTPP Parties (for which the CPTPP is in force as between that Party and the UK) will, for the GB market, be able to apply to be approved by the relevant UK accreditation body in the same way as CABs established in the UK. The power may also be required to allow Departments to make further, smaller, operational changes to their own legislation, but this can only be for the purposes of providing for NTCABs for CPTPP Parties pursuant to Article 8.6 of the CPTPP.

Justification for delegation

18. The power in clause 2(1) is delegated in order to enable Departments to make amendments to subordinate legislation necessary to achieve NTCABs. These changes will need to be made to a number of regulations (including some retained EU Law), falling under the responsibility of a number of different government departments. These regulations are of a technical nature as they relate to mechanics of approval of certain bodies to check compliance against product specifications and requirements. Accordingly, the Parliamentary time required for passing primary legislation to make the necessary changes is not considered to be commensurate with their significance. Instead, a delegated power will enable the changes to be made with greater efficiency and put less burden on Parliamentary resource than would be required if the necessary amendments were made on the face of primary legislation.
19. A delegated power will also enable government departments to exercise the power in the future if necessary, obviating the need for future primary legislation in the event that further changes are needed to ensure the UK complies with its obligations regarding NTCABs should new parties accede to CPTPP, and providing a means of efficiently correcting any oversights made during the process of implementing NTCABs in preparation for the UK's accession.
20. A delegated power to implement NTCABs is not being sought solely to meet the exigencies of timing, although it is acknowledged that there are time constraints associated with implementing the CPTPP before it enters into force, and the use of a delegated power will be useful in this regard. Instead, it complies with the principle that the principal aspects of policy should be on the face of a bill and its detailed implementation left to delegated legislation. We consider that the changes made to the relevant subordinate legislation would be in the form of detailed implementation, reflecting both the technical nature of the changes and that it is in

the form of implementation of the principal policy aim of ensuring domestic compliance with CPTPP upon the UK's accession to that free trade agreement.

21. It should also be noted that there is precedent for taking a delegated power to implement an international agreement which the UK has signed or to which it is about to accede. For example, the Trade Act 2021 contains powers that allow an appropriate authority to make provision by secondary legislation to implement the World Trade Organization Agreement on Government Procurement⁴. The Trade (Australia and New Zealand) Act 2023 contains delegated powers to implement the government procurement chapters of free trade agreements with Australia and New Zealand.
22. We also consider that this power is narrower in scope than the examples above, because it relates to one particular Article in the CPTPP, rather than to a whole agreement or Chapter of an FTA. Accordingly, the power is proportionate and limited to what is necessary to implement the technical aspects of NTCABs.

Justification for the negative procedure

23. Parliament will have the opportunity to scrutinise the chapter on technical barriers to trade that sets out the requirement to enact NTCABs. This is done via the Constitutional Reform and Governance Act 2010 process. Accordingly, Parliamentarians will be aware of CPTPP's provisions with respect to NTCABs. The Government has also undertaken that if a Parliamentary Committee reports on an FTA and recommends a debate, it will seek to facilitate the debate, subject to available Parliamentary time. Further, the Accession Protocol and the CPTPP text have been published online and so Parliamentarians have been able to consider the provisions and the UK's accession following signing of the Accession Protocol on 16 July 2023.
24. The scope of the power is limited to implementing Article 8.6 of CPTPP and so in the Department's view is narrow in purpose and scope. The conformity assessment processes themselves will not be changed using the power, and neither will the requirements for CABs seeking approval, save for those related to CABs' location.
25. As a matter of international law, the UK must be in a position to fulfil its obligations under a treaty from the date the treaty enters into force. There are a number of possible dates on which CPTPP might enter into force for the UK, but in any event, time will be of the essence when it comes to making changes to ensure that the domestic legal framework is compatible with the UK's obligations. Additionally, the Accession Protocol gives the UK 12 months after the date of signature of the Accession Protocol on 16 July 2023 to consent to be bound by the Protocol by

⁴ Agreement on Government Procurement, as amended on 30 March 2012

depositing an instrument of accession to the CPTPP. Accordingly, in order for the UK to accede it must first be in a position to fulfil its obligations under the treaty.

26. The power in clause 2(1) will come into force upon Royal Assent, so that departments can begin to use it immediately to make statutory instruments for the purpose of implementing NTCABs. The longer legislative process associated with the affirmative procedure would increase the risk that the necessary domestic changes will not be made in time to comply with the UK's obligations to implement CPTPP. A made affirmative procedure in these circumstances would also carry a risk if it was not subsequently approved, as this would have the potential impact of the UK losing its legislative implementation for the CPTPP and Protocol for when they enter into force and put the UK in breach of its obligations if it was unable to otherwise make the necessary regulations in time. This could also be detrimental to the international reputation of the UK for being a reliable trading partner.
27. The power is limited to amending subordinate legislation (including EU retained legislation) and will involve technical changes which are not in themselves politically sensitive. The power cannot be used to amend primary legislation and so is not in the form of a 'Henry VIII' power. Consequently, we do not consider this power requires the heightened control of the affirmative procedure for any instrument seeking to amend the relevant legislation. The negative procedure is thus considered appropriate with respect to the power in clause 2(1).

Amendment of power in section 206(4) of the Copyright, Designs and Patents Act 1988 to make the application of Part II of that Act (rights in performances) subject to restrictions (clause 5(3))

Existing Power conferred on: Her Majesty

Existing Power exercisable by: Order in Council

Existing Parliamentary procedure: Negative

Context and Purpose

28. The Copyright, Designs and Patents Act 1988 ('CDPA 1988') provides intellectual property rights to performers in respect of their 'qualifying performances'. This currently means a performance that is given by a national or resident of, or that takes place in, the UK, a Crown Dependency or Gibraltar, or any other country that is a 'qualifying country' (which is defined in section 206(1) of the CDPA 1988).
29. Section 206(4) contains an existing power for Her Majesty by Order in Council to restrict the protection extended to any qualifying country other than the UK, a Crown Dependency, or Gibraltar. In effect, this means that secondary legislation may be made under section 206(4) to restrict the protection extended to any performance other than a performance that takes place in the UK, a Crown

Dependency, or Gibraltar; or which is given by a national or resident of any of those places. This is an important power that can be used to restrict the protection for foreign performances in line with the UK's international obligations. For example, where the UK is not required under its international commitments to extend a certain right to performances from a certain country, the power in section 206(4) can be used to provide that a foreign performance qualifies for a right only if the other country provides equivalent protection to UK performances.

30. Clause 5(1) of the Bill will substitute section 181 of the CDPA 1988 to expand the definition of 'qualifying performances'. This is necessary for the UK to comply with its obligations when it accedes to the CPTPP. It will mean that a performance may qualify for protection not only by virtue of the nationality of the performer or the place in which a performance took place (Conditions A and B of section 181 as amended by clause 5(1)) but also:

- (a) the nationality of the producer of a sound recording of the performance and the place in which a sound recording of the performance was first published (Condition C), and
- (b) the place from which a performance that is not contained in a sound recording is broadcast or the nationality of that broadcaster (Condition D).

This will mean an expansion in the pool of foreign performers that will qualify for rights in UK law.

31. However, without consequential amendments to section 206, the changes to section 181 will inadvertently narrow the effective scope of the power in section 206(4). In particular, without amendment to that power, this will mean that the power can only be used to restrict the protection extended to any performance other than those that:

- (a) take place in the UK, a Crown Dependency or Gibraltar; are given by a national or resident of any of those places;
- (b) are contained in a sound recording the producer of which is a national or resident of any of those places;
- (c) are first published in any of those places; or
- (d) are carried on a broadcast made from, or by a national or resident of, those places.

In other words, the class of performances to which protection can be restricted under section 206(4) will be significantly narrowed as a result of the changes to section 181 in clause 5(1).

32. This narrowing of the scope of the power is inadvertent, is not necessary for compliance with the CPTPP when the UK accedes, and is not desirable, since it substantially reduces the ability to make changes that may currently be made via secondary legislation.

33. Clause 5(3) will therefore amend section 206(4) by inserting new paragraphs in 206, being section 206(4)(za) and (4A) to ensure that the power can continue to be used to restrict the protection extended to any performance except a performance that takes place in the UK, a Crown Dependency, or Gibraltar; or which is given by a national or resident of any of those places. Section 206(4) can then continue to be exercised to the same practical extent as under the status quo.

Justification for delegation

34. As with the existing section 206(4) CDPA 1988, clause 5(3) will enable the application of Part II of the CDPA 1988 to qualifying performances to be subject to specified restrictions. The Department remains of the view that these kinds of provisions are most appropriately made in secondary legislation.

35. The original power has been approved by Parliament during the passage of the CDPA 1988. The amendment itself does not change the underlying purpose and scope of the original power. Instead, it is intended to ensure that the original power continues to function in light of other changes to copyright protections in this Bill which could not have been foreseen at the time the CDPA 1988 was making its way through Parliament.

36. Restrictions to the application of Part II of the CDPA under section 206(4) are mainly imposed to 'mirror' the approach taken by other countries to UK performances. This picture can be complex and can change rapidly. It depends on factors including which countries are signatories to which treaties, and whether relevant notifications have been deposited or withdrawn under those treaties, and therefore requires provisions containing the restrictions to be updated regularly. It is important to be able to make bespoke provision for individual countries, and to ensure the timely imposition and/or modification of restrictions according to changes in the international obligations or approaches of individual countries, if and when such changes arise. The restrictions themselves are also of a technical nature.

Justification for the continuation of use of the negative procedure for the amended power

37. Statutory instruments made under the existing power in section 206(4) of the CDPA 1988 are already subject to the negative procedure: per section 206(5). The Department remains of the view that, as with the existing section 206(4) power, the negative procedure affords the appropriate level of scrutiny in the case of an Order in Council under clause 5(3).

38. The new insert to the power cannot be used to amend primary legislation and so is not in the form of a 'Henry VIII' power. Consequently, the Department does not

consider the new insert to the power requires the heightened control of the affirmative procedure.

39. Parliament more generally has the right to scrutinise treaties under section 20 of the Constitutional Reform and Governance Act 2010.
40. Clause 5(3) is narrow in purpose and scope. It is intended to allow the status quo regarding performances from non-CPTPP countries to be preserved. Clause 5(3) will only be applied to performers who meet the 'new' eligibility criteria in Conditions C and D of section 181 as substituted by clause 5(1) by virtue of a connection to the UK, a Crown Dependency or Gibraltar. It will not affect performers who currently qualify for rights under the CDPA 1988 by virtue of being a national or resident of, or giving their performance in, the UK, a Crown Dependency or Gibraltar. Clause 5 will allow provision to be made that reflects the UK's international obligations including under the CPTPP. The existing power was most recently used in 2016 and this did not attract significant parliamentary attention. In the Department's view, the amendment in clause 5(3), like the existing power in section 206(4) of the CDPA 1988 itself, is largely technical and does not engage policy issues that require the affirmative procedure.