

UK INFRASTRUCTURE BANK BILL

Memorandum from the Treasury 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 its scrutiny of the UK Infrastructure Bank Bill (“the Bill”). The Bill was introduced in the House of Lords on 11 May. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

2. The purpose of this Bill is to place the UK Infrastructure Bank (“the Bank”) on a statutory footing. The Bank is an operationally independent institution that will help tackle climate change and support local and regional economic growth, through investment in infrastructure.
3. The Bank was launched in June 2021, relying on provisions set out in its Framework Document, as well as the Companies Act 2006, the Infrastructure (Financial Assistance) Act 2012, other relevant legislation and common law powers. However, the Bill is important to securing the Bank’s future as a long-lasting institution with a clear policy mandate, as it will put key provisions on governance, as well as the Bank’s objectives, activities and the definition of “infrastructure” for the Bank’s purposes into law. It will also remove legal obstacles to enabling the Bank to lend directly to local authorities and will contain provisions to allow the Treasury to provide funding to the Bank, including through the National Loans Fund.

C. DELEGATED POWERS

Overview

4. Clause 2 sets out the Bank’s objectives and activities, as well as the definition of “infrastructure” for the purpose of the Bill. This Clause contains the Bill’s two delegated legislative powers exercisable by statutory instrument, both of which are subject to the affirmative procedure:
 - a. a power to amend the Bank’s activities; and
 - b. a power to amend the definition of “infrastructure” in the Bill.
5. Further, the Bill will require the Treasury to prepare and lay before Parliament a statement of strategic priorities for the Bank (Clause 3); and enable the Treasury to give specific or general directions to the Bank, with which it must comply, and which must be published (Clause 4). These measures will provide some scope for Treasury ministers to steer and direct the Bank’s operations and arguably have some degree of legislative character in view of their general nature and potential legal effects in relation to the Bank’s activities.

Clause 2 – Power to amend the Bank’s activities and the meaning of “infrastructure”

Power conferred on: the Treasury (meaning the Lords Commissioners of the Treasury by virtue of the Interpretation Act 1978)

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

Context and Purpose

6. The Bill sets out the Bank’s objectives and activities. The latter are defined by reference to “infrastructure”.
7. The Bank’s objectives are contained in Clause 2(3), and these are to:
 - a. help tackle climate change, including by supporting efforts to meet the target for 2050 set out in section 1 of the Climate Change Act 2008; and
 - b. support regional and local economic growth.
8. Clause 2(4) sets out the Bank’s activities, which are to:
 - a. provide financial assistance to projects wholly or mainly relating to “infrastructure”;
 - b. provide loans to relevant public authorities (including local authorities) for such projects;
 - c. to act as a centre of expertise by providing advisory and other services in relation to such projects; and
 - d. any other activities that are incidental or conducive to, or otherwise connected with, anything in paragraphs (a) to (c).
9. Clause 2(5) provides a definition of “infrastructure”, which is directly relevant to the scope of each of the activities of the Bank as set out in Clause 2(4).
10. Clauses 2(6) and (7) contain the relevant delegated powers: the intention is that the Treasury will be able, by secondary legislation subject to the affirmative procedure, to amend section 2 so as to change the Bank’s activities or the definition of “infrastructure”. As these two powers are closely inter-related, they will be considered together for the purposes of this memorandum.
11. The Bank is in a broad sense similar to bodies that have engaged in infrastructure investment on behalf of this and previous governments, namely Infrastructure UK (“IUK”) and the Infrastructure Projects Authority (“IPA”). These bodies operated the UK Guarantee Scheme on the Government’s behalf, relying on common law powers and the Parliamentary authorisation for expenditure afforded by the Infrastructure (Financial Assistance) Act 2012.
12. The design of the Bank, however, specifically reflects the policy priorities of the current Government (including manifesto commitments) in terms of its ‘Levelling Up’ agenda and its commitment to tackle climate change. The objectives and activities of the Bank, as well as the definition of “infrastructure” as outlined above, have been crafted with these priorities in mind.
13. The activities of the Bank are in some respects broader (e.g. the Clause 2(4)(c) “centre of expertise” function and the specific reference to climate change in

Clause 2(5)(c)) than was the case with the legislation authorising the activities of IUK and the IPA; but they are also potentially narrower in other respects (e.g. the references to some specific kinds of infrastructure in section 1(2) of the 2012 Act are not repeated).

14. The current Government's policy is for the Bank to invest mainly in economic infrastructure sectors such as clean energy, transport, digital, water, and waste. A future government may wish to adjust this emphasis by amending the definition of "infrastructure" using the delegated powers set out in the remainder of Clause 2.
15. Subsections (6) and (7) of the Clause give the Treasury the power to amend the Bank's activities or the definition of "infrastructure" by statutory instrument following the affirmative Parliamentary procedure.
16. The purpose of these powers is to ensure that whilst the Bank's overall objectives will be alterable by primary legislation only, its specific activities will be able to be modified by delegated legislation, with affirmative parliamentary consent.

Justification for taking the power

17. These powers will allow for the possibility that a future government may wish to change the emphasis of the Bank's activities for policy reasons and may desire to alter the definitions to support this change.
18. They will also allow for the fact that the Bank's approach may need to evolve in the future to reflect changes in the market for infrastructure.
19. Examples of these changes would include the emergence of new kinds of green or other technologies, or new kinds of "infrastructure" that did not exist or were not considered as such when the Bill became law; and the categorisation of which within the current scope of the definition is debateable.
20. The powers are both 'Henry VIII' powers enabling the Treasury to make textual amendments to the Act that will result from the Bill.
21. It is considered appropriate for the powers to take this form, as their whole purpose is to enable change to be made to the relevant aspects of the primary legislation for future policy reasons; and it is desirable that any future changes to Clauses 2(4) or (5) made this way are made by direct textual amendment in the interests of clarity.

Justification for the procedure

22. The draft affirmative procedure has been proposed for these powers given the nature of the issues as described above, and with regard to their status as 'Henry VIII' powers. In light of these factors it is appropriate that Parliament have the opportunity to consider the Government's case for change and be given the opportunity to vote on it in advance of any change taking effect.

Clauses 3 and 4 – Duty to prepare strategic statement and power to give directions to the Bank

Power conferred on: the Treasury (meaning the Lords Commissioners of the Treasury by virtue of the Interpretation Act 1978)

Power exercised by: preparing and laying a statement before Parliament; publishing a direction

Parliamentary Procedure: none

Context and Purpose

23. The Government's policy is that the Bank will be operationally independent.
24. However, given overall ministerial accountability to Parliament for the Bank and for any element of risk to the Exchequer that its activities create, it is also considered necessary and appropriate that the Government have some degree of influence over the strategic direction of the Bank; and that it has a 'reserve' power to direct the Bank about how it is to deliver its objectives.
25. Clause 3 requires the Treasury to prepare and lay before Parliament (at the latest six months after the Bill takes effect) a statement of strategic priorities for the Bank. Such a statement may be revised or replaced by the Treasury. The policy intention is that the statement will provide the Bank with a steer on where in the Government's view the Bank should prioritise and focus its activities. The first, non-statutory, steer of this type was published on 18th March 2022 in the form of a letter from the Chancellor of the Exchequer to the Chief Executive Officer of the Bank and is available online at <https://www.gov.uk/government/publications/chancellors-letter-to-the-uk-infrastructure-bank>.
26. Clause 3 also requires the Bank to secure that its articles of association provide for it to publish and act in accordance with strategic plans, which must reflect the Treasury's strategic statement; and for the Bank to update those plans whenever the Treasury's strategic statement is revised or replaced. As the Chancellor of the Exchequer's recent letter sets out, the Government's intention is for the strategic statement of 18th March 2022 to help the Bank to interpret its policy mandate as it develops the Bank's first strategic plan, due to be published in June 2022.
27. Clause 4 of the Bill gives the Treasury the power to give directions to the Bank of a specific or general nature about how it is to deliver its objectives.
28. The Bank is required by subsection (2) to comply with such a direction.
29. The Treasury is not able to give a direction until it has consulted the Bank's board of directors.
30. Any direction given must be published by the Treasury.
31. Both of these powers arguably have some degree of legislative character in that they will operate so as to require the Bank to amend its articles of association in the case of a strategic statement; or to act or refrain from acting in a particular way in the case of a direction: and thus could indirectly modify the effect of companies legislation in its application to the Bank.
32. Similar powers have been taken elsewhere in legislation. For example, the Treasury has a power to direct the Bank of England (except for with regard to monetary policy) following consultation with the Governor (provided by the Bank of England Act 1946). This has never been used. Equally, the Chancellor has a

statutory power to issue notices of remit and recommendations to the Bank of England's Monetary Policy Committee and Financial Policy Committee, which is comparable to the power created in this Bill for the Treasury to issue the Bank with strategic statements.

Justification for taking the power

33. As noted above ministers will remain accountable to Parliament for the Bank and for any element of risk to the Exchequer that its activities create.

34. This will be the case despite the fact that the Bank will remain independent as regards its day-to-day operations and investment decisions

35. It is therefore considered necessary and appropriate that the Government have some degree of influence over the strategic direction of the Bank; and that it has a 'reserve' power to direct the Bank about how it is to deliver its objectives.

36. The strategic statement duty in Clause 3 will enable an appropriate allocation of responsibility and accountability as between the Treasury and the Bank as regards strategic and operational matters. The Bank will be required to translate the Treasury's strategic statements into strategic plans, with which it will need to comply in practice by virtue of its articles of association. Within this framework the Bank will be able to make operational and investment decisions at its own discretion.

37. The power to give a direction in Clause 4 will also create clear lines of responsibility and accountability as between the Treasury and the Bank. If the Treasury does not give a direction, then the allocation of responsibility referred to in the previous paragraph will prevail. If the Treasury does decide to give a direction in relation to any matter, then that allocation may be changed depending on the content of the direction. The more specific the direction, the more the Treasury rather than the Bank will be accountable for its consequences.

38. The Government considers these provisions to provide for the appropriate balance of accountability to Parliament for the Bank's activities.

Justification for the procedure

39. Neither of the above powers is exercisable by statutory instrument.

40. This is considered appropriate given their nature.

41. Strategic statements and directions of greater or lesser degrees of precision and specificity may be required in practice, including statements or directions that may not be wholly expressible in the form of exact statutory language.

42. As the powers are intended to clarify the nature and relative scope of accountability to Parliament by other means (such as through the Treasury Select Committee, Public Accounts Committee or the Economic Affairs Committee) as between the Bank and the Treasury, it is not considered necessary for Parliament to have prior scrutiny or decision-making capacity in relation to the statements or directions themselves. A statement or direction will provide the appropriate

framework and focus for later Parliamentary scrutiny of the Treasury's and/or the Bank's decisions or actions that follow from it.

43. Given the nature and generality of a strategic statement it is considered appropriate that a copy of it be laid before Parliament, including any revisions or replacement statements. This will enable Parliament to be appraised of the Government's intentions for the general strategic direction of the Bank, and any updates to it.

44. As directions are intended to be a power of a 'reserve' nature there may be a wide variety of circumstances in which the power could conceivably be used and which are not predictable in advance with any degree of confidence. In view of this the Government considers that the appropriate procedure is to require prior consultation with the Bank's board before a direction can be issued, and for any direction to be published. These steps will ensure that the Bank's board will be in a position to make any representations it thinks appropriate to the Treasury before a direction can be given; and that the relative degree of accountability as between the Bank and the Treasury for any subsequent decisions or actions can be established by Parliament and members of the public. Further, the requirement to consult before issuing a direction is consistent with the process required for the Treasury to issue a direction to the Bank of England, so we have followed this precedent, whilst requiring publication of any direction to provide increased transparency.

Department Name HM Treasury

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