

SEAFARERS' WAGES BILL

Supplementary Memorandum from the Department for Transport to the Delegated Powers and Regulatory Reform Committee

Introduction

1. This Supplementary Memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Department for Transport (“the Department”). The Government made 64 amendments to the Seafarers Wages Bill in the House of Commons. These amendments include six new delegated powers and five amendments to existing powers in the Bill. One power has been removed from the Bill. This supplementary memorandum explains why these new and modified powers have been taken and the justification for the procedure selected. The amendment numbers are those that appear in the consolidated list of Commons Amendments (HL Bill 103) and references to clause numbers are to those in the Bill as introduced in the Commons (Bill 184 2022-23).

Description and analysis of delegated powers

A. New powers

Amendment 1 –power to specify matters that must, or must not, be taken into account in determining what is a “service” for the purpose of the Bill

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary scrutiny procedure: Affirmative resolution

Context and purpose

2. Clause 1 sets out the scope of the Bill, that is, the Bill applies to services for the carriage of persons or goods by ship, with or without vehicles, between a place outside the United Kingdom and a place in the United Kingdom. Amendment 1 inserts a new subsection (2A) into clause 1 which provides a power (subject to the affirmative procedure) for the Secretary of State to make regulations which specify matters that must, or must not be taken into account in determining whether provision for the carriage of persons or goods between two places by ship on two or more journeys constitutes a single service.
3. The concept of “service” is not defined on the face of the Bill. However, by adding a power to specify in regulations factors that must, or must not, be taken into account in determining what is a “service” for the purpose of the Bill, the Secretary of State will be able to intervene, if necessary, to guide how the concept of service is interpreted over time, for example to ensure consistent application of the Bill’s provisions.

Justification for taking the power

4. It will be a question of fact whether ships on the same route are providing the same “service”, taking into account all of the circumstances of the particular case. Harbour authorities will need to make a decision as to whether ships are providing the same service, as part of their consideration of whether they have reasonable grounds to believe that ships providing a service to which the Bill applies will enter, or have entered, its harbour on at least 120 occasions during a relevant year, under clause 3(1) (as amended by Amendment 2). There is therefore a possibility that different harbour authorities will take into account different factors, leading to an inconsistent application of the Bill’s provisions. While in practice this is considered unlikely, this power will provide a safeguard against such inconsistent application. This power is only intended to be used if it becomes necessary, once it becomes clear how the concept of “service” is being interpreted in practice and over time.
5. For these reasons, the Department considers that it is appropriate for the Bill to include this regulation-making power.

Justification for the procedure

6. It is intended that the power will only be used if it becomes necessary to clarify the meaning of “service”. However, the Department recognises that this is a broad power with potential to amend the interpretation of “service”, which is a central concept in the Bill. On one reading, this power could be used to adjust the scope of the Bill (for example by specifying factors that lead to a narrow reading of “service”, limiting the number of services in scope). While this is not the Department’s intention, it is accepted that a higher level of scrutiny is appropriate for this power, and as such it will be subject to the affirmative resolution procedure.

Amendment 2 – power to make provision for the period within which harbour authorities must request national minimum wage equivalence declarations

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary scrutiny procedure: Negative resolution

Context and purpose

7. Amendment 2 amends clause 3 to convert the existing power for harbour authorities to request national minimum wage equivalence declarations (“equivalence declarations”) into a duty to do so. Where a harbour authority has reasonable grounds to believe that ships providing a service to which the Bill applies will enter, or have entered, its harbour on at least 120 occasions during a relevant year, the harbour authority must request an equivalence declaration within such period as is determined by regulations.
8. The power to make regulations that determine the period within which a harbour authority must request an equivalence declaration is consequential on changing the power to a duty, as this will ensure the duty is clear and enforceable. Failure

to comply with the duty within the period specified in regulations will be a criminal offence (new subsection (3A)).

Justification for taking the power

9. The substantive duty for harbour authorities to request equivalence declarations is on the face of the Bill. This power will be limited in scope to providing for the procedural detail outlined above and so it is the Department's view that it is appropriate for this to be left to secondary legislation. Furthermore, the regulation-making power will provide flexibility to make changes to the timings if it becomes clear that this is necessary once the Bill has come into force and the policy has been operational for a time.

Justification for the procedure

10. Regulations under this power will simply set out the procedural requirements as respects the period within which harbour authorities must comply with their substantive duty to request equivalence declarations under the Bill. This is unlikely to be controversial or of particular interest to Parliament and therefore the negative procedure is considered appropriate.

Amendment 3 – power to make provision as to the period within which equivalence declarations are to be provided by operators

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary scrutiny procedure: Negative resolution

Context and purpose

11. Amendment 3 adds a new paragraph (za) to clause 3(4) of the Bill, which provides a power for regulations to make provision as to the period within which equivalence declarations are to be provided by operators.
12. This amendment is consequential on Amendment 24, which provides that harbour authorities must impose surcharges where they request an equivalence declaration from an operator in scope of the Bill and the operator does not provide the declaration in the prescribed form and manner before the end of the prescribed period (this was previously a power and not a duty). "Prescribed period" is defined as the period within which the operator is required to provide the declaration in accordance with regulations under clause 3(4)(za), and "prescribed form and manner" means the form and manner in which the operator is required to provide the declaration in accordance with regulations under clause 3(4)(a) and (b).
13. This amendment therefore allows the Secretary of State to set the period within which an operator is to provide an equivalence declaration following a request from a harbour authority; the expiry of this period triggers the duty for harbour authorities to impose surcharges.

Justification for taking the power

14. The substantive requirement that harbour authorities must impose surcharges where an operator fails to provide an equivalence declaration is included on the face of the Bill. This power is limited in scope to providing the procedural detail of the timing for operators to provide equivalence declarations. Furthermore the regulation-making power will provide flexibility to make changes to the period within which declarations are to be provided if it becomes clear that this is necessary once the Bill has come into force and the policy has been operational for a time. For these reasons, it is the Department's view that it is appropriate for this to be left to secondary legislation.

Justification for the procedure

15. This power to make regulations is subject to the negative procedure. The timing for provision of equivalence declarations is a procedural matter which is unlikely to be controversial or of particular interest to Parliament, and therefore it is the Department's position that this procedure is appropriate.

Amendment 6 – power to specify a “relevant year” in respect of equivalence declarations

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary scrutiny procedure: Negative resolution

Context and purpose

16. Amendment 6 inserts a new subsection (4A) into clause 3, which provides that a “relevant year” means:

- a. the period of 12 months beginning with a date specified in regulations, and
- b. each successive period of 12 months.

17. Under the previous wording of the Bill, harbour authorities had the power to determine the year in respect of which an equivalence declaration is requested, provided ships providing the service called at the harbour on at least 120 occasions in the year. The year could then be any period of 12 months, starting on the date the declaration is requested (clause 3(2)(a)), or a date specified in the request, where the date is earlier than the day on which it is requested by no more than a year (clause 3(2)(b)).

18. By converting the power to request equivalence declarations into a duty, it is necessary to make provision for declarations to relate to a fixed year, to ensure that harbour authorities and operators are all working to the same period, and that the duties on harbour authorities are clear and enforceable. As such, Amendment 2 provides that where a harbour authority has reasonable grounds to believe that ships providing a service to which the Bill applies will enter, or have entered, its harbour on at least 120 occasions during a relevant year, the harbour

authority must request that the operator of the service provide the authority with an equivalence declaration in respect of the service for the relevant year.

Justification for taking the power

19. The substantive requirement that harbour authorities must request declarations with respect to a relevant year if the conditions in the Bill apply is on the face of the Bill. Regulations under this power will be limited in scope to setting the procedural detail of the date on which a “relevant year” begins. Furthermore the regulation-making power will provide flexibility to change the date if it becomes clear that this is necessary once the Bill has come into force and the policy has been operational for a time. For these reasons the Department considers that it is appropriate for this to be left to secondary legislation.

Justification for the procedure

20. This power to make regulations is subject to the negative procedure. This is considered appropriate as the procedural detail of the date on which the “relevant year” begins is unlikely to be controversial or of particular interest to Parliament.

Amendment 35 – power to make regulations that require a harbour authority to notify the Secretary of State if it has imposed surcharges and a specified period has expired without the surcharge having been paid

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary scrutiny procedure: Negative resolution

Context and purpose

21. Amendment 35 inserts a new subsection (7A) into clause 7, to provide a new power to make regulations to require harbour authorities to notify the Secretary of State about surcharges that remain unpaid after a specified period following their imposition.

22. This amendment is intended to ensure that the Secretary of State is notified if the period within which a surcharge must be paid is close to expiring and there is a risk that the harbour authority will be required to refuse access to the harbour if the surcharge remains unpaid. It is necessary for the Secretary of State to be aware of circumstances where harbour access is likely to be refused, in order to (a) monitor the operation of the Bill, (b) take steps to mitigate disruption caused by the refusal of access if necessary, and (c) consider whether a direction should be issued to the harbour authority under clause 11(2) (as amended by Amendments 52 and 53).

Justification for taking the power

23. Regulations under this power will establish a procedural requirement for harbour authorities to notify the Secretary of State if they have imposed a surcharge and it remains unpaid after a specified period. This will ensure that the Secretary of

State is aware of circumstances where there is a risk that a harbour authority will be required to refuse access to its harbour but does not impact on the substantive duties for harbour authorities (to impose surcharges and refuse access to the harbour if circumstances so require). Setting this procedural requirement in regulations will also provide flexibility to change the period that must have passed for the duty to notify the Secretary of State to apply if it later becomes clear that this is necessary once the Bill has come into force and the policy has been operational for a time. For these reasons, it is the Department's view that it is appropriate for this to be left to secondary legislation.

Justification for the procedure

24. This power to make regulations is subject to the negative procedure. This is considered appropriate as the procedural requirement established by the regulations is unlikely to be controversial or of particular interest to Parliament.

Amendment 39 – power to make provision for a period within which objections to surcharges must be made

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary scrutiny procedure: Negative resolution

Context and purpose

25. Clause 8 provides that an interested party may object to a surcharge in writing to the Secretary of State. Previously, it did not include a time-limit for objections, meaning that it would be theoretically possible for a person who had paid a surcharge to object long after it was paid. This may have led to uncertainty for harbour authorities and port users, and create complexity for the Secretary of State when considering historic objections.

26. As such, Amendment 39 requires the Secretary of State to specify a time limit for objections to surcharges in regulations. This means that harbour authorities will have greater certainty about when a surcharge may be challenged and will prevent objections being raised years after a surcharge has been imposed.

Justification for taking the power

27. In common with a number of the new powers, this is limited to providing the procedural detail of a time limit, in this case the period after which the Secretary of State will not be required to consider any objection made under clause 8. By including the time-limit in regulations, rather than on the face of the Bill, this will allow the Department to consult on and give careful consideration to what would be an appropriate period. It will also provide flexibility to amend this period if it later becomes necessary once the Bill is in force.

Justification for the procedure

28. As with the other powers to set a time period in regulations, it is considered appropriate for the negative procedure to apply. The time period for bringing an objection is a procedural matter which is unlikely to be controversial or of particular interest to Parliament.

B. Modified powers

Amendment 29 – power to specify the tariff of surcharges in regulations (as opposed to being specified by harbour authorities in accordance with regulations)

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary scrutiny procedure: Negative resolution

Context and purpose

29. As a result of Amendments 24 to 26, harbour authorities will be required to impose surcharges in specified circumstances, namely when an equivalence declaration is not provided in time, when a declaration relates only to part of a year, or when a service is operated inconsistently with a declaration.

30. In the original draft of the Bill, the amount of a surcharge was to be determined by a tariff of surcharges specified by the harbour authority in accordance with regulations under clause 7(5), i.e. regulations would set out the framework within which harbour authorities would have discretion to set their own tariff. Amendment 29 removes that discretion, and provides that the tariff of surcharges will now be specified by the Secretary of State in regulations.

Justification for taking the power

31. The intention is that there will not be a single surcharge rate, but instead a tariff whereby the rate payable depends on a number of factors, for example the size of ships providing the service and the number of seafarers working onboard. As such, whilst the circumstances in which harbour authorities are required to impose surcharges are detailed on the face of the Bill, the tariff of surcharges will include a level of technical detail that is considered more appropriate in regulations. Furthermore, as was noted in paragraph 32 of the original Delegated Powers Memorandum (DPM), the tariff is likely to be subject to change and regular update and secondary legislation provides the flexibility necessary to accommodate this. Finally, having the power in secondary legislation enables the Department to consult on this matter of technical detail, including when the tariff is changed in the future. For these reasons, it is the Department's view that it is appropriate for the tariff to be specified in regulations.

Justification for the procedure

32. As noted in paragraph 35 of the DPM, in general harbour charges are not fixed by legislation. As previously drafted there would have been Parliamentary scrutiny of the framework within which harbour authorities had to operate when

setting their tariffs of surcharges, but not the tariffs themselves. This amendment will allow greater Parliamentary scrutiny of the rates of surcharges because these will be included on the face of the regulations. As such, it is considered that the negative procedure is appropriate here.

Amendments 33 and 34 – power to make regulations as to the procedural requirements for surcharges

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary scrutiny procedure: Negative resolution

Context and purpose

33. Under the original drafting of the Bill, clause 7 provided for a two-stage process whereby a harbour authority would first make a determination to impose surcharges, before doing so. Amendment 27 removes the determination stage of the process, and harbour authorities are now required to simply impose surcharges in the circumstances specified in the new clauses inserted by Amendments 24 to 26.

34. As a result, Amendment 33 removes the power for regulations to make provision as to publication of a determination to impose surcharges, and Amendment 34 clarifies that regulations may make provision as to notification of *the imposition of* a surcharge to the Secretary of State (as opposed to notification of a surcharge generally). These amendments therefore remove a power that has been rendered otiose, and clarify that it is the imposition of a surcharge that will be notified to the Secretary of State. They do not substantively alter the scope of the power.

Justification for taking the power

35. Please see paragraph 33 of the DPM, the justification in which applies equally to this modified power.

Justification for the procedure

36. Please see paragraph 37 of the DPM.

Amendments 41 and 42 – power for the Secretary of State to make decisions as respects objections to surcharges

Power conferred on: Secretary of State

Power exercisable by: Decision/direction

Parliamentary scrutiny procedure: None

Context and purpose

37. Clause 8 provides that interested parties may make an objection to a surcharge in writing to the Secretary of State, and specifies the procedure for such

objections. In the original drafting of the Bill, subsection (7) provided that the Secretary of State's consideration of an objection may include consideration of whether any direction in relation to the surcharge should be varied or withdrawn. Subsection (8) set out the decisions the Secretary of State may make having considered an objection.

38. Amendment 41 removes subsection (7), and Amendment 42 limits the decisions open to the Secretary of State under subsection (8). These amendments are consequential on a number of other amendments, namely:

- a. Amendment 27, which removes the determination stage of the surcharge process;
- b. Amendment 29, which switches the duty for specifying the tariff of surcharges from harbour authorities to the Secretary of State; and
- c. Amendments 52 and 53, which limit the direction-making power (see paragraphs 42 to 49 below).

39. As a result of these amendments, subsection (7) has been rendered otiose and limited the decisions available to the Secretary of State on consideration of an objection.

Justification for taking the power

40. These amendments have simply narrowed the Secretary of State's decision-making power in clause 8, therefore the justification in paragraphs 42 to 45 of the DPM continues to apply.

Justification for the procedure

41. Please see paragraph 46 of the DPM.

Amendments 52 to 54 – amendment of the power for the Secretary of State to give directions to harbour authorities

Power conferred on: Secretary of State

Power exercisable by: Direction

Parliamentary scrutiny procedure: None

Context and purpose

42. Amendments 2, 24 to 26 and 43 impose duties on harbour authorities to request equivalence declarations, impose surcharges and refuse access to harbours in specified circumstances (previously the Bill conferred powers to do so).

Consequential on these harbour authority powers becoming duties, Amendments 52 and 53 amend clause 11(2) to redefine the circumstances in which directions may be given to harbour authorities by the Secretary of State. In particular there is no longer a need to be able to direct harbour authorities to exercise their functions under the Bill, as they will already be required to do so. There will still be a power to direct them not to do anything they would otherwise be under a duty to do by reason of the Bill, or to comply with their duties in a particular way.

43. Amendment 54 removes subsection (3) from the Bill and is consequential on Amendments 52 and 53.

44. In addition, Amendments 2, 32 and 48 clarify that harbour authorities' duties to request declarations, impose surcharges and refuse harbour access are subject to a direction by the Secretary of State not to do anything they would otherwise be under a duty to do by reason of the Bill.

Justification for taking the power

45. The original justification for the direction-making power is set out in paragraphs 62 to 66 of the DPM. As a result of imposing duties on harbour authorities it is no longer necessary to have a power to direct harbour authorities to exercise their functions under the Bill and this has been removed. Following the Committee's criticism of the breadth of the power in its 10th Report of Session 2022-23, the then Minister of State wrote to the Committee on 25 October 2022 to further clarify the limited circumstances in which directions were intended to be used. This response was published by the Committee in its 16th Report of Session 2022-23. The response made clear that the power was not intended to have general effect to allow the Secretary of State to simultaneously direct all harbour authorities as to the use of their powers, nor was it intended to modify the character of the Bill itself by means of direction.

46. The Minister's letter of 25 October 2022 noted that the policy intention is that the direction-making power would only be used in five circumstances. Of these, the only one which remains relevant is (v), namely to direct a harbour authority not to refuse access to a harbour, or to set conditions on the refusal of access (for example with respect to timings), where the Secretary of State considers that the refusal of access would cause damage by disrupting key passenger services and supply chains critical for national resilience.

47. Whilst this remains the policy intention, it is considered necessary to retain the direction-making power in respect of all of the duties of harbour authorities and to provide that their duty to request declarations and impose surcharges remains subject to the Secretary of State's direction-making power.

48. It remains the Department's position that the power is necessary for the effective functioning of the Bill and that it will only be used in exceptional circumstances and not as a matter of course.

Justification for the procedure

49. See paragraphs 67 to 69 of the DPM. As set out above, the direction-making power has been narrowed, and it is expected that this will only be used in exceptional circumstances.

Amendments 60 and 61 – change of direction-making power to regulation-making power

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary scrutiny procedure: Negative resolution

Context and purpose

50. Amendments 60 and 61 change the power to make a direction to specify which harbour authority is to be treated as the harbour authority in respect of a particular harbour into a power to make regulations. This is consequential on the amendments to convert harbour authority powers into duties, as now that harbour authorities are required to request declarations, impose surcharges and refuse access to harbours in specified circumstances, it is important that they have clarity on which is the relevant harbour authority for a particular harbour.

Justification for taking the power

51. See paragraphs 77 and 78 of the DPM. A power to make regulations will provide flexibility to update the list of harbour authorities in the future, for example where responsibility for a particular harbour changes, and provide greater legal certainty for harbour authorities so that they know whether they are in scope of the obligations in the Bill.

Justification for the procedure

52. In changing this from a power to make directions to a power to make regulations, the power will be subject to a greater level of Parliamentary oversight than had been originally intended. As noted in paragraph 79 of the DPM, this power deals with operational and administrative matters, and will only affect the harbour authorities for a particular harbour. As such the Department considers that the negative procedure is appropriate and that it would be disproportionate for the power to be subject to a higher level of Parliamentary scrutiny.

C. Power removed from the Bill

Amendment 51 – power to give guidance to harbour authorities

Power conferred on: n/a

Power exercisable by: n/a

Parliamentary scrutiny procedure: None

Context and purpose

53. Amendment 51 removes the power in clause 11(1) for the Secretary of State to give guidance to harbour authorities as to how to exercise their powers under the Bill. This is consequential on converting the harbour authority powers in the Bill into duties. The Department still intends to provide guidance to harbour authorities, but it will have no statutory basis.

Justification for taking the power

54. N/A

Justification for the procedure

55.N/A