

Product Regulation and Metrology Bill

Memorandum concerning the Delegated Powers in the Bill for 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 Product Regulation and Metrology Bill (“the Bill”) by the Department of Business and Trade (“DBT”). The Bill is due to be introduced on week commencing 2 September 2024. 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.
2. As background, a huge number of manufactured products are sold or supplied to consumers and other end users in the United Kingdom, which is underpinned by an extensive body of law. Regulation of these products is (largely) fully harmonised at the EU level and therefore the vast majority of our product regulation reflects the EU regulation at the end of the Implementation Period, and – prior to EU Exit – relied on powers in the European Communities Act 1972 to implement and update. We currently do not have sufficient powers to update this body of law, for example to deal with new risks, products and technologies. To ensure that our product regulation can respond to new challenges and risks, we need appropriate powers to make timely changes to this body of technical regulation.
3. Throughout the drafting process, the Bill has been reviewed in depth to ensure that the use of delegated powers is appropriate and supported by a strong justification. For example:
 - (a) Definition of manufactured product: we have carefully considered the scope of the products we seek to cover and have provided that they must be tangible products or the component of a tangible product, and that they must result from an element of production. In so doing we are seeking to ensure that we do not seek powers that regulate raw materials or intangible goods, except insofar as these may be used in the production of a relevant product or insofar as they are a digital version or digital template of a tangible item (that end users can print themselves). We have also excluded all the items listed in the Bill Schedule from the scope of “products”, which significantly narrows the relevant powers.
 - (b) Objectives and purpose pursued: we have given considerable thought to how the powers can be narrowed to give effect to a closed list of objectives and purposes.

- One of the primary objectives of product regulation is to ensure the safety of products for end users and to ensure other risks that products pose are minimised or mitigated so that products perform effectively or efficiently.
- The product regulatory regime requires that products must meet all relevant product requirements before the product can be marketed or used. These requirements are essential, and cover safety, performance, accuracy, and environmental impacts and are subject to change, as technology develops.
- Legislation is also critical for ensuring we can adapt the legal metrology regime: ensuring the accuracy of weighing and measuring instruments, so that consumers and other end users are confident that when they buy a quantity of a product (for example, petrol from a petrol pump), they get what they pay for. It is also vital to make regulations about units of measurement, to be able to legally define standard units of measurement (for example, a “metre” or a “kilogram”) and to be able to specify quantities in which goods (including food and wine) can be sold.
- Strictly limiting the powers to only product safety and legal metrology would leave the United Kingdom unable to respond to technological developments and to changes in EU law. This could impact supply chain availability and the cost of products for consumers, as well as the safety or performance of products. It would also create regulatory uncertainty, impacting business investment and economic growth.
- However, taking a power to pursue the full range of objectives that the EU may wish to regulate could go further than we intend by granting powers to make regulation where we have no intention of so doing, or where there are already powers to amend or create regulations. We have therefore limited the powers to make product regulations to where the Secretary of State is pursuing an objective of reducing or mitigating risks presented by products, ensuring that products operate efficiently or effectively, or that weighing and measuring instruments are accurate. The power may additionally be used for the purpose of reducing or mitigating the environmental impact of products, but only where the regulations correspond, or are similar to, a provision of relevant EU law.
- This power also specifically allows the United Kingdom to recognise EU product law by treating United Kingdom requirements as met when specified EU requirements are met, where this is in the interests of United Kingdom businesses and consumers. This would create consistency and regulatory certainty for manufacturers. The Secretary of State may add conditions as to when United Kingdom requirements may be treated as satisfied by EU requirements. Before exercising the power in this way, the Secretary of State must have regard to the social, environmental and economic impact of doing so.

(c) Powers to amend primary legislation: we have tested the need for a broad power to amend primary legislation and determined that we can confine these powers to specific Acts dealing with product regulation and metrology. These are the Consumer Protection Act 1987, the Consumer Rights Act 2015, the Weights and Measures Act 1985 and 3 specific Gun Barrel Proofing Acts (of 1868, 1950 and 1978). The powers to amend primary legislation in the Bill are limited to a consequential power to amend or repeal. For the Consumer Protection Act 1987 the power is limited to repealing provision in Parts 2, 4 and 5 in consequence of any provision made by or under the Bill, for example where it is no longer necessary since it has been replaced by provisions made under the Bill (such as the power to make safety regulations under section 11 of the Consumer Protection Act 1987). The Gun Barrel Proofing Acts may be amended or repealed in consequence of any provision made by or under the Bill. The Consumer Rights Act 2015 may also be amended or repealed but this power is limited to making changes to section 77 and Schedule 5 of that Act (which deal with investigatory powers). For the Weights and Measures Act 1985, the power is limited to repealing provision made by that Act in consequence of any provision made by or under the Bill. The power also includes power to amend other primary legislation in consequence of any amendment or repeal made to the specified primary legislation in the Bill, for example where there are cross references to any repealed provisions under the Consumer Protection Act 1987, the Gun Barrel Acts or Schedule 5 to the Consumer Rights Act 2015. There is also a power to amend the definition of “online marketplace” within the Bill itself. This power is necessary because the models of online marketplaces are continually evolving, and we want to have clear regulation of products offered for sale online.

4. In addition to the provisions, we have made to narrow the scope of the powers, we have given considerable thought to the procedural provisions that should attach to exercise of the powers, to ensure an appropriate level of Parliamentary scrutiny. Many of the provisions made under the powers in the Bill will be very technical in nature, and in some cases the changes will be discrete and relatively minor. We are mindful of the need to ensure that the level of parliamentary scrutiny is appropriate and proportionate, bearing in mind the Parliamentary time required to debate changes which may be of a minor or technical nature. Where this is the case, we have proposed that the negative procedure should be used. However, there are a number of areas where we think the affirmative procedure should apply; that is where provision is made for:

- (a) a power to enter, inspect or search premises;
- (b) emergencies;
- (c) creating or widening the scope of a criminal offence;
- (d) information sharing;
- (e) costs recovery;
- (f) amending specific primary legislation, including the definition of “online marketplace” in the Bill.

5. We judge it essential to be able to respond quickly to an evolving evidence base on product safety and metrology issues, and in particular emerging and potentially urgent risks and threats – specifically that the Secretary of State will be able to respond more rapidly to changing circumstances through secondary legislation, than if required to amend primary legislation.
6. Our understanding of product safety and metrology risks will continue to evolve and improve over time. We need to ensure flexibility and future proofing across the new regulatory regime as this understanding develops and as the products available, and methods of manufacturing, selling and distributing continue to evolve, sometimes in unexpected or unpredictable ways.
7. This need for flexibility and fast paced responsiveness also applies to enforcement. In order to ensure the framework achieves its desired outcomes, it is essential that we have a targeted and proportionate enforcement and compliance regime in place. The powers in the Bill allow for this, ensuring that as new duties are identified, proportionate penalties can be applied, reflecting the nature of the potential harm. It is not possible to determine the level of these penalties until the harms themselves have been assessed – and these change over time. Likewise, proportionate data sharing powers are sought alongside powers to retain and strengthen current powers of entry, with appropriate safeguards.
8. It is common and usual for technical, administrative and procedural details of a regulatory regime to be set out in secondary legislation. A significant number of delegated powers in the Bill relate to technical, procedural and administrative detail of the regulatory regime, such as precise manufacturing details, processes for conformity assessment, and the roles and responsibilities of different economic operators.
9. Whilst the recognition of EU law under clause 2(7) of the Bill may appear significant, since leaving the EU, minor but important changes to legislation have been made using powers in the Retained EU Law (Revocation and Reform) Act 2023, including the decision to continue recognition of certain EU law, specifically CE marking, for 21 manufactured goods regulations. It would be consistent to continue this precedent to apply technical changes to product regulations via secondary legislation, alongside a suitable level of parliamentary scrutiny.
10. Alongside introduction of the Bill and during its passage, we will publish a number of factsheets that explain key areas of the Bill and set out our intentions for developing further secondary legislation.
11. We intend to publish case studies to demonstrate examples of emerging threats we may wish to regulate for in the future, alongside clear and agreed policy positions to demonstrate how we would use the powers.

12. It is also worth noting that, as additional technical barriers to trade, amendments to product regulations are generally subject to the WTO notification process, through which interested parties could make comments on proposed exercise of the powers.

B. SUMMARY OF THE BILL

13. The United Kingdom's product regulatory regime, and much of its metrology regime, is derived from EU legislation. The legal landscape is complex and technical, primarily set out in secondary legislation and based on assimilated law. There are around 150 pieces of assimilated secondary legislation covering the technical requirements for different products and detailing requirements relating to metrology.

14. Currently, there are insufficient powers to update the body of law to keep pace with technical developments (such as artificial intelligence) and to deal with new risks and hazards, especially in relation to online marketplaces. In addition, existing legislation only recognises EU law as it is now. An inability to recognise any new EU requirements risks introducing new trade barriers with our closest trading partner as well as potentially within the United Kingdom internal market.

15. The Bill gives new powers to the Secretary of State to create regulations for the marketing and supply of certain products in the United Kingdom to ensure the current product legislative framework is up to date and remains fit for purpose.

16. The vast majority of product regulation and metrology legislation implemented EU law or constituted directly applicable EU Regulations (now assimilated in United Kingdom law).

17. Most DBT legislation was made under section 2(2) of, and paragraph 1A of Schedule 2 to, the European Communities Act 1972 ("ECA"). Following EU Exit, this body of law was assimilated, with deficiencies corrected using powers under the EU Withdrawal Act 2018 ("EUWA"), which have since expired.

18. The Bill is made up of 14 clauses and will make changes to domestic legislation to meet key policy aims. These include ensuring we have the ability to respond to emerging threats and that the United Kingdom has the ability to manage upcoming regulatory divergence from EU requirements.

19. The Bill contains three delegated powers. These are to make provision for:

- (a) product regulations (framing power);
- (b) metrology regulations (framing power);
- (c) the definition of online marketplaces in the Bill.

20. The other clauses in the Bill all support these powers, relating to their scope as well as making clear that we can revoke or amend provisions of certain primary legislation in consequence of provisions made under the Bill.

21. The Bill:

- Creates new powers to allow the Secretary of State to make regulations in relation to certain products in the United Kingdom for the purpose of ensuring products meet the required safety levels.
- Limits the scope of the products we seek to regulate to tangible products or the component of a tangible product that results from an element of production.
- Includes a provision allowing for recognition of new or updated EU product requirements.
- Contains a power which enables requirements to be imposed on specific actors in the supply chain, including in relation to online markets.
- Confers powers to allow for the clarification and rationalisation of the existing enforcement regime, including the creation of criminal offences and new civil sanctions (including fines).
- Confers an emergency derogation power to allow for the disapplication or amendment of product regulatory requirements in emergencies.
- Allows the Secretary of State to make provision with regard to metrology including quantities and units of measurement.
- Allows the Secretary of State to make provisions relating to the sharing of information within product or metrology regulations.
- Contains powers to make provision for costs which will allow the relevant authority (as defined) to recover some of the costs attributable to the operation of the regulatory regime.
- Contains a consequential power to repeal provisions in the Consumer Protection Act 1987 and the Weights and Measures Act 1985, and amend or repeal provision in section 77 and Schedule 5 to the Consumer Rights Act 2015, and the Gun Barrel Proofing Acts.

22. The delegated powers in the Bill are:

- (a) Clause 1: Product regulations (framing power);
- (b) Clause 5: Metrology regulations (framing power);
- (c) Clause 10(2): Interpretation (power to amend the definition of “online marketplace”).

C. ANALYSIS OF DELEGATED POWERS BY CLAUSE

Clause 1: Product regulations (power to make product regulations)

Power conferred on: Secretary of State

Power exercised by: Regulations (Statutory Instrument)

Parliamentary procedure: Affirmative procedure where the power is being exercised to create or widen the scope of a criminal offence, to create powers of entry, inspection, or search under clause 3(4)(b)(i), or to amend or repeal primary legislation. The affirmative procedure is also to be used where the power is being exercised to make provision in relation to information sharing in line with clause 7, cost recovery in line with clause 8, or emergencies in line with clause 4. Otherwise, negative procedure.

Purpose and context

23. Clause 1(1) provides the Secretary of State with the power to make provision in relation to products marketed or used in the United Kingdom, for the purpose of—
- (a) reducing or mitigating risks presented by products;
 - (b) ensuring that products operate efficiently and effectively; or
 - (c) ensuring that products designed for weighing or measuring operate accurately.
24. Clause 1(2) provides the Secretary of State with the power to make provision in relation to products made available or used in the United Kingdom, corresponding to, or similar to, a provision of relevant EU law for the purpose of reducing or mitigating the environmental impact of products.
25. Clause 1(3) excludes some products (listed in the Schedule) from the scope of the powers in clauses 1(1) and (2).
26. Clause 2 sets out provisions that the Secretary of State may make under clause 1 clarifying that product regulations may make provision about requirements that products must meet in relation to or in order for them to be marketed or used in the United Kingdom.
27. Clause 2 also sets out examples of what those requirements may include or relate to, such as setting out the requirements for the manufacturing process and that requirements may be placed on persons carrying out activities in relation to products, giving examples of the persons who could have requirements placed on them. It also specifically clarifies that the regulations may provide that a requirement in the regulations may be treated as being met if a specified requirement under relevant EU law is met. The Secretary of State may add conditions that must be met in addition to the specified EU requirement. Before exercising this power, the Secretary of State must have regard to the economic, social and environmental impacts of such recognition.
28. Clause 3 relates to enforcement of clause 1. It provides that product regulations may designate bodies that exercise functions of a public nature as relevant authorities and confer on those authorities functions of monitoring compliance, investigating non-compliance, securing compliance and mitigating the effect of non-compliance. It further provides that product regulations may make provision in relation to sanctions for non-compliance with product regulations or any notice issued by a relevant authority, obstruction or failure to assist or co-operate with relevant authorities, and the provision of

false or misleading information to relevant authorities. Clause 3 also sets out examples of what kind of activities regulations can enable under the auspices of monitoring, investigating, sanctioning, or enforcing to secure compliance with product safety.

29. Clause 3 also places restrictions on the making of regulations relating to powers of entry, inspection or search and criminal penalties.
30. Clause 4 makes clear that the Secretary of State, when making regulations under clause 1, can make provision about the disapplication or modification of a provision in product regulations in cases of emergency.
31. Clause 7 provides that the regulations may include provision about the disclosure of information between relevant authorities and—
 - (a) other relevant authorities,
 - (b) the emergency services, or
 - (c) persons otherwise specified, or of a description specified, in product regulations.
32. Clause 7(5) makes clear that this disclosure does not allow for the processing of personal data contrary to the data protection legislation.
33. Clause 8 provides that product regulations may make provision for a relevant authority to implement a cost recovery regime in relation to carrying out their functions.
34. Clause 9 provides that provisions of certain Acts may be repealed or in some cases amended as a consequence of provisions made in regulations under the Bill:
 - (a) Provision made by Parts 2, 4 and 5 of the Consumer Protection Act 1987 may be repealed;
 - (b) Section 77 and Schedule 5 to the Consumer Rights Act 2015, may be amended or repealed;
 - (c) Provisions of the Gun Barrel Proofing Acts 1868, 1950 and 1978, may be amended or repealed; and
 - (d) Other primary legislation may be amended or repealed in consequence of amending or repealing the Acts listed above (for example to remove or update cross references to them).
35. Clause 11 provides that regulations under the Bill may make provision generally or about particular cases; may make different provision for different purposes or areas and make provisions about when things must be done, as well as making provision binding the Crown and consequential, supplementary, incidental, transitional or saving provision.

Justification for delegation

36. A delegated power is needed in order to ensure that the Secretary of State is able to respond swiftly to any new risks and hazards that might arise in this area, as well as ensuring continuity across the United Kingdom internal market. This will include an ability to maintain continuity with relevant EU law where it is deemed appropriate and, in the United Kingdom's best interests to do so, but also the ability to make different provision to the EU.
37. It is not possible to set the appropriate safety limits for each and every product in primary legislation. For example, new scientific evidence may make clear that certain chemicals pose a risk and should not be included in particular products, such as toys. The government may need to act quickly in these instances to make sure that once risks are identified, they can be mitigated quickly. The government scientists are constantly reviewing the safety limits for chemicals and it is vital for safety that legislation can be updated to reflect scientific advice.
38. Product safety legislation is technical and detailed and requires frequent updates to respond to emerging hazards and risks, and developments in technology and scientific or technical understanding. For instance, button batteries in a variety of household items, such as toys or remote controls, offer dangers if swallowed, which may not be sufficiently addressed by current rules. To raise consumer awareness of the risks associated with button batteries, the Office for Product Safety and Standards within DBT ("OPSS") has published a product warning leaflet, encouraged the development of a new standard for the safety of button and coin batteries, and developed guidelines for Trading Standards to use when evaluating the risk of products containing these batteries. As part of our ongoing examination of product safety standards, OPSS is analysing and, where appropriate, combining individual product restrictions. Examining whether manufacturers should be required to safeguard battery compartments in all goods that pose a contextual risk to children and other vulnerable users is one example.
39. The Department is in regular contact with businesses and consumer groups and experts in the relevant field such as fire and rescue services and the most effective and proportionate response will be determined following analysis of evidence from technical experts within the Department. It would not be possible, or appropriate, for such technical amendments to be made by way of primary legislation. The evolution of future products requires flexibility to address risks posed by products which rely on artificial intelligence functionality or which could be subject to cyber attack. Existing conformity assessment procedures may need to be adapted to cover emerging and currently unknown risks.
40. As well as development in the manufacture and use of products, the ways in which people buy and sell products develops quickly over time. The application of the law to online marketplaces has been the subject of legal challenge, which exposes the need to ensure the law is clear and future proofed in relation to actors in the supply chain. The applicability of definitions depends on detailed examination of business models. Flexibility is necessary

to adapt definitions to new and disruptive business models in the market and to provide clarity and certainty for business.

41. Not all product regulation pursues product safety objectives. For certain products (weighing and measuring instruments), it is also necessary to ensure the products perform accurately. There is a public interest in ensuring that weighing and measuring instruments perform accurately so that the end consumer of goods is able to rely on and have confidence in the accuracy of the weighing and measuring that has taken place in the course of the supply chain. In certain cases, this may be an important aspect of the safety of the end product. In other cases, it may be more aimed at consumer protection. However, though the aims and purposes are different, the way in which metrology instruments are regulated has a lot in common with product safety law. For example, as products develop (e.g. electric vehicle charging equipment) in conjunction with technological advancement such as AI and cyber security risk, we require the powers to enable the Secretary of State to regulate the accuracy of certain products in the same way as their safety. In other cases, we need the power to ensure that products operate effectively, for example to ensure that radio equipment works as intended and does not cause harmful interference with the radio spectrum.
42. We require the flexibility to be able to continue to recognise EU law, and/or to align with EU rules across the United Kingdom, where this is in the interests of the United Kingdom. EU product regulation pursues a range of objectives that may go somewhat beyond product safety, such as the Radio Equipment Directive 2014/53/EU (RED), which the Commission describes as “setting essential requirements for safety and health, electromagnetic compatibility, and the efficient use of the radio spectrum”.
43. Other measures, such as the Common Charging Directive and the Noise Emission in the Environment by Equipment for Use Outdoors Directive contain measures which, through the imposition of essential requirements, standards and conformity assessment procedures, pursue the objective of reducing the environmental impact of products.
44. We are therefore seeking powers to make regulations pursuing similar objectives, so that the United Kingdom may make a case-by-case decision on whether to recognise EU requirements and whether to make similar provision in the United Kingdom. The Secretary of State must have regard to social, environmental and economic impact before making provision to recognise EU requirements. We do not want United Kingdom consumers to be left behind or for products to become more expensive or less available on the United Kingdom market, which could happen if we do not have such provision.

Enforcement (clause 3)

45. In order to ensure the framework achieves its desired outcomes, it is also essential that we have a targeted and proportionate enforcement and compliance regime in place. The powers in the Bill need to allow for this, ensuring that as new duties are identified, effective

sanctions and proportionate penalties can be applied, reflecting the nature of the potential harm. It is not possible to determine the level of these penalties until the harms themselves have been assessed – and these change over time. Similarly, new technologies and supply chain actors affect market conditions, and those changes must be contemporaneously reflected in the enforcement regime in the form of applicable sanctions and proportionate penalties. Setting out enforcement powers in regulation delivered through secondary legislation will enable active management of new risks and ensure the safety of products on the market, regardless of adaptations that occur in the market landscape.

46. There is significant variation in different product sectors that warrant tweaks to offences and penalties and that is reflected in the considerable amount of secondary legislation the current regime is constructed upon. ‘Products’ are sufficiently diverse that the seriousness of the consequences of non-compliance with the same duties can be considerably different. Consequences may also be impossible to foresee right now due to the likely emergence of unanticipated phenomena that will significantly change the danger of some products. Regulation delivered through secondary legislation can accommodate that variation and provide an acceptable level of flexibility when sectors change, or new sectors emerge. Nevertheless, the Bill contains some important safeguards. As well as procedure (outlined below), there are statutory limits to criminal offences created under regulations.

Emergencies (clause 4)

47. The Covid-19 pandemic highlighted the need for the Government to have the ability to offer temporary regulatory easements during emergencies to support sufficient supply of critical products. The Bill includes a power to provide for the disapplication or modification of particular product regulations in emergencies – for example, by temporarily easing or permitting alternative assessment processes. It is difficult to predict the nature of future emergencies, or the kinds of products that may be relevant; regulation-making powers will best allow such changes to be based on the practical realities of the situation at the time.

Information sharing (clause 7)

48. Proportionate data sharing powers are sought, with appropriate safeguards. A Bill power to permit the sharing of general information and data about products may be too broad given the multiplicity and complexity of data that may accompany a product. (Data may include technical and scientific, physical and chemical properties and ownership and patent details etc). To ensure products are safe for consumer use, delegated powers may be more proportionate and appropriate where the data in question is specified. The ability to share more specific data, will be more able to respond to new products being developed and risk to cause harm.
49. The information sharing requirements may also be different depending on the subject matter of particular product regulations. It is therefore more appropriate to set out the

overall framework of what provision can be made by regulations in the Bill, so that the regulations themselves can adapt the provisions to best meet the regulation of the product in question. As set out below, where product regulations make provision as to information sharing, this must be subject to the affirmative procedure.

Cost recovery (clause 8)

50. Costs of enforcement or surveillance activity is variable dependant on the specification of the product in question. There is therefore an increasing need to provide relevant authorities the power to reclaim from the economic operator the total costs of their enforcement activities with respect to instances of non-compliance, which may be singular but very serious or persistent and repeated. This is again because the activities of enforcement authorities may be different in relation to different product areas, as will the framework of action up to and immediately prior to that where costs are recovered.¹ Clause 8 provides relevant authorities with the power to consider bespoke cost recovery processes on a product by product basis. It is preferable to have a power that may be adapted, subject to parameters on the face of the Bill, to cater for different circumstances, such as disposal of goods abandoned by the economic operator, or where enhanced testing of a product is required to determine whether it is safe for consumers.

Consequential amendment of certain Acts (clause 9)

51. Regulations made under the powers in the Bill will replace provisions made under the Consumer Protection Act 1987 (“CPA”). Part 2 of the CPA includes a power to make safety regulations (and related provisions) which will no longer be necessary once the Bill provisions are enacted. Part 4 of the CPA relates to enforcement of Part 2, and Part 5 sets out miscellaneous and supplemental provisions. We are therefore taking a power in the Bill to repeal provision made by Parts 2, 4 and 5 of the Consumer Protection Act 1987, in consequence of any provision made by or under the Bill. The 1868 Gun Barrel Proofing Act still provides the legal framework for the remaining two gun barrel proofing houses in the United Kingdom, in London and Birmingham. These are internationally renowned proof houses. The legislation requires updating to ensure the Birmingham proof house has equity with its London competitor. Provisions made under powers in the Bill will replace provision in this 1868 Act and the related Acts of 1950 and 1978 and therefore the Bill provides power to amend or repeal provision made by those Acts, in consequence of any provision made by or under the Bill.

52. Schedule 5 to the Consumer Rights Act 2015 sets out investigatory powers which are currently relied on by enforcement authorities for product safety and metrology legislation but which regulations made under the Bill will supersede. The Bill therefore provides that the Secretary of State can amend or repeal provision made by section 77 and Schedule 5 of the Consumer Rights Act 2015.

¹ There are existing cost recovery powers but only in circumstances where legal action is taken and a court grants a cost recovery order.

Justification for procedure selected

53. Where the regulations set out detail of requirements, such as outcome focused requirements that a particular product must meet, the negative procedure is the most appropriate procedure. For example, the Measuring Instruments Regulations 2016 currently have 10 schedules setting out the detailed requirements that different types of measuring instruments must meet, and the conformity assessment procedures that must be applied. Each different product type (ranging from toys to simple pressure vessels) sets out the particular requirements that product must meet and the procedures for assessment and verification that the product does actually meet the requirements. These are highly technical matters which must be amended to take into account scientific and technological advances. It is appropriate for these matters to be set out in secondary legislation and subject to the negative procedure. However, we have specified various specific scenarios in which the affirmative procedure should be used.
54. One example of such a scenario is where the power is being exercised to create or widen the scope of a criminal offence. The affirmative procedure is appropriate in such a scenario to reflect the serious potential implications for individuals involved. It also reflects the usual procedural approach taken when dealing with such matters. For example, paragraph 8F of Schedule 7 to the European Union (Withdrawal) Act 2018 provides for mandatory affirmative resolution in the case of an instrument made under its powers which “*creates, or widens the scope of, a criminal offence*”.
55. We have also taken into consideration the findings of the Joint Committee on Delegated Legislation under the chairmanship of Lord Brooke of Cumnor (“the Brooke Committee”) which, in 1973, set out three circumstances where the affirmative procedure would normally be appropriate. The latter of these circumstances is where a delegated power involves considerations of special importance and the example provided is where the power is used to create a new variety of criminal offence of a serious nature. Furthermore, we took into account the DPRRC’s comments in its written response to the Secondary Legislation Scrutiny Committee’s inquiry into the sifting criteria to be applied when considering whether instruments laid under certain provisions of the European Union (Withdrawal) Act 2018². In particular, we noted its comment that it would generally expect statutory instruments setting out the maximum penalty for any criminal offence to be required to use the affirmative procedure.
56. Accordingly, we have ensured that the creation and expansion of criminal offences, as well as new powers of entry, inspection, and search of premises under clause 3(4)(b)(i), are subject to the affirmative procedure; and have provided for statutory limits in relation to offences (3 months for a summary conviction and 2 years on indictment). Power of entry is clearly intrusive in nature and likely to engage rights enshrined in the European

² Written evidence from the House of Lords Delegated Powers and Regulatory Reform Committee (TSC0008) - <https://committees.parliament.uk/writtenevidence/90473/html/>

Convention on Human Rights such as a right to peaceful enjoyment of one's possessions. It therefore warrants use of the affirmative procedure.

57. In making our decision, we also took note of the House of Commons Procedure Committee's report scrutinising the use of delegated powers in the European Union (Withdrawal) Act 2018³. In particular, we noted that the JCSI had listed "provisions which confer or apply intrusive powers, for example rights of entry" as an example of provisions which might be serious enough to require the affirmative procedure.
58. Another example of a scenario where we have specified that the affirmative procedure should be used is where the power is being exercised to amend or repeal primary legislation. We have ensured that we minimise and restrict the use of these powers in the Bill as much as possible. However, where they are needed in the Bill, we have mandated the use of the affirmative procedure for their exercise to reflect the seriousness of using secondary legislation to amend primary legislation, given the reduced parliamentary scrutiny afforded to the former compared to the latter.
59. We have also taken this approach to reflect the usual procedure associated with such powers, and having noted the DPRRC's comment in the written response previously referred to⁴ that "*there should be a presumption that a Henry VIII power (by which is meant a delegated power which enables a Minister, by delegated legislation, to amend, repeal or otherwise alter the effect of an Act of Parliament, including where the power is expressed in terms of "modification") should be subject to the affirmative resolution procedure*".
60. We have also required that the affirmative procedure be used when Bill powers are exercised to make emergency provision in line with clause 4. We decided to take this approach because this exercise of powers will, by definition, be used in emergency circumstances where the provisions being made are much more likely to be unusual and have a greater impact on the public. They are therefore more likely to be significant or have special importance that would warrant increased parliamentary scrutiny.
61. We have also required that the affirmative procedure be used when Bill powers are exercised to make information sharing provision in line with clause 7. This is to reflect the particular sensitivities that can arise when sharing information, particularly where this may involve sharing data with third countries or international organisations. We are aware that the DPRRC, in relation to the Data Protection Bill, recommended that regulations specifying that the transfer of data to third countries or international organisations is to be regarded as necessary in the public interest should be subject to the affirmative resolution procedure rather than the negative.

³ Written evidence from the House of Lords Delegated Powers and Regulatory Reform Committee (TSC0008) - <https://committees.parliament.uk/writtenevidence/90473/html/>

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62. Finally, we have also specified that the affirmative procedure should be used is where the power is being exercised to recover costs in line with clause 8. We took this approach because it reflects the usual procedural approach taken when dealing with such matters and having noted that the second of the three Brooke Committee circumstances referred to previously includes where a delegated power allows for the imposition of financial burdens.

63. Overall, this general use of the negative procedure but requiring the affirmative procedure in the specific scenarios discussed above aims to achieve an appropriate balance between ensuring proper parliamentary scrutiny where warranted but also respecting parliamentary time and avoiding wasting it unnecessarily on any regulations which are purely technical or administrative in nature.

Clause 5 - Metrology regulations (power to make metrology regulations)

Power conferred on: Secretary of State

Power exercised by: Regulations (Statutory Instrument)

Parliamentary procedure: Affirmative procedure where the power is being exercised to create or widen the scope of a criminal offence, to provide for a power of entry, inspection, or search (under clause 6(4)(b)(i)), or to amend or repeal primary legislation. The affirmative procedure is also to be used where the power is being exercised in relation to information sharing in line with clause 7 or cost recovery in line with clause 8. Otherwise, negative procedure.

Purpose and context

64. Clause 5(1) provides the Secretary of State with the power to make provision about the units of measurement that are used to express quantities and how they must or may be calculated, determined, or referred to.

65. Clause 5(2) provides a power to make provision about quantities in which goods must or may be marketed in the United Kingdom or the units of measurement that must or may be used to express such quantities.

66. For metrological instruments (measuring and weighing instruments), these count as products in their own right and will fall within the scope of the delegated power in clause 1. However, there is a need for an additional delegated power in clause 5 in order to cover other legal metrology requirements such as units of measurement, and quantity requirements.

67. Clause 6 permits the Secretary of State, when making regulations under clause 5, to make provision about enforcement. It includes substantially the same provisions as in clause 3 (enforcement of product regulations) but for metrology regulations.

68. Clause 7 provides that (as with product regulations) metrology regulations may include provision about the disclosure of information between relevant authorities and—

- (a) other relevant authorities,
- (b) the emergency services, or
- (c) persons otherwise specified, or of a description specified, in product regulations.

69. Clause 8 permits the Secretary of State, when making regulations under clause 5, to make provision for a relevant authority to recover costs in relation to the functions conferred on the authority under clause 6.

70. Clause 9 permits the Secretary of State, when making regulations under clause 5, to repeal, and in some cases amend, provisions of certain Acts as a consequence of provisions made in regulations under the Bill. It operates for metrology regulations in the same way as discussed above for product regulations but with the addition that metrology regulations may also repeal provision made by the Weights and Measures Act 1985, in consequence of any provision made by or under the Bill.

71. Clause 11 applies to metrology regulations in the same way it applies to product regulations.

Justification for delegation

72. A delegated power is needed to update these areas of legal metrology as they are not covered (or not entirely covered) by existing powers in the Weights and Measures Act 1985 and existing legislation in this area has historically been made or heavily amended using section 2(2) of, and paragraph 1A of Schedule 2 to, the European Communities Act 1972 which is no longer available.

73. We need delegated powers in order to quickly respond to technological advances and advances in manufacturing processes, particularly in the field of quantity marking for packaged goods. For example, technological advances in packaging systems to include smart weighing techniques may mean we want to change the accuracy tolerance limits set out in the existing regulations and tighten them to increase accuracy in the quantity of goods sold and reduce short measure for the consumer.

74. A delegated power is also appropriate here to match the pre-existing statutory regime for metrology which relies heavily on secondary legislation. It also best suits the technical and often highly administrative and procedural nature of metrology regulations.

75. For units of measurement in particular, we also need powers in order to ensure that the United Kingdom is able to continue to be able to meet its international commitments as a member of the General Conference on Weights and Measures and the International Organization of Legal Metrology. For example, we made legislative changes in 2019 to

reflect seven new definitions of expressions of measurement and indications of quantity of the International System of Units (SI) adopted by the General Conference on Weights and Measures. This previous amendment was made using the s.2(2) power which is no longer available so the Bill power would be needed to make similar future amendments.

Enforcement of metrology regulations (clause 6)

76. As for the enforcement of product regulations, in order to ensure the metrology framework achieves its desired outcomes, it is also essential that we have a targeted and proportionate enforcement and compliance regime in place. The powers in the Bill need to allow for this, ensuring that as new duties are identified, effective sanctions and proportionate penalties can be applied, reflecting the nature and impact of the non-compliance. It is not possible to determine the level of these penalties until the impacts themselves have been assessed – and these change over time. Similarly, new technologies and supply chain actors affect market conditions, and those changes must be contemporaneously reflected in the enforcement regime in the form of applicable sanctions and proportionate penalties.

77. The consequences of new technologies in metrology may also be impossible to foresee right now due to the likely emergence of new innovations that will significantly change the method and accuracy of measurement systems. Regulation via secondary legislation can accommodate that variation and provide an acceptable level of flexibility when sectors change, or new sectors emerge.

Information sharing (clause 7)

78. Proportionate data sharing powers are sought, with appropriate safeguards. The justification for this being a delegated power is the same for metrology regulations as for product regulations. (Discussed in full under clause 1).

Costs (clause 8)

79. As for product regulations, metrology regulations need to provide authorities with the power to reclaim from the relevant economic operator the totality of the costs of their activities with respect to instances of non-compliance. Also, as for product regulations, as the activities of enforcement authorities may be different in relation to different goods, it is preferable to have a power that may be adapted, subject to parameters on the face of the Bill, to cater for different circumstances.

Consequential amendment of certain Acts (clause 9)

80. The Weights and Measures Act 1985 provides the legal framework for many metrological areas. Whilst most of these areas are within the scope of the Bill powers, some areas (such as coinage standards) are not. It is therefore not our intention that the Bill powers

should be used to entirely replace the Weights and Measures Act 1985. However, we do require a power in the Bill to enable the consequential repeal of provisions of the Weights and Measures Act 1985 to the extent that those provisions are considered redundant where they have been superseded by regulations made under the Bill powers. This will prevent the Weights and Measures Act 1985 – much of which is quite old and some of which is based on EU law – from unreasonably constraining our future ability to use the Bill powers to adapt to technological advances.

Justification for procedure selected

81. As for the delegated power in clause 1, in many cases, the negative procedure will be the most appropriate procedure for use of this power. This is for the same reasons as for clause 1 (that is, the power is likely to most often be used to make technical, administrative and procedural amendments to existing legislation which do not warrant taking up large amounts of parliamentary time). Also, for the same reasons as for clause 1, we have therefore generally required the use of the negative procedure for exercise of this power but then specified various specific scenarios in which the affirmative procedure should be used.

82. These scenarios are identical to the scenarios discussed for clause 1 and the justification behind them the same, with the exception that references to provisions on enforcement in line with clause 3 should instead be read as provisions on enforcement in line with clause 6. Additionally, as the clause 5 power does not include the ability to make provision in relation emergency provision in line with clause 4, those references do not apply here.

Clause 10(2): Interpretation (power to amend the definition of “online marketplace”)

Power conferred on: Secretary of State

Power exercised by: Regulations (Statutory Instrument)

Parliamentary procedure: Affirmative procedure

Purpose and context

83. Clause 10(2) provides the Secretary of State with the power to amend the definition of “online marketplace” in the Bill.

Justification for delegation

84. In order to aid Parliamentary scrutiny, a definition of “online marketplace” is provided at clause 10(1) but we seek a power to amend this definition, at clause 10(2), to keep abreast of developments in the marketplace, including but not limited to deliberate attempts to evade regulation.

Justification for procedure selected

85. We have specified that the affirmative procedure should be used where the power is being exercised to amend the definition of “online marketplace” within the Bill itself. This also amounts to a power to amend primary legislation – albeit in a very confined way – and so we have required the affirmative procedure for its exercise for the same reasons we have required the affirmative procedure for making to changes to primary legislation elsewhere in the Bill.

Department for Business and Trade

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