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Delegated Powers and Law Reform Committee

Second Supplementary Legislative Consent Memorandum: delegated powers exercisable within devolved competence in the Product Regulation and Metrology Bill



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Textphone: 0800 092 7100
Email: sp.info@parliament.scot

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Delegated Powers and Law Reform Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



DPLR.Committee@parliament.scot



0131 348 5974

Committee Membership



Convener
Stuart McMillan
Scottish National Party



Deputy Convener
Bill Kidd
Scottish National Party



Jeremy Balfour
Scottish Conservative
and Unionist Party



Katy Clark
Scottish Labour



Roz McCall
Scottish Conservative
and Unionist Party

Introduction

1. This report considers the second Supplementary Legislative Consent Memorandum (“second SLCM”) lodged by the Scottish Government in respect of the Product and Metrology Bill (“the Bill”).
2. The Committee has previously considered the delegated powers in the Bill which are conferred on the Secretary of State and which may be exercised within devolved competence. [It published its report on 5 December 2024 in respect of the Scottish Government’s first LCM.](#) It also considered the Supplementary LCM lodged by the Scottish Government at its meeting on 18 March 2025. It did not make any further recommendations or publish a report in respect of the SLCM, as the Bill had not been amended to address the concerns raised by the Committee in its report, and it was anticipated that the Scottish Government would be lodging a second SLCM.
3. Previously, the Scottish Government had recommended that the Parliament refuse consent to the Bill on account that it did not include any requirement that the Secretary of State consults with, or obtains the consent of, the Scottish Ministers before exercising the powers in the Bill to make provision within devolved competence. The Bill has now been amended to include a new clause which provides that the Secretary of State may only make regulations under clause 1 of the Bill in areas of devolved competence with the consent of the Scottish Ministers, unless the provision is merely incidental to, or consequential upon, provision outside Scottish devolved competence.
4. As a result, the Scottish Government is now recommending that the Scottish Parliament consents to the Bill.

Overview of the Bill

5. The Product Regulation and Metrology Bill was introduced by the UK Government in the House of Lords on 4 September 2024. It is currently at report stage in the House of Commons.
6. Further background information about the Bill can be found in [the Committee's report](#).

Review of relevant powers

Clause 1 – 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 make the first provision about the marketing of products through an online marketplace in product regulations and where regulations are imposing requirements, for the first time, on a person who controls access to an online marketplace, controls the contents of an online marketplace, or acts as an intermediary for a person who controls such access or contents, where regulations create or widen the scope of a criminal offence, or create powers of entry, inspection, or search under clause 3(4)(b)(i), or to amend or repeal primary legislation insofar as permitted by clause 11. 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.

Provision

7. Clause 1 provides that the Secretary of State may make regulations which make provision, in relation to the marketing or use of products in the United Kingdom, for the purpose of:
 - Reducing or mitigating risk presented by products,
 - Ensuring that products operate efficiently and effectively,
 - Ensuring that products designed for weighing or measuring operate accurately.
8. Product is defined as a tangible item that results from a method of production and excludes products which are listed in the schedule. The products listed in the schedule include food, feeding stuff and fertiliser, plants, plant protection products, animal by-products, aircraft and components of aircraft, medical equipment and medicines and medical devices.
9. Risk is defined as where a product could endanger the health or safety of persons, endanger the health or safety of domestic animals, endanger property (including the operability of other products) or cause or be susceptible to electromagnetic disturbance.
10. Clause 1(2) provides a power which enables the Secretary of State to make regulations which make provision, in relation to the marketing or use of products in the United Kingdom, which corresponds, or is similar, to a provision of relevant EU law for the purpose of reducing or mitigating the environmental impact of products.
11. Clause 2 provides that product regulations may make provision about requirements (“product requirements”) that must be met in relation to products marketed or used in the United Kingdom or in order for products to be marketed or used in the United Kingdom. It also provides that such regulations may provide that a product

requirement is to be treated as met if a requirement of relevant EU law specified in product regulations is met, or such a requirement is met and conditions specified in the regulations are also met.

12. Clause 3 provides that product regulations may designate one or more persons as a relevant authority for the purpose of the enforcement of the regulations. This could include monitoring compliance, investigating suspected non-compliance, securing compliance and mitigating the effect of non-compliance. Regulations may also confer power to appoint inspectors to carry out functions including conferring powers of entry, although entry to a premises used wholly or mainly as a dwelling would require a warrant issued by a sheriff, summary sheriff or a justice of the peace in Scotland. Product regulations may also make provision about sanctions, including the power to create or widen the scope of criminal offences.
13. Clause 4 provides that product regulations may make provision for the regulations to be disapplied or apply with modifications in cases of emergency.
14. Clause 7 provides that product regulations may make provision for or in connection with the disclosure of information by a relevant authority carrying out functions under product regulations to another relevant authority, the emergency services or a person specified or of a description specified in product regulations, or vice versa. Such regulations may also provide for the processing of information, however not in contravention of data protection legislation.
15. Clause 8 provides that product regulations may make provision for a relevant authority to impose fees in respect of any costs incurred by the relevant authority in carrying out functions conferred on the authority by or under such regulations.
16. Clause 9 did not form part of the Bill as introduced but the Committee has since considered it in light of the Scottish Government's first SLCM. It provides that the power to make product regulations includes the power to make any provision described in clause 2(4), (6) or (7) in connection with existing product requirements (that is product requirements contained in subordinate legislation made before the passing of the Bill or in assimilated direct legislation) that could be made by product regulations under this Bill. It provides that the power also includes the power to make any provision described in clauses 3, 4, 7 and 8, in connection with existing product provision (that is provision in subordinate legislation made before the passing of the Bill or in assimilated direct legislation) that could be made by way of product regulations under the Bill.
17. Clause 10 is also a new provision and is the subject of the Scottish Government's second SLCM. It provides that the Secretary of State may only make regulations under section 1 which contain provision within Scottish devolved competence with the consent of the Scottish Ministers, unless the provision is merely incidental to or consequential on, provision outside Scottish devolved competence. Similar provision is made in respect of the devolved authorities in Wales and Northern Ireland.
18. Clauses 11 and 13 provide that product regulations may also make consequential, supplementary, incidental, transitional or saving provision and may amend or repeal specified primary legislation. The primary legislation specified are the Gun Barrel Proof Acts 1868 to 1978.

19. Provision is also made that any Act passed before the Act that flows from this Bill, or any Act passed later in the same session as the Act that flows from this Bill, may be amended or repealed in consequence of any amendment or repeal made as provided for by clause 11.
20. Clause 13(6) provides that before making regulations under the Bill, the Secretary of State must consult such persons as the Secretary of State considers appropriate.
21. Product regulations would be subject to the negative procedure, except where the power is being exercised:
 - to make the first provision about the marketing of products through an online marketplace in product regulations and where regulations are imposing requirements, for the first time, on a person who controls access to an online marketplace, controls the contents of an online marketplace, or acts as an intermediary for a person who controls such access or contents,
 - to create or widen of the scope of a criminal offence,
 - to create powers of entry, inspection, or search under clause 3(4)(b)(i),
 - to amend or repeal primary legislation insofar as permitted by clause 11
 - to impose requirements on a person carrying out activities in relation to a product who is not described in clause 2(3), where requirements are being imposed on that category of person for the first time.
 - to make provision in relation to information sharing in line with clause 7,
 - to make provision about cost recovery in line with clause 8,
 - to make provision about emergencies in line with clause 4.
22. In the scenarios outlined above, such regulations would be subject to the affirmative procedure.

Committee consideration

23. The Committee previously asked the UK Government how it envisages that this power may be used in relation to devolved matters, and why it considers it appropriate that the power has been conferred so that it is exercisable by the Secretary of State alone in relation to devolved matters.
24. The UK Government responded that it considers that many of the regulations made under the Bill will concern technical areas in relation to product regulation and metrology, which it said are “largely reserved, although some do touch on devolved areas”. It said that where the powers in clause 1 may be exercised in areas of devolved matters (for example, to ensure they operate efficiently and effectively; or reduce their environmental impact – where this is to make corresponding or similar provision to a provision of EU law) they are likely to involve the subject matter of EU technical regulations and standards as they stood at IP completion date, which is reserved. It noted, however, that as EU law develops, there are conceivable scenarios where the exercise of the powers could potentially cover matters of

devolved competence.

25. The requirement inserted by clause 10 means that product regulations may only make provision within Scottish devolved competence if the Secretary of State has first sought the consent of the Scottish Ministers, unless the provision is merely incidental to, or consequential upon, provision outside Scottish devolved competence.
26. The Scottish Government has stated in its second SLCM that the statutory consent mechanism provides a means for the Scottish Ministers to ensure the powers are used appropriately in areas of devolved competence. It has also stated that it would expect that in many cases, any regulations made under clause 1 would fall under the scope of the SI Protocol 2, as the UK's product regulatory framework is largely inherited from the EU and is mainly assimilated law. As this statement suggests that there are conceivable scenarios whereby the SI Protocol 2 will not apply, the Committee calls on the Scottish Government to commit to facilitating, in such cases, the Scottish Parliament's scrutiny of any decisions by the Scottish Ministers to consent to the making of regulations under clause 1.
27. The Scottish Government has also stated that it considers that it remains unclear why the UK Government requires powers over certain areas of devolved competence, and that it is "disappointing that the UK Government has not agreed to provide the Scottish Government with similar powers to take action in devolved areas in this Bill".
28. The statutory consent requirement provides an opportunity for the Scottish Parliament to scrutinise the Scottish Ministers' decision to consent to regulations made by the Secretary of State which make provision within Scottish devolved competence. However, the Committee notes that it remains the case that this is a broad power to make significant provision, potentially in devolved areas, which will not be laid before the Scottish Parliament.

29. **The Committee highlights, in relation to this power, its agreed position in relation to delegated powers in UK Bills exercisable in devolved areas which is, in general terms, that:**

a) The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence,

b) Where such powers are exercised by UK Ministers in devolved areas, there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament,

c) If such powers contain a requirement for the Scottish Ministers' consent when exercised within devolved competence, the Scottish Parliament can scrutinise the Scottish Ministers' consent decision.

The Committee will scrutinise powers conferred on UK Ministers not subject to a requirement for Scottish Ministers' consent and may suggest matters for the lead committee to consider.

d) As a minimum, powers when exercised by UK Ministers in devolved areas should be subject to the process set out in [the SI Protocol 2](#) where the power is within the scope of that protocol.

30. **The Committee highlights the power to the lead committee, noting that it has been amended to include a requirement that the Secretary of State obtains the consent of the Scottish Ministers before making regulations under Clause 1 in areas of devolved competence.**
31. **It also highlights the Scottish Government's statement, in its second SLCM, that it would expect that in many cases the exercise of this power would fall under the scope of the SI Protocol 2, given that the UK's product regulatory framework is largely inherited from the EU and is mainly assimilated law.**
32. **The Committee calls on the Scottish Government to facilitate the Scottish Parliament's scrutiny of any decisions by the Scottish Ministers to consent to the making of regulations which do not fall within the scope of SI Protocol 2.**
33. **The Committee also notes that it remains the case that the power may be exercised within devolved competence by the Secretary of State only. It is a broad power, that could make significant provision in regulations. There is no equivalent power conferred on the Scottish Ministers and as such, product regulations will not be laid in the Scottish Parliament.**

