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The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

Commercial Payments Bill (UK Parliament legislation) delegated powers exercisable within devolved competence, with reference to LCM-S7-5, LCM S7-5a and LCM S7-5b.

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Delegated Powers and Law Reform Committee

To consider and report on the following —
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.


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Introduction

1. The purpose of this report is to consider the delegated powers that are exercisable within devolved competence in the Commercial Payments Bill ("the Bill").

2. At its meetings on 8 September and 27 October 2026, the Committee considered the Legislative Consent Memorandum, a Supplementary Legislative Consent Memorandum and a Second Supplementary Legislative Consent Memorandum. The Bill does not confer powers to make subordinate legislation on the Scottish Ministers. However, the Bill does confer power on UK Ministers to make subordinate legislation in devolved areas. Therefore, the LCM is being considered in terms of the Committee's wider remit, contained in Rule 6.11.1(b) of the Standing Orders, which provides that the remit of the Committee includes considering and reporting on proposed powers to make subordinate legislation in particular bills "or other proposed legislation."

3. The Lead Committee for the LCM is the Economy, Tourism and Energy Committee.

The Bill

4. The Bill was introduced by the UK Government in the House of Lords on 19 May 2026. It is currently awaiting its 2nd reading, in the House of Commons, date to be announced.

5. The Bill contains 3 Parts (comprising 32 clauses) and 4 schedules. Its provisions generally extend to Scotland, England, Wales and Northern Ireland. However, sections 2(2)-(4), 11-16 and Part 1 of Schedule 2 extend only to England, Wales and Scotland, while sections 2(5)-(7) and Part 2 of Schedule 2 extend only to Northern Ireland.

6. The UK Government's Explanatory Notes give the full background to the Bill and a summary of each clause. The overview of the Bill, on page 4 of the Explanatory Notes, says (in summary) that the Bill will:

- Amend the Late Payment of Commercial Debts (Interest) Act 1998 (renamed the Commercial Payments and Interest on Late Payments Act 1998 ("CPILPA")),
- Introduce maximum payment terms of 30 days for public authorities (where not covered by the (Procurement Act 2023) and 60 days for non- public authorities, subject to limited exemptions,
- Introduce an implied contractual right for suppliers to recover fixed sum where disputes are raised late or without sufficient information,
- Prohibit contractual terms that exclude or vary the statutory right to interest on late payments,
- Amend the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") to align late payments provisions with existing construction payment and dispute resolution legislation, including changes to Pay Less Notices and payments reckoning periods,
- Prohibit contractual provisions that allow the deduction or withholding of retention sums under construction contracts,
- Introduce transitional arrangements for existing retention clauses and require the return of retained sums within a specified period,
- Create an implied contractual right for suppliers to recover a fixed sum where retention sums are unlawfully withheld, in addition to any statutory interest and compensation,
- Expand the powers of the Small Business Commissioner ("SBC") to investigate persistent poor payment practices and breaches of payment legislation by larger businesses,
- Empower the SBC to make recommendations and take enforcement action, including issuing directions and imposing financial penalties,

- Enable SBC to adjudicate payment disputes between small and larger businesses and make binding interim decisions outside the court process, and
- Empower the SBC to take enforcement action against businesses that fail to comply with statutory payment reporting requirements.

7. The Bill was amended during its passage through the House of Lords and an amended version of the Bill was introduced in the House of Lords and then agreed on 15 September 2026. The Scottish Government lodged a second supplementary Legislative Consent Memorandum on 9 October 2026, which takes account of those amendments.

8. The Scottish Government has recommended that the Scottish Parliament gives legislative consent to all the relevant provisions of the Bill.

Delegated Powers

9. The UK Government has published a Delegated Powers Memorandum ("DPM")a supplementary Delegated Powers Memorandum ("sDPM"), and a second Supplementary Delegated Powers Memorandum which reflects the Bill as amended and which explains the purpose of each power.

10. As is standard practice for UK bills, the Scottish Government has not published a delegated powers memorandum. Its position on the relevant clauses is set out in the LCM.

Review of relevant powers

Clauses 1, 2 and 3 insert the following provisions in the Late Payment of Commercial Debts (Interest) Act 1998 (renamed the Commercial Payments and Interest on Late Payments Act 1998 ("CPILPA"):

New section 2B(7)(b): Power to exempt related contracts from the scope of the maximum payment terms

New section 2D(7)(b): Power to exempt related construction contracts from the scope of the maximum payment terms

New section 2E(4): Power to exempt contracts from the scope of the maximum payment terms

Powers conferred on: Secretary of State

Powers exercisable by: Regulations

Parliamentary procedure: Affirmative procedure

Provision

11. Clause 1 inserts provision about maximum payment terms into the Commercial Payments and Interest on Late Payments Act 1998 ("CPILPA"). New section 2B of CPILPA provides that a contract must make provision for when payment becomes due, which must be a maximum of 30 days (for public authorities) or 60 days (for other purchasers). Where there is no express provision in the contract (or it is inconsistent with the 30- or 60-day requirement), a term is implied into the contract that payment is due 30 days from the latest of the specified events. Where a contract seeks to provide for a term other than one permitted by the maximum payment terms provisions, that term will be void.

12. Section 2B(8) provides that terms in other types of related contracts may also be void if they seek to vary or override provisions within the main contract regarding when payment falls due.

13. Clause 2 inserts section 2D into CPILPA to make provision equivalent to section 2B for payments in construction contracts, as these are governed by a separate statutory regime under the Housing Grants, Construction and Regeneration Act 1996.

14. Clause 3 inserts section 2E into CPILPA, which makes provision for certain contracts to be exempted from the maximum payment terms in section 2B or 2D. Section 2E(4) confers a delegated power on the Secretary of State to specify, by regulations, the types of contracts which are exempt.

15. Before exercising the power in section 2E(4), the Secretary of State must have considered the impact of specifying that type of contract on all sizes of undertakings, particularly ones that are small. The Secretary of State must also consider that specifying that type of contract strikes a fair balance between the interests of purchasers and suppliers under that type of contract.

16. Section 2B(7)(b), and the corresponding section 2D(7)(b) applying to construction contracts, also confer delegated powers on the Secretary of State to exempt certain contracts from the provisions that would render void terms in related contracts purporting to vary or override the maximum payment terms.

17. The powers are subject to the affirmative procedure.

Committee consideration

Nature of the powers

18. In its DPM the UK Government explains that the powers to exempt certain contracts are intended to provide flexibility to respond to stakeholder feedback, changing business practices and any unforeseen impacts of legislation, ensuring that the regime remains proportionate.

19. In its 2nd Report of Session 2026-27 (19 June 2026), the Delegated Powers and Regulatory Reform Committee of the House of Lords ("DPRRC") raised concerns that the exemption powers in clauses 1-3 were too broad. The DPRR reported that the DPM did not explain the principles that would govern their use, including which sectors might benefit, when exemptions would be granted, how loopholes and avoidance would be prevented and what safeguards would protect weaker parties. The DPRRC recommended the removal of the delegated powers in Clauses 1-3, in the absence of a convincing justification for their retention.

20. The sDPM responded to those concerns by stating that any exemption would be evidence based, targeted, proportionate and narrowly drawn, and would be subject to consultation and affirmative procedure, and could be adapted or withdrawn to address unintended consequences or avoidance practices.

21. The Scottish Government states in its LCM that the policy intention behind the powers is to preserve contractual flexibility where bargaining power is broadly comparable or where the smaller purchaser agrees to a longer payment term. The Scottish Government further notes that the clauses would apply in Scotland in areas within legislative competence of the Scottish Parliament including aspects of Scots contract law relating to specified business to business commercial and construction contracts.

22. The Committee considered that, while there may be a case in principle for delegating a power to create exemptions from the statutory maximum payment term requirements, concerns remained regarding the breadth of the power. Therefore, the Committee wrote to the Scottish and UK Government to consider these points (see further detail below).

Exercise of powers by the Secretary of State

23. The Secretary of State is required to obtain the consent of the Scottish Ministers before making any regulations under this section that make provision within the Scottish Parliament's legislative competence. This is expressly stated under Schedule 1, Part 1, paragraph 10 which inserts a new section 15 into CPILPA.

24. There are no equivalent powers conferred on the Scottish Ministers. This means that regulations made under these powers within the Scottish Parliament's legislative competence will be laid before and scrutinised by the UK Parliament only.

Such regulations will fall within the scope of the UKSI Protocol and will be notified to the Scottish Parliament only after becoming law.

25. At paragraph 49 of the LCM, the Scottish Government says:

"While it is disappointing that the UK Government has not agreed to provide the Scottish Ministers with corresponding regulation-making powers in the Bill enabling the Scottish Ministers to make provision within devolved competence in relation to Scotland, the Scottish Government's view is that these statutory consent requirements would provide Scottish Ministers and the Scottish Parliament with an acceptable level of control and oversight over the use of the Secretary of State's substantive regulation-making powers within the Bill in devolved areas in relation to Scotland."

26. Given that these are relatively significant powers, enabling types of contracts to be carved out of the new statutory payments regime introduced by the Bill, the Committee considered that the Parliament might wish to be sighted on legislative developments in this area. The Committee asked the Scottish Government how it intends to keep the Parliament informed about intergovernmental discussions on proposed uses of the powers, as the policy develops.

Committee correspondence on these powers

27. On 10 September, the Committee wrote to both the Scottish Government and UK Government regarding the broad powers in clauses 1 to 3 of the Commercial Payments Bill which permit the Secretary of State to exempt categories of contracts from the new statutory payment regime. In doing so, the Committee referred to the concerns raised by the House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC) that the powers were too broad and asked whether they could be drafted more narrowly by including criteria, condition or limitations on the face of the Bill. The Committee also asked the Scottish Government how the Parliament would be kept informed of intergovernmental discussions on the future use of these powers.

Scottish Government Response to Committee's letter of 10 September 2026

28. The Scottish Government acknowledged the Committee's concerns but stated that it does not consider further restrictions on the powers to be necessary. It considers the powers need to remain flexible to accommodate the different sectors and commercial arrangements and to respond to future developments in commercial practice and market conditions.

29. The Scottish Government instead highlighted the requirement for the Secretary of State to obtain the Scottish Ministers' consent before making regulations within devolved competence as an important safeguard for devolved interests.

30. On Parliamentary scrutiny, the Scottish Government advised that the UK Statutory Instrument Protocol will apply and stated that, where appropriate, it would keep relevant parliamentary committees informed of significant policy developments and proposals under consideration.

31. The Scottish Government considers these arrangements provide an appropriate balance between flexibility, protection of devolved interests and parliamentary oversight.

UK Government Response to Committee's letter of 10 September 2026

32. The UK Government explained that the powers are intended to primarily enable exemptions for import and export contracts where maximum payment times could adversely affect the competitiveness of UK businesses in international markets. It stated that further consultation is required before defining the scope of any such exemptions and therefore considers it preferable to set them out in regulations rather than on the face of the Bill.

33. While the UK Government does not currently intend to exempt other categories of contracts, it considers that flexibility may be required to address specialist supply chains or future developments. It also highlighted that any future exemptions would require consultation, be subject to the affirmative procedure and where relevant require the consent of devolved governments.

Committee conclusion

34. The Committee notes the government responses. Taken together with the safeguards afforded by the affirmative procedure and the limitations on use of the power, the Committee considers that adequate justification has been provided for the delegation.

35. As regards the Parliamentary scrutiny point, the Committee notes the Scottish Government's commitment, where appropriate, to keep relevant parliamentary committees informed of any significant policy developments as policy proposals for regulations are developed.

36. Accordingly, the Committee is content with the delegation of the powers in principle and the choice of affirmative procedure.

Recommendation

37. **The Committee is content with delegation of the powers in principle and is content that the affirmative procedure will apply.**

38. **The Committee draws the following scrutiny implications to the lead committee's attention:**

- **Only the Secretary of State can exercise the powers within the Scottish Parliament's legislative competence.**
- **Regulations will be laid before and scrutinised by the United Kingdom Parliament only.**
- **The Secretary of State must obtain the Scottish Ministers' consent before making the regulations.**
- **The regulations will fall within the scope of the UKSI Protocol and will be notified to the Scottish Parliament only after becoming law.**
- **The Scottish Government commits, where appropriate, to keep relevant parliamentary committees informed of any significant policy developments as policy proposals are developed.**

Clause 3 inserting the following provision in CPILPA: New section 2E(7)(a) and (b): Powers to define micro, small, medium sized and large undertakings.

Powers conferred on: Secretary of State

Powers exercisable by: Regulations

Parliamentary procedure: Affirmative procedure

Provision

39. Clause 3 inserts section 2E into CPILPA. Section 2E exempts certain contracts from the statutory restrictions on payment terms, including contracts where the supplier is larger than the purchaser and contracts entered into between two or more large undertakings.

40. Section 2E(7) confers powers on the Secretary of State to make regulations defining what is meant by a micro undertaking, a small undertaking, a medium sized undertaking and a large undertaking for the purposes of the conditions in sections 2E(2) and 2E(3). These definitions are used to determine whether a contract falls within the exemption in those provisions.

41. Section 2E(9) sets out matters that may in particular be addressed by the regulations, including the criteria relating to headcount, turnover and balance sheet total, provision about the meaning of those criteria and the date or period by reference to which they are assessed.

42. The powers are subject to the affirmative procedure.

Committee consideration

Nature of the powers

43. In the DPM, the UK Government explains that the power in section 2E(7) to define micro, small, medium and large undertakings in regulations provides flexibility to adapt the exemption regime in response to feedback, changing business practices and unforeseen impacts. The UK Government considers this necessary to ensure that exemptions remain appropriately targeted and proportionate, while balancing the objective of tackling late payment with preserving commercial freedom where businesses have sufficient bargaining power.

44. The Scottish Government explains in the LCM that the policy intention of the provision is to preserve a degree of contractual freedom where the bargaining power of the parties is comparable, including where a smaller purchaser and a supplier wish to agree longer payment terms.

45. The Committee is content with delegation of this power in principle, and that it is subject to the affirmative procedure. While regulations under the power will set the parameters of which businesses are exempt from the maximum payment terms, the principles regarding the size-based exemptions are clearly set out on the face of the Bill. The Committee considers it appropriate for the technical detail about how to determine the size of an undertaking to be set out in regulations, where it can be updated over time as necessary.

Exercise of powers by the Secretary of State

46. The Secretary of State is required to obtain the consent of the Scottish Ministers before making any regulations under this section that make provision within the Scottish Parliament's legislative competence. This is expressly stated under Schedule 1, Part 1, paragraph 10 which inserts a new section 15 into CPILPA.

47. There are no equivalent powers conferred on the Scottish Ministers. This means that regulations made under the powers within the Scottish Parliament's legislative competence will be laid before and scrutinised by the UK Parliament only. Such regulations will fall within the scope of the UKSI Protocol and will be notified to the Scottish Parliament only after becoming law.

48. The Scottish Government's position is set out above in relation to the previous power. It states at paragraph 49 of the LCM:

"While it is disappointing that the UK Government has not agreed to provide the Scottish Ministers with corresponding regulation-making powers in the Bill enabling the Scottish Ministers to make provision within devolved competence in relation to Scotland, the Scottish Government's view is that these statutory consent requirements would provide Scottish Ministers and the Scottish Parliament with an acceptable level of control and oversight over the use of the Secretary of State's substantive regulation-making powers within the Bill in devolved areas in relation to Scotland."

49. The Committee notes that the powers in new section 2E(7) are more limited than the powers to exempt any contracts described above (in new sections 2B(7)(b), 2D(7)(b) and 2E(4) of CPILPA), given that the principles are set out on the face of the Bill. Accordingly, the Committee did not seek any commitment from the Scottish Government for the Parliament to be kept informed as the policy develops.

50. The Committee does however draw the scrutiny implications of the powers being exercised by the Secretary of State within devolved competence to the attention of the lead committee, to enable it to take a view on the appropriateness of the regulations being made by the UK statutory instrument.

51. **The Committee is content with delegation of the powers in principle and is content that the affirmative procedure will apply.**

52. **The Committee draws the following scrutiny implications to the lead committee's attention:**

- **Only the Secretary of State can exercise these powers within the Scottish Parliament's legislative competence.**
- **Regulations will be laid before and scrutinised by the United Kingdom Parliament only.**
- **The Secretary of State must obtain the Scottish Ministers' consent before making the regulations.**
- **The regulations will fall within the scope of the UKSI Protocol and will**

be notified to the Scottish Parliament only after becoming law.

New clause 4 inserts the following provisions CPILPA" - Powers to shorten payment terms

New section 2F(1): Power to substitute the maximum payment period for public authority purchasers

New section 2F(3): Power to substitute the maximum payment period for other purchasers

New section 2F(5): Power to substitute the implied payment period where a contract does not contain compliant payment terms

New section 2F(6): Power to substitute the deemed completion period for acceptance or verification procedures

Powers conferred on: Secretary of State

Powers exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Provision

53. Clause 4 inserts new section 2F into the CPILPA. Section 2F(1) confers a delegated power on the Secretary of State to substitute the number of days specified in sections 2B(2)(a) and 2D(3)(a), which provide that the maximum payment period where the purchaser is a public authority is 30 days.

54. Section 2F(2) provides that regulations under 2F(1) may not specify a number of days higher than 30 and must specify the same number of days in sections 2B(2)(a) and 2D(3)(a).

55. Section 2F(3) confers a delegated power on the Secretary of State to substitute the number of days specified in sections 2B(2)(b) and 2D(3)(b), which provides that the maximum payment period where the purchaser is not a public authority is 60 days.

56. Section 2F(4) provides that regulations under 2F(3) may not specify a number of days higher than 60 and must specify the same number of days in sections 2B(2)(b) and 2D(3)(b).

57. Section 2F(5) confers a delegated power on the Secretary of State to substitute the number of days specified in sections 2B(5), which provides for an implied payment period of 30 days where a contract does not contain compliant payment terms. Regulations under section 2F(5) may not specify a number of days higher than 30.

58. Section 2F(6) confers a delegated power on the Secretary of State to substitute the number of days specified in sections 2C(3), which provides that acceptance or verification procedure is deemed to be completed at the end of a 30 day period beginning with the day on which the supplier performs its obligations under the

contract. Regulations under section 2F(6) may not specify a number of days higher than 30.

59. Section 2F(7) requires the Secretary of State, within the period of five years beginning with the day on which sections 2B and 2D come into force (or, if they come into force on different days, the later if those days), to consult such persons as the Secretary of State considers appropriate about whether regulations should be made under sections 2F(1), (3), (5) or (6) and the number of days that might be specified in such regulations.

60. The powers are subject to the affirmative procedure.

Committee consideration

Nature of powers

61. In its DPM the UK Government explains that the powers inserted by clause 4 are intended to enable the statutory maximum payment periods introduced by the Bill to be reduced in the future if changes in business practices, technology or payment processes make shorter payment periods appropriate. The UK Government states that the powers are intended to ensure that the effectiveness of the regime is not weakened over time and that changes can be made without the need for further primary legislation.

62. The powers are Henry VIII powers as they permit periods specified in primary legislation to be amended by regulations. However, they are limited in scope. The powers may only be exercised to reduce periods specified in sections 2B(2)(a) and (b), 2C(3) and 2D(3)(a) and (b) and may not be used to increase those periods beyond the limits set out on the face of the Bill.

63. The Committee notes that the Bill contains safeguards including a requirement for consultation within 5 years about whether to make regulations under the power, and restrictions on maximum periods that may be specified by regulations. As such, the Committee is content with delegation of the power in principle.

Exercise of powers by the Secretary of State

64. The Secretary of State is required to obtain the consent of the Scottish Ministers before making regulations under this section that make provision within the Scottish Parliament's legislative competence. This is expressly stated under Schedule 1, Part 1, paragraph 10 which inserts a new section 15 into CPILPA and extends the statutory consent requirements to the powers conferred by section 2F.

65. There are no equivalent powers conferred on the Scottish Ministers. This means that regulations made under these powers within the Scottish Parliament's legislative competence will be laid before and scrutinised by the UK Parliament only. Such regulations will fall within the scope of the UKSI Protocol and will be notified to the Scottish Parliament only after becoming law.

66. Given that the powers are relatively narrow in scope and subject to appropriate safeguards, the Committee is content with delegation of the power to the Secretary of State.

67. The Committee does however draw the scrutiny implications of the powers being

exercised by the Secretary of State within devolved competence to the attention of the lead committee, to enable it to take a view on the appropriateness of the regulations being made by the UK statutory instrument.

68. **The Committee is content with delegation of the powers in principle and be content that the affirmative procedure will apply.**

69. **The Committee draws the following scrutiny implications to the lead committee's attention:**

- **Only the Secretary of State can exercise these powers within the Scottish Parliament's legislative competence.**
- **Regulations will be laid before and scrutinised by the United Kingdom Parliament only.**
- **The Secretary of State must obtain the Scottish Ministers' consent before making the regulations.**
- **The regulations will fall within the scope of the UKSI Protocol and will be notified to the Scottish Parliament only after becoming law.**

Clause 16 inserting new section 113F(1) in the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA"): power for the Secretary of State to amend the definition of retentions and retention clauses

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative procedure

Provision

70. Chapter 2 of Part 1 of the Bill creates a ban on contractual provisions which permit the deduction and withholding of retention sums under a construction contract. Proposed section 113B(1) of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA"), inserted by clause 12 of the Bill, defines "retention clause" as a term of a construction contract which permits the practice of deduction or withholding of a sum until a condition specified under the contract is met.

71. Proposed section 113F(1) confers a power on the Secretary of State to amend the definitions of retention practice and retention clause in the relevant sections inserted in the HGCRA. The new provisions in the HGCRA define retentions and retention clauses, establish a transitional regime leading to a ban on retention clauses in construction contracts, provide for the payment of certain sums withheld during the transition period, prohibit new retention clauses and most variations of existing retention arrangements after the transition period, and provide for a fixed statutory sum where retention monies are wrongfully retained.

72. Before making regulations the Secretary of State must consult appropriate persons and obtain the consent of the Scottish Ministers and Welsh Ministers where the regulations make provision within devolved competence. The power is subject to

the affirmative procedure.

Committee consideration

Nature of the power

73. The UK Government explains in its DPM that the power for the Secretary of State to amend provisions relating to retentions is intended to ensure that the legislation remains effective and cannot be undermined by evolving contractual practices within the construction industry. The UK Government states that the power would enable the definition of "retention" and related provisions to be amended in a targeted manner to address attempts to circumvent the ban on retentions, respond to significant unintended consequences, and future proof the legislation without the need for further primary legislation.

74. The power enables amendment of primary legislation by secondary legislation and is therefore a Henry VIII power. However, the power is confined to amending the definition of retention and related provisions. The ban on retention practices itself is clearly set out in the Bill, with the power limited to making adjustments to the relevant definitions. The Committee therefore considers that the scope and purpose of the power, together with the affirmative procedure and the requirement for consultation, provide sufficient safeguards.

75. The Committee is content with delegation of this power in principle and with the choice of the affirmative procedure.

Exercise of the power by the Secretary of State

76. The Scottish Government states in its LCM that the provisions on retention practices fall within the legislative competence of the Scottish Parliament, as they make provision in relation to Scots contract law as it applies to specified types of construction contracts.

77. The Secretary of State is required to obtain the consent of the Scottish Ministers before making any regulations under this section that make provision within the Scottish Parliament's legislative competence.

78. There are no equivalent powers conferred on the Scottish Ministers. This means that regulations made under the powers within the Scottish Parliament's legislative competence will be laid before and scrutinised by the UK Parliament only. Such regulations will fall within the scope of the UKSI Protocol and will be notified to the Scottish Parliament only after becoming law.

79. The Scottish Government's position is as set out above in relation to previous powers. It states at paragraph 49 of the LCM:

> "While it is disappointing that the UK Government has not agreed to provide the Scottish Ministers with corresponding regulation-making powers in the Bill enabling the Scottish Ministers to make provision within devolved competence in relation to Scotland, the Scottish Government's view is that these statutory consent requirements would provide Scottish Ministers and the Scottish Parliament with an acceptable level of control and oversight over the use of the Secretary of State's substantive regulation-making powers within the Bill in devolved areas in relation to Scotland."

80. The Committee does however draw the scrutiny implications of the powers being exercised by the Secretary of State within devolved competence to the attention of the lead committee, to enable it to take a view on the appropriateness of the regulations being made by the UK statutory instrument.

81. **The Committee is content with delegation of the power in principle and with the choice of the affirmative procedure.**

82. **The Committee draws the following scrutiny implications to the lead committee's attention:**

- **Only the Secretary of State can exercise the power within the Scottish Parliament's legislative competence.**
- **Regulations will be laid before and scrutinised by the United Kingdom Parliament only.**
- **The Secretary of State must obtain the Scottish Ministers' consent before making the regulations.**
- **The regulations will fall within the scope of the UKSI Protocol and will be notified to the Scottish Parliament only after becoming law.**

Clause 18, inserting new section 2G(1) in the Enterprise Act 2016 ("EA 2016"): Power to make regulations about the procedural detail of the SBC adjudication scheme

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative procedure

Provision

83. The Small Business Commissioner ("SBC") currently operates a complaints scheme under Part 1 of the EA 2016. The complaints scheme is repealed by the Bill. Clause 18 inserts sections 2A to 2G into the EA 2016 to establish a new adjudication scheme for determining certain payment disputes between smaller and larger businesses.

84. Inserted sections 2B to 2F set out the detail of how the SBC adjudication scheme is to operate, including which payment disputes are out of scope, the right to adjudication, the use of information, what decisions the adjudicator may make and the effect of the decision and its enforcement.

85. The proposed section 2G gives the Secretary of State a power to make further provision about the SBC adjudication scheme in regulations. Section 2G(2) provides an illustrative list of the administrative and procedural matters which might be included under the regulations, although the power is not limited to those matters.

86. The power is subject to the affirmative procedure and requires consultation in

advance of making regulations, with the SBC and other appropriate persons.

Committee consideration

Nature of the power

87. The UK Government explains in its DPM that the power allows detailed procedural and administrative aspects of the SBC adjudication scheme to be set out in regulations and provides flexibility to make technical or operational changes in light of experience, without requiring further primary legislation.

88. The Committee notes that the Bill itself makes detailed provision about the operation of the adjudication scheme. The power enables further provision about the scheme to be set out in regulations but does not permit alteration of the scheme.

89. Therefore, the Committee is content with delegation of the power in principle, and with the choice of the affirmative procedure.

Exercise of the power by the Secretary of State

90. The Scottish Government states in its LCM that the provisions in the Bill about the SBC adjudication scheme fall within the legislative competence of the Scottish Ministers, as they make provision in respect of the devolved matter of business support policy.

91. The Secretary of State is required to obtain the consent of the Scottish Ministers before making any regulations under this section that make provision within the Scottish Parliament's legislative competence.

92. There are no equivalent powers conferred on the Scottish Ministers. This means that regulations made under the power within the Scottish Parliament's legislative competence will be laid before and scrutinised by the UK Parliament only. Such regulations will fall within the scope of the UKSI Protocol and will be notified to the Scottish Parliament only after becoming law.

93. The Scottish Government's position is as set out above in relation to previous powers. It states at paragraph 49 of the LCM:

> "While it is disappointing that the UK Government has not agreed to provide the Scottish Ministers with corresponding regulation-making powers in the Bill enabling the Scottish Ministers to make provision within devolved competence in relation to Scotland, the Scottish Government's view is that these statutory consent requirements would provide Scottish Ministers and the Scottish Parliament with an acceptable level of control and oversight over the use of the Secretary of State's substantive regulation-making powers within the Bill in devolved areas in relation to Scotland."

94. The Committee does however draw the scrutiny implications of the powers being exercised by the Secretary of State within devolved competence to the attention of the lead committee, to enable it to take a view on the appropriateness of the regulations being made by the UK statutory instrument.

95. **The Committee is content with the power in principle and that it is subject to the affirmative procedure.**

96. **The Committee draws the following scrutiny implications to the lead committee's attention:**

- **Only the Secretary of State can exercise the power within the Scottish Parliament's legislative competence.**
- **Regulations will be laid before and scrutinised by the United Kingdom Parliament only.**
- **The Secretary of State must obtain the Scottish Ministers' consent before making the regulations.**
- **The regulations will fall within the scope of the UKSI Protocol and will be notified to the Parliament only after becoming law.**

Clause 20 and Schedule 3, inserting the following powers in the EA 2016:

New section 2P(1): Power to make regulations about SBC investigations and enforcement action

Paragraph 8(1) of new schedule 1A: Power to make further provision on financial penalties

Powers conferred on: Secretary of State

Powers exercisable by: Regulations

Parliamentary procedure: Affirmative procedure

Provision

97. Clause 20 inserts sections 2H to 2P into the EA 2016, to provide the SBC with new powers to investigate poor payment practices of larger businesses and to take enforcement action where appropriate.

98. The criteria the SBC must take into account in deciding whether to carry out an investigation, together with provision about investigations, recommendations and enforcement action, are set out in new sections 2H to 2O. Clause 2P(1) gives the Secretary of State power to make regulations providing further detail about investigations, recommendations, enforcement, reports and information.

99. Schedule 3 inserts new Schedule 1A into the EA 2016, which makes further provision in relation to financial penalties. Under sections 2J(6) and 2L(7) of the EA 2016, the SBC may impose a financial penalty where it is satisfied beyond reasonable doubt that a larger business has persistently engaged in poor payment practices or has failed without reasonable excuse to comply with an enforcement direction. Schedule 1A sets the upper limit of financial penalties, makes provision about notices and appeals, the recovery of unpaid amounts and the form and content of notices and appeals.

100. Paragraph 8(1) of Schedule 1A gives the Secretary of State power to make regulations about the operation of the financial penalty regime, including provision about the criteria for imposing penalties, the calculation of turnover for the purpose of determining penalty amounts, procedural requirements, notices and appeals.

101. The powers are subject to the affirmative procedure and require consultation in advance of making regulations, with the SBC and other appropriate persons.

Committee consideration

Nature of the powers

102. The UK Government explains in the DPM that these powers are necessary to ensure that the detailed criteria, procedures and evidential requirements governing the SBC investigations, enforcement action and financial penalties can be set out and updated in secondary legislation, rather than on the face of the Bill. The UK Government considers that this approach provides businesses with certainty as to the overarching framework, while allowing the detailed operational requirements to be adapted in response to experience of the scheme in practice.

103. In relation to the financial penalty regime specifically, the UK Government states that regulations may make provision about matters such as the circumstances in which penalties may be imposed, calculation of turnover, procedural requirements, notices and appeals. It considers these matters are appropriate for delegated legislation given their technical and detailed nature and the likelihood that amendments may be required as the SBC becomes operational.

104. The Committee notes that the principal framework governing investigations, enforcement action and financial penalties is set out on the face of the Bill. The powers are directed towards procedural, evidential and operational matters, the purpose and scope of which are sufficiently clear. While the power relating to financial penalties is broad, the Committee considers that it is appropriately constrained by the framework established in the primary legislation.

Exercise of powers by the Secretary of State

105. The Scottish Government states in its LCM that the provisions in the Bill about the SBC adjudication scheme fall within the legislative competence of the Scottish Ministers, as they make provision in respect of the devolved matter of business support policy.

106. The Secretary of State is required to obtain the consent of the Scottish Ministers before making any regulations under this section that make provision within the Scottish Parliament's legislative competence.

107. There are no equivalent powers conferred on the Scottish Ministers. This means that regulations made under the powers within the Scottish Parliament's legislative competence will be laid before and scrutinised by the UK Parliament only. Such regulations will fall within the scope of the UKSI Protocol and will be notified to the Scottish Parliament only after becoming law.

108. The Scottish Government's position is as set out above in relation to previous powers. It states at paragraph 49 of the LCM:

"While it is disappointing that the UK Government has not agreed to provide the Scottish Ministers with corresponding regulation-making powers in the Bill enabling the Scottish Ministers to make provision within devolved competence in relation to Scotland, the Scottish Government's view is that these statutory consent requirements would provide Scottish Ministers and the Scottish Parliament with an acceptable level of control and oversight over the use of the Secretary of State's substantive regulation-making powers within the Bill in devolved areas in relation to Scotland."

109. The Committee does however draw the scrutiny implications of the powers being exercised by the Secretary of State within devolved competence to the attention of the lead committee, to enable it to take a view on the appropriateness of the regulations being made by the UK statutory instrument.

110. **The Committee is content with the power in principle and that it is subject to the affirmative procedure.**

111. **The Committee draws the following scrutiny implications to the lead committee's attention:**

- **Only the Secretary of State can exercise the powers within the Scottish Parliament's legislative competence.**
- **Regulations will be laid before and scrutinised by the United Kingdom Parliament only.**
- **The Secretary of State must obtain the Scottish Ministers' consent before making the regulations.**
- **The regulations will fall within the scope of the UKSI Protocol and will be notified to the Parliament only after becoming law.**

Clause 22, inserting new section 12A(1) in the EA 2016: Power to transfer the SBC's functions to a relevant person

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative procedure

Provision

112. This is a power enabling the Secretary of State to make regulations to transfer some or all of the SBC's functions to the Secretary of State or to another body that exercises public functions. If all the SBC's functions are transferred, the regulations may also abolish the office of the SBC. The regulations may also amend or repeal existing legislation where necessary to give effect to the transfer of functions or the abolition of the office.

113. The power is subject to the affirmative procedure and requires consultation in advance of making regulations, with the SBC and other appropriate persons.

Committee consideration

Nature of the power

114. The UK Government explains in its DPM that the delegated power provides flexibility for the Secretary of State to transfer some, but not necessarily all, of the SBC's functions if its expanded role proves more substantial than anticipated. It explains that, for example, the SBC's investigatory functions could be transferred to another public body while the SBC retains its adjudicatory role. The power may also be used to abolish the SBC where all of its functions are transferred.

115. The Scottish Government explains in its LCM that the new power enables future reform of the SBC's functions and could, where functions are transferred to a Scottish public body, make provision within devolved competence.

116. This is a broad Henry VIII power which would permit some or all of the SBC's functions to be transferred and, where all functions are transferred, the abolition of the office. The Committee notes that transferring or removing the SBC's functions would not affect the nature of those functions, only the public sector entity through which those functions are carried out. According to the UK Government, this means that the effect on businesses regulated by the SBC will not be significant.

117. The power is drafted in such a way that it can only be used to make strictly consequential amendments to primary legislation, in order to give effect to the transfer of functions or the abolition of the SBC. Taken together with the requirements for advanced consultation and use of the affirmative procedure, the Committee is content with delegation of the power in principle.

Exercise of the power by the Secretary of State

118. The Scottish Government states in its LCM that the provisions in the Bill about the SBC adjudication scheme fall within the legislative competence of the Scottish Ministers, as they make provision in respect of the devolved matter of business support policy.

119. The Secretary of State is required to obtain the consent of the Scottish Ministers before making any regulations under this section that make provision within the Scottish Parliament's legislative competence.

120. There are no equivalent powers conferred on the Scottish Ministers. This means that regulations made under the power within the Scottish Parliament's legislative competence will be laid before and scrutinised by the UK Parliament only. Such regulations will fall within the scope of the UKSI Protocol and will be notified to the Scottish Parliament only after becoming law.

121. The Scottish Government's position is as set out above in relation to previous powers. It states at paragraph 49 of the LCM:

> "While it is disappointing that the UK Government has not agreed to provide the Scottish Ministers with corresponding regulation-making powers in the Bill enabling the Scottish Ministers to make provision within devolved competence in relation to Scotland, the Scottish Government's view is that these statutory consent requirements would provide Scottish Ministers and the Scottish Parliament with an acceptable level of control and oversight over the use of the Secretary of State's

substantive regulation-making powers within the Bill in devolved areas in relation to Scotland."

122. The Committee does however draw the scrutiny implications of the powers being exercised by the Secretary of State within devolved competence to the attention of the lead committee, to enable it to take a view on the appropriateness of the regulations being made by the UK statutory instrument.

123. **The Committee is content with the amendment to the existing power and that it remains subject to the affirmative procedure.**

124. **The Committee draws the following scrutiny implications to the lead committee's attention:**

- **Only the Secretary of State can exercise the power within the Scottish Parliament's legislative competence.**
- **Regulations will be laid before and scrutinised by the United Kingdom Parliament only.**
- **The Secretary of State must obtain the Scottish Ministers' consent before making the regulations.**
- **The regulations will fall within the scope of the UKSI Protocol and will be notified to the Parliament only after becoming law.**

Clause 28(1): Consequential provision

Power conferred on: Secretary of State or the Chancellor of the Duchy of Lancaster

Power exercisable by: Regulations

Parliamentary procedure: affirmative procedure for amending, repealing or revoking primary legislation, otherwise negative procedure.

Provision

125. Clause 28(1) confers a power on the Secretary of State or the Chancellor of the Duchy of Lancaster, by regulations, to make provision that is consequential on the Act, including provision to amend or repeal primary legislation.

Committee consideration

126. The UK Government explains in its DPM that this power is necessary because, while consequential provisions identified to date are included on the face of the Bill, further consequential amendments or modifications may be identified after enactment. The UK Government also explains that the power provides flexibility to make such amendments, including minor, technical and cross-referencing changes to primary and secondary legislation, without the need for further primary legislation. The UK Government considers that the power is also necessary to ensure legislative coherence and to avoid inconsistencies or gaps in the statute book that could undermine legal certainty and effective operation of the Bill.

127. The Committee notes that the power is conferred on the Secretary of State and is capable of being exercised within devolved competence. However in terms of its scope, this is a standard power to make provision consequential on the Bill. If the Parliament is content to give its consent for the substantive provisions in the Bill, it would be reasonable and appropriate for it also to consent to the Secretary of State taking standard ancillary powers to give it full effect. As such, the Committee is content with the power in principle and with the choice of parliamentary procedure, which is again standard for consequential powers.

128. **The Committee is content with the power in principle and is content that it is subject to the affirmative procedure when amending or repealing primary legislation.**

Clause 31(1) and (5): Commencement, transitional and savings provision

Powers conferred on: Secretary of State

Powers exercisable by: Regulations

Parliamentary procedure: no procedure

Provision

129. Clause 31(1) confers a power on the Secretary of State to bring different provisions of the Bill into force at different times, except those commencing automatically on the day which the Act is passed, and sections 13-15 which commence two years after sections 11 and 12 come into force.

130. Clause 31(5) enables the Secretary of State to make transitional or saving provisions in connection with the commencement of any provision of the Act.

Committee consideration

131. The DPM states that these powers are justified to ensure that the provisions of the Bill can be commenced in a coherent manner alongside any necessary secondary legislation, guidance, systems and procedures required for the new regime. It also states that the powers to make transitional and saving provision are also intended to support an orderly transition from existing legal framework to the new one.

132. The Committee considers that these powers are exercisable by the Secretary of State within the legislative competence of the Scottish Parliament, to the extent that they relate to provisions of the Bill which operate within devolved competence. However, commencement powers are a standard feature of primary legislation and Parliament will already have approved the substantive provisions brought into force under the power. The power to make transitional and saving provision is limited to facilitating the transition from the existing legal position to the new arrangements established by the Bill. It is standard practice for commencement regulations not to be subject to parliamentary procedure.

133. The Committee therefore considers the powers and the absence of parliamentary procedure to be acceptable.

134. **The Committee is content with these powers in principle and that they are not subject to parliamentary procedure.**

Schedule 1, Part 3, paragraph 18 and 22 inserting new sections 68B(1) and 88B(1) into the Procurement Act 2023 ("PA 2023"): Powers to reduce the maximum implied payment period

Powers conferred on: Minister of the Crown

Powers exercisable by: Regulations

Parliamentary procedure: Negative procedure

Provision

135. Part 3 of Schedule 1 amends the Procurement Act 2023 ("PA Act 2023") to align the implied payment terms for public contracts and public construction contracts, under the public procurement regime, with the payment terms introduced by this Bill. The provisions amend section 68 which applies to public contracts, and insert new sections 68A and 88A, which make specific provision for public construction contracts.

136. New Sections 68B(1) and 88B(1) confer powers to make regulations reducing the maximum implied payment period that applies under the PA 2023. Any period specified in regulations may not exceed 30 days. These provisions replace existing delegated powers in sections 68(10) and 88(12) of the PA 2023.

137. The powers are subject to the negative procedure.

Committee consideration

Nature of the powers

138. In the sDPM, the UK Government explains that the amendments are intended to bring the payment terms implied into public contracts by the PA 2023 into closer alignment with the payment terms introduced by the Bill, including by removing provisions that could otherwise allow parties to agree a payment date later than 30 days after receipt of an invoice. The UK Government further explains that the amendments provide greater clarity about the application of implied terms to construction contracts. As a consequence of these changes, the existing delegated powers in section 68(10) and 88(12) are revoked and replaced by the powers in new sections 68B and 88B. The UK Government states that the new powers replicate the effect, scope and parliamentary procedure of the existing powers.

139. The Committee notes that the provisions replicate existing powers in the PA and extend them to public construction contracts, and that the powers are subject to the same limitations and the same parliamentary procedures as the existing powers. Accordingly the Committee is content with the delegation of the powers in principle and the choice of negative procedure.

Exercise of the powers by a Minister of the Crown

140. In the sLCM, the Scottish Government explains that in terms of its application to

Scotland, the PA 2023 regulates the procurement activity of cross-border bodies or bodies whose functions are entirely reserved, and devolved public bodies procuring under a reserved procurement arrangement. Accordingly, while the delegated powers are capable of being exercised for purposes (public procurement) within the legislative competence of the Scottish Parliament, in practice they have limited application to Scottish contracting authorities and utilities. The Scottish Government and its agencies, local authorities, universities and colleges and registered social landlords continue to be regulated by Scottish procurement legislation.

141. **The Committee is content with the powers in principle and content that they are subject to the negative procedure.**

