

Justification for procedure

338. The consequential power is subject to the negative procedure. It is nevertheless considered that such an approach is justified - the consequential power, like consequential powers in other primary legislation, will be construed strictly by the courts and, in effect, to making the minimum amendments necessary to procedure, or machinery to reflect the provisions of the Act or instrument concerned. In particular there will be a presumption against substantive changes that interfere with rights or liabilities²⁰.

339. The transitional power is subject to no procedure. There is substantial precedent for this type of power to attract no procedure, as most recently seen in the Taxation (Cross-border Trade) Act 2018.

²⁰ *Ye Olde Cheshire Cheese Ltd v Daily Telegraph Plc* [1988] 1 W.L.R. 1173

Paragraphs 5 and 69 of Schedule 6: operation of the powers to make consequential provision and transitional, transitory and savings provision in the EU (Withdrawal) Act 2018

Power conferred on: A Minister of the Crown

Power exercised by: Regulations made by Statutory Instrument

Henry VIII power: Yes, but only in respect of section 23(1) - the consequential power

Parliamentary Procedure: Existing procedures which apply to section 23(1) and (6) of the EU (Withdrawal) Act 2018

Context and purpose

340. Paragraph 5(1) of Schedule 6 clarifies that the consequential power in the EU (Withdrawal) Act 2018 is capable of making regulations in consequence of the Act as amended by or under the Bill. The Bill will also amend section 23(3) so that the consequential power can amend primary legislation until the end of the implementation period. Further, the power will be sunset ten years from IP completion day.

341. Paragraph 69(1) of Schedule 6 clarifies that the transitional, transitory and saving power in section 23(6) the EU (Withdrawal) Act 2018 is capable of making regulations in connection with the coming into force of any provision of the Act as amended by or under the Bill. The Bill will also amend section 23(6) so that the power can be used in connection with the coming into force of any provision including its operation in connection with IP completion day.

Justification for power

342. The clarification in Paragraph 5(1) is required so that the consequential power in section 23(1) the EU (Withdrawal) Act 2018 can be used as intended in the event of an implementation period. This enables the power to be used to make regulations in consequence of the Act as it will stand following the passage of this Bill and the modifications this will make to it. The further amendments ensure that the power can be exercised in light of the implementation period.

343. The clarification in paragraph 69(1) is required so that the consequential power under section 23(6) of the EU (Withdrawal) Act 2018 can be used as intended in the event of

an implementation period. This enables the power to be used to make regulations in connection with the coming into force of any provision of the Act as it will stand following the passage of this Bill and the modifications this will make to it. The further amendment ensures that the power can be exercised in light of the implementation period.

Justification for procedure

344. These are technical extensions of the powers to make consequential and transitional, transitory or saving provision under sections 23(1) and 23(6) of the EU (Withdrawal) Act 2018. Regulations made under these powers will continue to be laid under the procedures set out in paragraphs 15, 16 and 17 of Schedule 7 of that Act.

Clause 40(7): power to make commencement provisions

Power conferred on: A Minister of the Crown

Power exercised by: Regulations made by Statutory Instrument

Henry VIII power: No

Parliamentary Procedure: no procedure

Context and purpose

345. This clause contains a standard power for a Minister of the Crown to bring provisions of the Bill into force by commencement regulations. Clause 40(6) lists the provisions that will come into force on the day on which the Bill is passed. Not all of the provisions in the Bill will need to be in force immediately on the Bill being passed and for this reason, a power is taken to enable a Minister of the Crown to appoint, by regulations, a day (or different days) for the coming into force of the remainder of the provisions contained in the Bill.

Justification for power

346. Some parts of the Bill will need to be commenced earlier than others. For that reason, where commencement is not already expressly provided for at clause 40(6), this power will enable a Minister of the Crown to make regulations to commence particular provisions for when they are needed.

Justification for procedure

347. As is usual with commencement powers, regulations providing for the coming into force of the remainder of the provisions of the Bill are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at the appropriate time.

Clause 28: amendment to powers in connection with Fees and Charges

Power conferred on: An appropriate authority (as defined by Schedule 5, Part 1, paragraph 2, EU (Withdrawal) Act 2018)

Power exercised by: Regulations made by Statutory Instrument

Henry VIII power: No

Parliamentary Procedure: Negative procedure where the altering of a fee or charge is to reflect changes in the value of money, otherwise draft affirmative procedure applies.

Context and purpose

348. The EU (Withdrawal) Act 2018 contains a power at Part 1 of Schedule 4 to provide for fees or charges in connection with functions given to public authorities by section 8 or section 9 of that Act. This enables UK ministers and devolved authorities to create fees and charges in connection with functions that public bodies in the UK take on in connection with EU exit. It ensures ministers have the flexibility to ensure the burden of specific industry-related costs does not fall on the general taxpayer. It should be noted that this could include the creation of tax-like charges, which go beyond recovering the direct cost of the provision of a service to a specific firm or individual, including to allow for potential cross-subsidisation or to cover the wider functions and running costs of a public body, or to lower regulatory costs for small or medium sized enterprises.

349. This clause extends this fee charging power by amending Schedule 4 of the EU (Withdrawal) Act 2018 so it can also be used in connection with functions given to public authorities by new sections 8B and 8C (and the corresponding powers for devolved authorities in new Part 1B and Part 1C of Schedule 2).

350. Extending Schedule 4 Part 1 to cover these new powers, means that they can also be used to mitigate the burden on the general taxpayer to pick up the cost of functions created to deal with the implementation of the Withdrawal Agreement and EEA EFTA Separation Agreement by new sections 8B and 8C (and their corresponding equivalents). For example, it is anticipated that this could include the cost of renewing certain intellectual property rights. While the Withdrawal Agreement and EEA EFTA Separation Agreement set out that existing rights holders will be granted equivalent UK rights at no charge, once these have expired there will be costs associated with their renewal. It may be that this power would be used in connection with those costs.

351. Subsection (c) sets out that the time limit that exists for making certain provisions under this power will not apply to its extended role. This is because the duties to implement the Withdrawal Agreement and EEA EFTA Separation Agreement on OSIs are not strictly time limited and it is therefore not possible to define the end point of the functions created in connection with those agreements.

352. The power as set out in Schedule 4 is capable of being used to confer a power on public authorities to create their own fees and charges schemes. The regulations conferring such a power on a public authority would themselves be subject to Treasury consent and the draft affirmative procedure.

353. In addition, for the UK Government, Treasury consent is required for the creation of a new fee or charge, further ensuring departments justify their case. This constraint does not apply to the devolved authorities, in accordance with standard practice around financial arrangements for devolution (although devolved authorities could of course impose their own similar constraints administratively to mirror the requirement for Treasury consent).

Justification for power

354. This power is designed to allow flexibility in how new Government functions are funded. It enables the creation and modification of fees or other charges so the costs of Government services do not have to always fall on the taxpayer.

355. The power is designed to work in conjunction with functions that may be legislated for by regulations under new sections 8B and C (and the corresponding powers for devolved authorities in new Part 1B and 1C of Schedule 1). It therefore follows that provision for creating fees and charges in this connection be made via a regulation-making power.

Justification for procedure

356. The draft affirmative procedure applies to the current exercise of the power in the UK Parliament or the devolved legislature, depending where the regulations are made, where departments provide for the charging of new fees. This procedure would be extended to the new functions of the power. The Government recognises that the decision whether or not to charge for a particular function is a policy choice with impact on industry or individuals wishes to ensure appropriate scrutiny of the proposed legislation for this exercise of the power (unless the power is being exercised only to reflect changes in the value of money in which case, the negative procedure

will apply on the basis that the power is being used only to update in line with inflation rather than to reflect any policy change).

Paragraph 50, Part 2 of Schedule 6: amendment to power to provide for judicial notice

Power conferred on: A Minister of the Crown

Power exercised by: Regulations made by Statutory Instrument

Henry VIII power: No

Parliamentary Procedure: Draft affirmative procedure

Context and purpose

357. The EU (Withdrawal) Act 2018 contains a power at paragraph 4, Part 2 of Schedule 5 which enables Ministers to make provision on judicial notice and evidential rules on EU law, the EEA agreement, and retained EU law. The power was taken to ensure that, despite the repeal of the ECA, provision could be made which would allow the courts to continue to take notice of aspects of EU law (such as the EU Treaties) and determine how evidence of EU instruments may be given in domestic courts. As was explained in the first Delegated Powers Memorandum²¹ to the then EU (Withdrawal) Bill, notwithstanding the repeal of the ECA, provisions on judicial notice and admissibility would in any event need to be supplemented to take into account the final details of the change in the legal landscape following the UK's exit from the EU.

358. The Bill amends paragraph 4(5) of Part 2, Schedule 2 to broaden the meaning of 'a relevant matter' for the purposes of paragraph 4(1) so as to include 'the EEA EFTA Separation Agreement', 'the Swiss Citizens' Rights Agreement' and 'the Withdrawal Agreement' (paragraph 4(5)(ca) to (cc)) and anything which is specified in the regulations and which relates to a matter mentioned in those Agreements (paragraph 4(5)(d)).

359. The Bill also makes a consequential change at paragraph 4(4) so as to ensure that regulations made under paragraph 4 cannot modify any provision contained in primary legislation passed or made after IP completion day (rather than after the end of the parliamentary Session in which the EU (Withdrawal) Act 2018 was passed).

Justification for amendments to the power

²¹ Dated 13 July 2017.

360. The broadening of the definition of ‘a relevant matter’ has the effect that regulations may be made by a Minister of the Crown to provide for the admissibility in legal proceedings of the EEA EFTA Separation Agreement, the Swiss Citizens’ Rights Agreement and the Withdrawal Agreement or anything which relates to it (if specified in the regulations). This is in addition to the regulations which may already be made under this power to provide for the admissibility in any legal proceedings of retained EU law, EU law and the EEA EFTA Separation Agreement (or anything which is specified in the regulations and which relates to them).
361. The consequence of not including ‘the EEA EFTA Separation Agreement’, ‘the Swiss Citizens’ Rights Agreement’ and ‘the Withdrawal Agreement’ as a ‘relevant matter’ for the purpose of the power at paragraph 4(1) is that these Agreements will need to be proved by evidence before a court of law in accordance with the general rule that all matters in issue or relevant to legal proceedings must be proved before they are admitted. This would create an unnecessary hurdle for those seeking to rely on matters contained in these agreements before a court or tribunal.
362. The amendment to paragraph 4(4) to ensure that regulations made under paragraph 4 cannot modify any provision contained in primary legislation passed or made after IP completion day (rather than after the end of the parliamentary Session in which the EU (Withdrawal) Act 2018 was passed) is adopted in the context of the transition period agreed between the UK and EU in the Withdrawal Agreement. Without this amendment, modifications to primary legislation required as a consequence of the exercise of the power at 4(1) could only be made up to the end of the parliamentary Session in which the Bill was passed (autumn of 2019) despite the fact that this has already come to pass, that the UK will continue to apply EU law for several more months whilst it is in the implementation period, and this would prevent the power being exercised for its intended purpose. As any regulations made under this power will not be required until the end of the implementation period, it is sensible to avail the relevant Government Departments of time to make regulations for this purpose so that they may be ready for the day of expiry of the implementation period.

Justification for the procedure

363. The power contained in the EU (Withdrawal) Act 2018 is currently subject to the draft affirmative procedure on the basis that the content of any regulations made under it may be of particular interest to Parliament. On the basis that Parliament has already approved the procedure in connection with the exercise of this power, the Bill does not seek to amend it.

Department for Exiting the European Union

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